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

STATUTORY ENVIRONMENTAL RIGHTS: LESSONS LEARNED FROM ONTARIO'S EXPERIENCE

By

Richard D. Lindgren, CELA Counsel

Prepared for the Renewing Environmental Law Conference
February 3 to 4, 2011 – Vancouver, B.C.

130 SPADINA AVE • SUITE 301 • TORONTO • ON. • M5V 2L4
TEL: 416/960-2284 • FAX: 416/960-9392 • WEB SITE: www.cela.ca

TABLE OF CONTENTS

STATUTORY ENVIRONMENTAL RIGHTS: LESSONS LEARNED FROM ONTARIO'S EXPERIENCE

By
Richard D. Lindgren[1]

I - INTRODUCTION

Ontario's *Environmental Bill of Rights*[2] ("EBR") has remained largely unchanged since it was first enacted in 1993 and proclaimed into force in 1994. During the legislative process, the EBR was hailed by the provincial Environment Minister as a ground-breaking statute that would substantially improve environmental protection:

> I believe the *Environmental Bill of Rights* is landmark legislation. It will change the way the government does business in Ontario. It will place an additional onus on the bureaucracy to stop and listen before acting, and it will bring environmental protection to a higher level. By increasing public participation, the *Environmental Bill of Rights* will help to prevent environmentally unsound decisions being made that would have had to be paid for in the future or by future generations.[3]

At the same time, however, another member of the Ontario Legislature expressed concern whether the EBR "will, in fact, meet that goal" because it "lacks some substance."[4] Similarly, representatives of municipal, agricultural, mining and forestry sectors warned during committee proceedings that the EBR would interject additional cost, complexity and uncertainty into the standard-setting and permit-issuing process in Ontario.[5]

Given the EBR's track record over the past 18 years, it seems that the truth lies somewhere in between these differing perspectives. On the one hand, the EBR has been instrumental in facilitating public participation in environmental decision-making, and, in some instances, the EBR has enhanced governmental accountability in the environmental context. This is particularly true in relation to governmental decisions relating to the issuance of statutory instruments (i.e., licences, permits and approvals) that are subject to the EBR's notice, comment and third-party appeal provisions.

On the other hand, however, it is debatable whether the EBR has fully achieved its stated purpose of providing "sustainability" of the environment, or protecting "the right to a healthful environment."[6] While there have been some localized examples where the

---

[1] Counsel, Canadian Environmental Law Association ("CELA"). The author served as CELA's representative on the Environment Minister's Task Force on the *Environmental Bill of Rights*.
[2] S.O. 1993, c.28.
[3] The Hon. Bud Wildman, Presentation to the Standing Committee on General Government (*Hansard*, October 14, 1993).
[4] Steven Offer MPP, Second Reading Debate on Bill 26 (*Hansard*, September 27, 1993).
[5] See, for example, the presentations to the Standing Committee on General Government in October and November 1993 by the Association of Municipalities of Ontario, Ontario Farm Environmental Coalition, Ontario Mining Association, and Ontario Waste Management Association.
[6] *Ibid.*, subs. 2(1).

EBR has helped protect, conserve or restore the environment, the overall ecological challenges currently facing Ontario remain as daunting and diverse as they were almost two decades when the EBR was first enacted. As noted by CELA at 10th anniversary of the EBR:

> Indeed, the available evidence suggests that despite the existence of the EBR, Ontario is still experiencing serious environmental crises, public health concerns, and threats to our quality of life. For example, during the past decade, Ontario has suffered the Walkerton Tragedy, the Plastimet fire, numerous chemical spills, increasing smog alerts, rampant urban sprawl, leaking landfills, energy shortages, climate change impacts, endangered/threatened species of flora and fauna, and intense resource management conflicts over water-takings, forestry practices, and aggregate/mining operations. In addition, annual reports from the Commission for Environmental Cooperation have consistently placed Ontario at or near the top of North American jurisdictions with the largest volume of releases of pollutants to air, land and water.
>
> Undoubtedly, the province's environmental track record over the past decade leaves much to be desired, and it appears that the EBR has had a negligible (or non-existent) effect on Ontario's overall environmental performance to date. Indeed, it seems that the environmental agenda in Ontario in 2004 is virtually the same as it was when the EBR was proclaimed in force in 1994.[7]

Accordingly, CELA's overall conclusion was that there was room for improvement in the EBR:

> Thus, while the EBR has generally worked in terms of meeting its procedural objectives (i.e. facilitating public participation), the EBR has not worked very well in meeting its substantive objectives (i.e. protecting, conserving and restoring the environment). Accordingly, future law reform efforts involving the EBR should address not only the procedural problems that have arisen to date (as discussed below), but should also include improving and strengthening the substantive components of the EBR.[8]

This conclusion remains equally valid in 2011, and underscores the need for the Ontario Legislature to review and, where appropriate, revise the EBR. In this regard, the recently introduced *Canadian Environmental Bill of Rights*[9] offers some instructive ideas on possible reforms to Ontario's EBR. Thus, the purpose of this paper is to:

- describe the evolution of the EBR in Ontario;
- provide an overview of the various components of the EBR;
- critically review EBR implementation and the need for EBR reform; and
- discuss the proposed federal EBR (Bill C-469).

---

[7] Richard Lindgren, "The EBR Turns 10 Years-Old: Congratulations or Condolences?" (CELA, 2004) at pages 7-8. This paper is available at: www.cela.ca.
[8] *Ibid.*, at page 8.
[9] Bill C-469 (private member's bill introduced by Linda Duncan MP).

II – EVOLUTION OF THE EBR IN ONTARIO

The development and enactment of the EBR in Ontario can be best described as slow, controversial, and heavily influenced by legislation passed or proposed in other jurisdictions.[10]

At the same time, it must be noted that there was considerable public consultation on the concept and content of the EBR prior to its enactment by the Ontario Legislature in 1993. Indeed, the origin of Ontario's EBR can be traced back to the public and parliamentary debates that accompanied various private members' bills that had been proposed in the late 1970s and 1980s to establish an EBR regime in the province.[11]

In 1990, the Ontario government established a multi-stakeholder advisory committee, which reached a consensus that an EBR was needed in Ontario. In 1991, the Ontario government established a Task Force on the EBR. In 1992, the Task Force released its final report, which contained a proposed EBR. This report was subject to another round of public consultation, and the Task Force released a supplementary report in late 1992.

In 1993, the Ontario government introduced the EBR in the form of Bill 26, which was subject to public hearings by a legislative committee. After the completion of the committee hearings (in which no substantive amendments were made), the EBR received Third Reading and Royal Assent in December 1993. In early 1994, the EBR was proclaimed in force, and various components of the EBR were phased in over time.

Having regard for the EBR's legislative evolution, there can be little doubt that the passage of the EBR represents an important milestone in Ontario's environmental legislation. Moreover, the creation of a multi-stakeholder Task Force to draft and consult upon the EBR constitutes an interesting if not novel approach to public policy development in the environmental context.

However, it must also be recognized that the EBR was very much a product of its age, and that societal values and environmental priorities have continued to evolve since the early 1990s. In addition, it must be noted that several key items now found in the EBR (i.e. the section 41 leave test for third-party appeals) were <u>not</u> contained in the text of the draft EBR originally proposed by the Task Force. Similarly, the Task Force itself recommended that certain EBR provisions (i.e. the reform of the public nuisance rule, the new civil cause of action to protect public resources, etc.) should be actively monitored

---

[10] For a review of the rationale for, and background of, the EBR, see Paul Muldoon et al., *An Introduction to Environmental Law and Policy in Canada* (Toronto: Emond Montgomery, 2009), Chapter 15; Paul Muldoon and Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995), Chapters 1 and 2; David Estrin and John Swaigen (eds.), *Environment on Trial (3rd edition)* (Toronto: Emond Montgomery, 1993), Chapter 25; and *Report of the Task Force on the Ontario Environmental Bill of Rights* (Toronto: Ministry of the Environment, 1992), Chapters 1 and 2 ("EBR Task Force Report").

[11] Generally, see Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995), pages 7 to 11.

over time and revisited if warranted.[12] In short, the Task Force recognized that its EBR proposals were not cast in stone, and that the operational experience under the EBR should be reviewed and appropriate EBR amendments should be developed where necessary or desirable.

In light of the past 18 years' worth of EBR experience, CELA has concluded that it is now time to formally review and revise the EBR in an open and accessible process. Accordingly, CELA lawyers have recently submitted an Application for Review of the EBR and implementing regulations.[13] In essence, this Application for Review focuses upon a number of systemic problems which have been repeatedly raised by the Environmental Commissioner of Ontario ("ECO"), as discussed below in Part IV of this paper. It is anticipated that the Ontario government's preliminary response to this Application for Review will be released in early 2011.

III – OVERVIEW OF ONTARIO'S EBR

Ontario's EBR currently consists of eight interrelated Parts which are collectively intended to achieve environmental protection, facilitate public participation, and ensure governmental accountability. The salient features of these Parts are summarized below.[14]

(a) Part I of the EBR: Definitions, Purposes and Principles

Following a brief preamble which asserts that Ontarians have "a right to a healthful environment," Part I of the EBR sets out the scope and overall objectives of the legislation. For example, the biophysical definition of "environment"[15] establishes that the EBR is primarily intended to protect Ontario's natural environment, rather than social, economic, cultural, or indoor environments.

Similarly, the EBR defines its legislative purposes as:

- protecting, conserving and, where reasonable, restoring the integrity of the environment;
- providing sustainability of the environment; and
- protecting the right to a healthful environment.[16]

The EBR further stipulates that these broad purposes include various environmental principles, such as:

- pollution prevention;

---

[12] EBR Task Force Report, pages 107 to 108.
[13] A copy of this Application for Review (filed in December 2010) has been web-posted at www.cela.ca.
[14] Factsheets, FAQs and user guides for the various EBR components can be found at the ECO website (www.eco.on.ca). See also ECO, *The Nuts, the Bolts and the Rest of the Machinery: A Guide to Ontario's Environmental Bill of Rights* (February 15, 1999).
[15] "Environment" is defined as the "air, land, water, plant life, animal life and ecological systems of Ontario": EBR, subsection 1(1). See also the definitions of "air", "land" and "water" under the EBR.
[16] EBR, subsection 2(1).

- protection of biodiversity;
- conservation and wise management of natural resources; and
- identification and protection of ecologically sensitive areas or processes.[17]

In order to achieve these purposes and principles, the EBR expressly provides legislative means for:

- facilitating public participation in environmentally significant decisions by the Ontario government;
- increasing the accountability of the Ontario government for its environmental decision-making;
- increasing public access to the courts in order to protect the environment; and
- enhancing protection for employees who take action in respect of environmental harm.[18]

As discussed below, however, the implementation track record under the EBR during the past 18 years raises considerable concern whether – or to what extent – these important objectives have been achieved in Ontario.

(b) Part II of the EBR: Public Participation Requirements

Part II of the EBR is widely regarded as the cornerstone of the legislation, as it contains a number of important procedural obligations to ensure meaningful public participation in governmental decisions to make, amend or revoke environmental laws, regulations, policies[19] or instruments.[20]

For example, Part II of the EBR requires the creation and maintenance of an online Registry to provide the public with "information about the environment",[21] as well as to provide the public with notice about proposed (or final) environmental decisions subject to the EBR. In essence, the EBR generally requires notices for Acts, regulations, policies and instruments to be placed on the Registry for public review and comment purposes,[22] although there are several exceptions to this requirement.[23] The EBR further specifies that all relevant public submissions received during the comment period shall be considered during the governmental decision-making process.[24]

---

[17] EBR, subsection 2(2).
[18] EBR, subsection 2(3).
[19] "Policy" is defined as a "program, plan or objective and includes a guideline or criteria to be used in making decisions about the issuance, amendment or revocation of instruments": EBR, subsection 1(1).
[20] "Instrument" is defined as "any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act": EBR, subsection 1(1).
[21] EBR, sections 5 to 6.
[22] EBR, section 27.
[23] EBR, sections 29 to 33.
[24] EBR, section 35. Notice periods typically run for a minimum of 30 days, but sometimes longer periods (i.e. 45 to 90 days) have been provided on the EBR Registry.

In addition, Part II of the EBR requires prescribed Ministries[25] to publicly prepare Statements of Environmental Values ("SEVs") that explain how the above-noted EBR purposes are to be applied during environmental decision-making.[26] Moreover, the Ministers of prescribed Ministries have a mandatory duty under the EBR to take "every reasonable step" to ensure that the SEVs are considered "whenever decisions that might significantly affect the environment" are being made within the Ministries.[27]

Aside from facilitating public participation, Part II of the EBR also includes an appeal mechanism that Ontarians can use to hold Ministries accountable for decisions in relation to prescribed instruments.[28] In particular, Ontario residents can seek leave to appeal instrument decisions to an independent appellate body (i.e. Environmental Review Tribunal).[29] Leave applications must be served and filed within 15 days after the date that notice of the instrument decision was posted on the EBR Registry.[30] However, the EBR stipulates that leave shall not be granted unless there is reason to believe that the decision is unreasonable, and could result in significant environmental harm.[31] If leave is granted (in whole or in part), then a public hearing is held and the appeal body can uphold, vary or revoke the impugned decision.

(c) Part III of the EBR: The Environmental Commissioner

Part III of the EBR creates and empowers the Environmental Commissioner, who is an independent officer of the Ontario Legislature (not the government of the day), and is appointed for renewable five year terms.[32] Often regarded as Ontario's "environmental watchdog," the Environmental Commissioner, among other duties, reviews and reports upon the implementation of the EBR, and the Ministries' compliance with EBR requirements.[33] The Environmental Commissioner also reports annually to the Legislature on Ontario's progress in improving energy conservation/efficiency, and reducing greenhouse gas emissions.[34]

---

[25] At the present time, O.Reg. 73/94 prescribes over one dozen provincial Ministries under the EBR. The current SEVs for these Ministries are web-posted on "About the Registry" page of EBR Registry (www.ebr.gov.on.ca).
[26] EBR, section 7.
[27] EBR, section 11.
[28] O.Reg.681/94 prescribes various instruments under the EBR in relation to many activities and projects regulated under Ontario's environmental laws (i.e. air emissions, pesticides, drinking water systems, waste disposal sites, spills, water-takings, sewage works, aggregate operations, land use planning, forestry, mining, etc.). This generally means that such instruments are subject to the notice, comment and third-party appeal rights under Part II of the EBR.
[29] EBR, section 38. These proceedings are also known as "third-party appeals" under the EBR.
[30] EBR, section 40.
[31] EBR, section 41.
[32] EBR, section 49.
[33] EBR, sections 57 and 58.
[34] EBR, sections 58.1 and 58.2.

(d) Part IV of the EBR: Applications for Review

Part IV of the EBR allows Ontarians to formally apply for reviews of outdated or ineffective environmental laws, regulations, policies or instruments on the grounds that they should be amended, repealed or revoked in order to protect the environment.[35] Similarly, Ontarians can use this mechanism to apply for a review of the need for a new law, regulation or policy to protect the environment.[36] Applications for review are filed with the Environmental Commissioner, who, in turn, forwards a copy to the relevant Ministry. Within 60 days of receipt of the application, the relevant Ministry must inform the applicants and the Environmental Commissioner whether the requested review will be undertaken.[37] If the Minister determines that it is in the public interest to conduct the review, then the review must be completed within a reasonable time.[38]

(e) Part V of the EBR: Applications for Investigation

Part V of the EBR enables Ontarians to formally apply for governmental investigations of suspected environmental offences.[39] Applications for investigation are filed with the Environmental Commissioner, who, in turn, forwards a copy to the relevant Ministry. If the Ministry decides not to investigate the matter, it must provide notice (with reasons) to the applicants and the Environmental Commissioner within 60 days of receipt of the application.[40]

The EBR specifies that Ministries are not required to conduct an investigation where the application is frivolous or vexatious, or where the alleged contravention is not sufficiently serious or is unlikely to cause environmental harm.[41] If the investigation proceeds, the Ministry must generally complete it within 120 days, and advise the applicants and the Environmental Commissioner of the investigation outcome within 30 days of its completion.[42] As described below, the filing of an application for investigation is a general precondition to using the new EBR cause of action to protect public resources.[43]

(f) Part VI of the EBR: Access to the Courts

Part VI of the EBR contains a number of provisions which are intended to enhance public access to the courts in order to protect the environment. For example, the EBR partially

---

[35] EBR, subsection 61(1).
[36] EBR, subsection 61(2).
[37] EBR, section 70.
[38] EBR, section 69.
[39] EBR, section 74.
[40] EBR, section 78.
[41] EBR, section 77.
[42] EBR, section 80. If the investigation cannot be completed within 120 days, then the Ministry must provide the applicants with a written estimate of the time required to complete it: EBR, section 79.
[43] EBR, subsection 84(2). The EBR provides an exception to this requirement where the delay involved in filing an application for investigation would result in significant harm (or serious risk of harm) to a public resource: EBR, subsection 84(6).

reforms the common law by providing that plaintiffs are not barred from bringing an action in relation to a public nuisance causing environmental harm simply because the Attorney General did not first consent to the action, or because other persons have suffered the same kind or degree of loss and injury as the plaintiffs. However, the plaintiffs must still be able to demonstrate that they have suffered "direct economic loss or direct personal injury" as a result of the public nuisance.[44]

In addition, Part VI the EBR creates a new statutory cause of action which permits Ontarians to bring a civil action to protect "public resources"[45] against significant harm caused (or imminently caused) by a contravention (or imminent contravention) of a prescribed Act, regulation or instrument.[46] This action cannot be framed as a class proceeding,[47] and certain defences (i.e. statutory authority, reasonable interpretation, etc.) are expressly recognized by the EBR.[48]

Plaintiffs utilizing this EBR cause of action are obliged to promptly serve the Statement of Claim upon the Attorney General of Ontario,[49] and are further required to post an appropriate public notice on the EBR Registry.[50] If the action is successful, the court may award costs, order declaratory or injunctive relief, or require the parties to negotiate a restoration plan; however, the court has no jurisdiction to award damages under the EBR.[51] There is a two-year limitation period prescribed by the EBR in relation to this new cause of action.[52]

(g) Part VII of the EBR: "Whistleblower" Protection

Part VII of the EBR prohibits employers from taking "reprisals"[53] against employees on certain grounds prohibited by the EBR. In particular, employers are prohibited from taking reprisals merely because an employee, in good faith, exercised public participation rights under the EBR, applied for reviews or investigations under the EBR, or provided information or evidence to appropriate authorities or in proceedings under prescribed Acts.[54] Where such reprisals occur, the employee may file a complaint with the Ontario Labour Relations Board, which is given various powers under the EBR (i.e. compensation, reinstatement, etc.) to remedy the situation.[55]

---

[44] EBR, section 103.
[45] "Public resource" is defined as air, water, certain public lands greater than 5 hectares, and any associated plant life, animal life or ecological system: EBR, section 82.
[46] EBR, subsection 84(1).
[47] EBR, subsection 84(7).
[48] EBR, section 85.
[49] EBR, section 86.
[50] EBR, section 87.
[51] EBR, section 93. If the parties cannot agree on a restoration plan, the court is empowered to develop one: EBR, section 98.
[52] EBR, section 102.
[53] This term generally refers to acts such as dismissing, disciplining, penalizing, coercing, intimidating, or harassing employees: EBR, subsection 105(2).
[54] EBR, subsection 105(3).
[55] EBR, section 110.

(h) Part VIII of the EBR: General Provisions

Part VIII of the EBR contains a number of implementation provisions, including a privative clause,[56] certain liability exemptions,[57] and broad regulation-making authority.[58]

IV – THE EBR TRACK RECORD AND NEED FOR REFORM

Over the past 18 years of EBR experience, there have been a number of success stories in Ontario which illustrate how the EBR can be used effectively to inform and empower the public to protect the environment and conserve resources, particularly at the local level. For example, CELA's clients have successfully used the third-party appeal under the EBR to result in the cleanup and closure of a problematic landfill,[59] and the revocation of approvals which purported to allow the burning of scrap tires, plastics and other wastes as "alternative fuels" at a cement plant.[60] These and other EBR success stories have been well-documented by the ECO,[61] and need not be repeated here.

Despite some EBR success, however, various commentators (including ECO staff) have identified significant shortcomings and "challenges" within the current EBR regime.[62] Similarly, the ECO's Annual and Special Reports since 2005 have documented numerous case studies which demonstrate serious systemic problems within the existing EBR regime. In CELA's view, these problems should be rectified through statutory and/or regulatory changes to the EBR regime, as described below. In short, the essential "lesson learned" to date is that Ontario's EBR needs to be recast, revitalized, and rebalanced in order to better achieve the broad public interest purposes of the legislation (i.e., environmental protection, public participation, and governmental accountability).

As described above, CELA lawyers have recently filed an Application for Review of the EBR which identifies and evaluates several high-priority issues for statutory and regulatory reform. It should be noted that this Application for Review does not attempt to inventory all EBR-related issues which have arisen since 1993. Instead, the Application for Review describes a "Top 10" list of issues which are illustrative of the types of systemic problems which require immediate legislative attention in Ontario. For

---

[56] EBR, section 118.
[57] EBR, section 119.
[58] EBR, section 121.
[59] *Barker v. Director* (1996), 20 C.E.L.R. (N.S.) 72 (Env. App. Bd.). This case marked the first time that leave to appeal an instrument was granted under the EBR.
[60] *Dawber v. Ontario (Director, Ministry of the Environment)*, (2007), 28 C.E.L.R. (3d) 281; affd. (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.); leave to appeal refused (Ont. C.A. File No. M36552, November 26, 2008)
[61] See, for example, ECO, *Celebrating the 10th Anniversary of the EBR and the ECO* (2004).
[62] See, for example, J.F. Castrilli, *Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences*, [1998] Vol. IX *Villanova L. Journal* 349; Elaine Hughes & David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999), 30 Ottawa L.R. 229; and Lynda Lukasik, David McRobert & Lisa Shultz, *Public Participation Rights, Environmental Policy Struggles & E-Democracy: Lessons Learned During the First 11 Years of Ontario's Environmental Bill of Rights* (November 2006).

each issue, the Application for Review briefly states the EBR-related concern(s) from the public interest perspective, and offers some suggested reforms to resolve the issue, as discussed below.

(a) Updating the Purposes of the EBR

Concern: As noted above, subsection 2(2) of the EBR entrenches a number of important environmental principles (i.e. "pollution prevention", "biodiversity conservation", "ecosystem protection", etc.) that are intended to direct or guide governmental decision-making in Ontario. However, since subsection 2(2) was drafted in the early 1990s, a number of equally important environmental principles have emerged at the national and international level, and have been adopted by legislators and the judiciary across Canada. This new environmental ethos includes well-known concepts such as the "zero discharge", "polluter pays" principle, "precautionary principle", and the "principle of intergenerational equity."[63]

Suggested Reform: In order to remain current and credible, subsection 2(2) of the EBR should be amended to expressly include "zero discharge", "polluter pays" principle, the "precautionary principle", and "principle of intergenerational equity." Combined with other EBR reforms (see below), the creation of an updated set of "green" principles within the EBR will serve as an important policy foundation for responding to the environmental challenges of the 21st century.

(b) The Lack of Environmental Rights in the EBR

Concern: At the present time, the EBR makes reference to the public "right to a healthful environment" in the unenforceable preamble. Similarly, subsection 2(1)(c) states that the purpose of the EBR is to "protect the right to a healthful environment through the means provided in this Act." However, no stand-alone, substantive public right to a clean and healthful environment is actually entrenched within the EBR. This significant omission has prompted many stakeholders and commentators to lament the irony of having an EBR that does not actually confer any enforceable environmental rights:

> Apart from the section 84 statutory tort, citizens' recourse to the courts is precluded (apart from ordinary civil proceedings where personal injury or property damage occurs). The only real "rights" of citizens are rights of notice, opportunities to comment, and the right to have their comments taken into account when government makes its decisions; failure to respect such rights will not invalidate those decisions…
>
> To summarize, while the Ontario EBR no doubt provides a great deal of public notice and input into government decision-making, it provides very little in the way of a remedy if environmental security is, nevertheless, violated. There is no judicial review of government failings and the statutory tort which permits action

[63] ECO Special Report, *Looking Forward: The Environmental Bill of Rights* (March 1, 2005), page 2 ("ECO Special Report").

> directly against rights-violators is, as with the Yukon Act, extremely limited. Indeed, given the absence of any equivalent to the Yukon "public trust" action, the Ontario legislation has virtually no potential to fulfill our "strong" rights model.[64]

At best, then, the current EBR represents a collection of procedural rights, not environmental rights *per se*.

Suggested Reform: The obvious remedy for the above-noted concern is to amend the EBR to include a substantive right to a healthful environment. The nature, scope, and legal effect of this new substantive right can be debated at length, but there can be little doubt that such a right is long overdue and represents a fundamental building block for a revitalized EBR in Ontario.

It is noteworthy that the EBR Task Force was unable to agree upon the inclusion of a substantive environmental right within the EBR. However, the EBR track record has demonstrated that little, if any, progress has been made on the significant environmental problems and challenges facing Ontarians.[65] It should be further noted that there is a federal private member's bill currently before Parliament that proposes to create a public right to a "healthy and ecologically balanced environment,"[66] as described in Part V of this paper. Accordingly, CELA maintains that it is now timely and appropriate to revisit the option of including an environmental right in Ontario's EBR.[67]

If this option is pursued, then this reform should be accompanied by improvements in the EBR's legal accountability tools (i.e. civil cause of action, enhanced judicial review, public trust doctrine, etc.), as discussed below.

(c) Complying with Meaningful Statements of Environmental Values

Concern: The EBR Task Force described the development and application of Ministry-specific SEVs as "the best method of ensuring that the purposes of the EBR" are influencing government decision-making with respect to the environment.[68] Accordingly, section 11 of the EBR imposes a positive legal duty upon prescribed Ministers to "take every reasonable step" to ensure that the Ministries' SEVs are considered whenever environmentally significant decisions are being made by the Ministries.

---

[64] Elaine Hughes & David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999), 30 Ottawa L.R. 229, paras. 79 and 81.
[65] CELA, *The EBR Turns 10 Years-Old: Congratulations or Condolences?* (June 16, 2004), pages 3, 6 to 7.
[66] *Canadian Environmental Bill of Rights* (Bill C-469), section 9. See also CELA, *In Support of a Federal Environmental Bill of Rights: Submissions to the House of Commons Standing Committee on Environment and Sustainable Development on Bill C-469* (November 1, 2010).
[67] ECO and LURA Consulting, *EBR Law Reform Workshop June 16, 2004: Meeting Report* (October 2004), pages 26 to 27.
[68] EBR Task Force Report, page 23.

Over the past 18 years, however, the implementation of this duty – and the substantive content of the SEVs – has been questionable at best. For example, the ECO's Special Report on EBR reform correctly concluded that "SEVs are vague and outdated, and have little impact in the ministries."[69] Although some SEVs have been revised since the ECO's Special Report in 2005, the SEVs still amount to little more than a verbatim recital of EBR purposes and high-level environmental principles (i.e. ecosystem approach, precautionary principle, etc.), with little or no operational direction on how these purposes and principles are to be put into practice during decision-making in relation to Acts, regulations, policies, or instruments.

Indeed, the MOE has steadfastly argued that its SEV is not even applicable to its decisions respecting prescribed instruments, despite findings to the contrary by the Environmental Review Tribunal ("ERT") and the Ontario Divisional Court in the recent "Lafarge" litigation.[70] In the wake of the Lafarge litigation, CELA wrote to the Minister of the Environment to specifically request that he take certain measures to ensure that MOE Directors understand and comply with their legal duty to consider the SEV when making instrument decisions.[71] However, in response to this request, the Minister merely stated that MOE "officials are considering how best to move forward in light of the judgment of the Divisional Court in *Lafarge v. Environmental Review Tribunal et al.*"[72] Thus, it remains unclear whether CELA's requested measures have been fully implemented by the Minister to date.

Suggested Reform: There are numerous reforms which are necessary to strengthen and improve SEV content and implementation. For example, section 10 of the EBR should be amended to impose a specific duty upon Ministers to undertake a public review and revision of their SEVs every five years. This kind of periodic review would help ensure that the SEVs remain current and effective. In addition, Ministers should develop (with public input) appropriate guidance materials, procedures and protocols which explain <u>how</u> EBR purposes are to be considered and applied during the Ministries' environmental decision-making (including decisions to issue or amend prescribed instruments).

Most importantly, the SEVs require clearer goals, prescriptive detail, and measurable targets, which will undoubtedly be best achieved through statutory amendments to the SEV provisions in the EBR.[73] To avoid further uncertainty (or more litigation), section 11 of the EBR should be amended to clarify that the SEVs must be considered whenever Ministries are making decisions in relation to prescribed instruments as well as Acts, regulations and policies.[74] CELA also submits that the statutory obligation upon prescribed Ministries to consider and apply SEV principles should be triggered regardless

---

[69] ECO Special Report, page 3. See also ECO, 2005-2006 Annual Report, pages 188 to 189.
[70] *Dawber v. Ontario (Director, Ministry of the Environment)*, (2007), 28 C.E.L.R. (3d) 281; affd. (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.); leave to appeal refused (Ont. C.A. File No. M36552, November 26, 2008). See also CELA, *Third-Party Appeals under the Environmental Bill of Rights in the Post-Lafarge Era: The Public Interest Perspective* (February 2, 2009).
[71] Letter from CELA to the Hon. John Gerretsen dated June 24, 2008.
[72] Letter from the Hon. John Gerretsen to CELA dated August 12, 2008.
[73] ECO Special Report, page 3.
[74] *Ibid.*, page 4.

of whether the instrument falls within an "exception" (i.e. sections 29 to 33) that dispenses with the general obligation to post notice of the proposal on the EBR Registry.

(d) Use, Misuse and Avoidance of the Environmental Registry

Concern: In general, the EBR Registry has been one of the more positive developments under the EBR, particularly as the Registry itself has technologically evolved into a more user-friendly and interactive database system. However, there is considerable room for improvement in how the EBR Registry has been used to date by Ministries to notify the public, and to solicit stakeholder input, about environmentally significant proposals.

For example, there is ongoing public and ECO concern that the minimum comment periods are too short[75] (or, in some instances, are wholly absent), especially in relation to complex or controversial proposals such as wholesale changes to environmental laws/regulations, provincial plans or policies, or complicated instruments for largescale facilities and projects.[76] The ECO has also documented instances where discretionary "information notices" were misused by prescribed Ministries in relation to significant policy proposals.[77]

The overall result is that despite the mandatory consultation requirements under Part II of the EBR, numerous environmentally significant decisions are still not being posted on the EBR Registry, and are therefore being made without the public review and comment opportunities imposed by law.[78] Conversely, the EBR provisions relating to enhanced notice/comment (i.e. sections 24, 25, 28) appear to be largely unused over the past 18 years.

In addition, the supporting documents (or actual text of the proposed laws, regulations or instruments) are not always included as links or attachments to EBR Registry Notices,[79] thereby making it difficult for the public to access and comment upon the proposals in a timely manner. In some instances, the ECO found that the supporting documents could not even be found by Ministry staff, who appeared to lack efficient centralized systems for storing and accessing files.[80]

In other cases, significant delays (of up to two years) have occurred between the original posting of a proposed instrument and the subsequent posting of the decision notice, which

---

[75] ECO, Annual Report 2009-2010, pages 182 to 184. See also ECO, 2007-2008 Annual Report, pages 153 to 154.

[76] For example, the controversial 2006 regulation that exempted Ontario's Integrated Power System Plan from the *Environmental Assessment Act* was not posted on the EBR Registry for public review/comment. See ECO, "Media Release: Third Decision on Government's Electricity Plan Evades *Environmental Bill of Rights*, says Environmental Commissioner" (June 19, 2006). See also ECO, 2007-2008 Annual Report, page 154 regarding Ontario's failure to post an EBR Notice in relation to its "Go Green" Action Plan on Climate Change.

[77] ECO, 2009-2010 Annual Report, page 190. See also ECO, 2008-2009 Annual Report, page 112; ECO, 2006-2007 Annual Report, page 160; and ECO, 2005-2006 Annual Report, pages 178 to 180.

[78] ECO, 2009-2010 Annual Report, pages 186 to 190. See also ECO, 2007-2008 Annual Report, pages 156 to 158.

[79] ECO, 2006-2007 Annual Report, page 157.

[80] ECO, 2009-2010 Annual Report, pages 177 to 178.

has allowed proponents to carry out the activities in question while simultaneously undermining the public's right to utilize the EBR's third-party appeal process in a timely manner.[81] Similarly, the ECO has repeatedly objected to significant delays in prescribing new instruments under the EBR, which again undermines public notice/comment rights, and the public right to apply for reviews, under the EBR.[82]

Moreover, the textual content of EBR Registry Notices can vary considerably, as some Notices are drafted in a fulsome and informative manner, while others simply set out sparse or inadequate descriptions of the proposal (or its environmental impacts).[83] Similarly, the ECO has found that some Ministry staff remain uncertain or unaware that interested members of the public are entitled to review the proponent's supporting documentation without being forced to file freedom-of-information requests.[84] This matter is further discussed below in the context of third-party appeals.

Furthermore, the ECO has expressed concern about incomplete EBR Registry postings in relation to permits or approvals issued by the Ministry of Natural Resources ("MNR") for renewable energy projects on Crown lands or waters.[85] There is also ECO concern that certain MNR permits (i.e. under the *Endangered Species Act, 2007)* are not currently prescribed under O.Reg.681/94, which means that such permits are not subject to the public notice/comment and SEV requirements under the EBR (see below).[86] Moreover, the ECO has concluded that the MNR failed to satisfy its consultation obligations under the EBR in relation to habitat policies developed under the *Endangered Species Act, 2007,* and guidelines developed to direct protected areas planning.[87]

Similar concerns were expressed in relation to exploration plans and permits under the amended *Mining Act*, and nutrient management plans under the *Nutrient Management Act*, none of which are currently prescribed as instruments under the EBR.[88] The ECO has also recommended that certain approvals under the *Niagara Escarpment Planning and Development Act* and *Crown Forest Sustainability Act* should be prescribed as instruments under the EBR.[89]

Suggested Reform: Further legislative and/or regulatory direction is required to ensure that members of the public receive clearer and more timely notification on the EBR Registry, and that they obtain longer comment periods which are commensurate with the significance of the proposal under consideration.[90] Similarly, EBR Registry Notices should consistently include either links to, or e-copies of, the supporting documentation

---

[81] *Ibid.,* page 195.
[82] ECO, 2008-2009 Annual Report, page 122.
[83] ECO, 2009-2010 Annual Report, page 184. See also ECO, 2006-2007 Annual Report, page 159; and ECO, 2005-2006 Annual Report, page 172.
[84] ECO, 2009-10 Annual Report, page 177.
[85] *Ibid.*, page 24.
[86] *Ibid.*, page 47.
[87] *Ibid.*, pages 47 to 48, 51, 77.
[88] *Ibid.,* pages 119 to 120, 134, 168
[89] ECO, 2006-2007 Annual Report, page 135.
[90] ECO Special Report, page 4.

submitted by proponents or relied upon by Ministry decision-makers.[91] In every case where ministry decision-makers conclude that Registry notice is not required due to statutory exemptions (see sections 29 to 33 of the EBR), then it should be obligatory upon the decision-makers to post an "exception notice" on the EBR Registry in order to provide clarity, traceability and accountability.[92] Moreover, there should be an open and accessible public consultation undertaken by the Ontario government in relation to O.Reg.681/94 in order to identify which additional permits, approvals, or licences should be prescribed as instruments under the EBR.

(e) Fixing the "EA Exception" under Section 32 of the EBR

Concern: Section 32 of the EBR created an "EA exception" to the public notice, comment, and third-party appeal rights which were established under Part II of the EBR. In short, this section provides that the Part II requirements do not apply to instruments which are necessary to implement undertakings which have been approved (or exempted) under Ontario's *Environmental Assessment Act* ("EAA").

In 1992, the EBR Task Force rationalized this exception on the grounds that the opportunities for public participation then in existence under the EAA were "substantially compliant" with EBR requirements.[93] The EBR Task Force also drew comfort from the pending release of a major report by the Environmental Assessment Advisory Committee ("EAAC") on long overdue reforms to Ontario's EA program.[94]

Since the early 1990s, however, most of the EAAC's suggested EA reforms have not been implemented by the Ontario government, and the EAAC itself was abolished in 1995. Moreover, the overbroad "EA exception" in section 32 has been used by ministries to deprive members of the public of their right to notice and comment "on many instruments that affect Ontario's environment."[95]

In particular, the ECO has scrutinized public participation rights in a number of EA processes (i.e. individual and Class EAs), and concluded that "they are deficient in many respects compared to the EBR process for instrument approvals."[96] In 2005, the Environment Minister's EA Advisory Panel (Executive Group) agreed with the ECO that section 32 of the EBR was "being used to 'shield' important EA-related approvals from adequate public scrutiny, and that public participation rights are being frustrated as a result."[97]

CELA further notes that since the release of the EBR Task Force Report, there have been a number of retrogressive changes which have occurred within Ontario's EA program

---

[91] *Ibid.*
[92] *Ibid.*, page 5.
[93] EBR Task Force Report, page 33.
[94] *Ibid.*
[95] ECO Special Report, page 5.
[96] ECO 2003-2004 Annual Report, page 53.
[97] EA Advisory Panel (Executive Group), *Improving Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Volume I, page 90 ("EA Advisory Panel Report").

(i.e., no public hearing referrals since 1995; proliferation of "scoped" EAs; inadequate consideration of need/alternatives; questionable public consultation; growing number of regulatory exemptions; demise of intervenor funding legislation in 1996; etc.).[98] Thus, the underlying assumptions made by the EBR Task Force about public participation in Ontario's EA program are no longer valid, and it is now time to revisit and revise the section 32 "EA exception."

CELA's concern about the overuse or abuse of the section 32 exception is perhaps best exemplified by the 2009 refusal of the Ministry of Natural Resources ("MNR") to classify and subject some of its instruments to Part II of the EBR. In essence, the MNR opined that the section 32 "EA exception" made the EBR wholly inapplicable to certain instruments under the *Endangered Species Act, 2007* and the *Provincial Parks and Conservation Reserves Act, 2006*. Although the MNR's questionable claim was strongly contested by CELA,[99] several of these instruments remain outside the scope of mandatory Part II requirements. In 2009, the ECO issued a Special Report which recommended that all instruments under the *Endangered Species Act, 2007* and regulations should be prescribed under the EBR.[100]

Similar concern has been expressed by the ECO in relation to MNR's ongoing reliance upon the EA exception to rationalize its refusal to post prescribed aquaculture licences for facilities in Great Lakes or Crown lands. Alarmingly, these facilities have been classified by MNR under the relevant Class EA as "Category A" projects, meaning that they are not subject to any public consultation under the EAA or the EBR.[101]

In relation to waste management projects subject to the new "screening process" established by O.Reg. 101/07 under the EAA, the ECO has commented that the EA exception effectively means that there will be a serious loss of transparency, and denial of public participation and appeal rights under the EBR, in the waste management context.[102]

Suggested Reform: Given the recent devolution of Ontario's EA program, CELA submits that the section 32 "EA exception" is no longer appropriate and should be deleted from the EBR in its entirety. In the alternative, if section 32 is to be retained within the EBR, then the provision should be substantially amended to provide that the EA exception only applies where the undertaking in question has been subject to a public hearing under the EAA. Such a recommendation was made by the EA Advisory Panel in 2005,[103] but it has not been acted upon to date by the Ontario government. Similar

---

[98] The many problems which currently plague Ontario's EA program have been succinctly described by the ECO in the 2007-08 Annual Report. See also Richard Lindgren and Burgandy Dunn, "Environmental Assessment in Ontario: Rhetoric vs. Reality" (2010), 21 J.E.L.P. 279.
[99] Letter from CELA to the Hon. Donna Cansfield dated April 17, 2009 re EBR Registry No. 010-6162.
[100] ECO, *The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk* (February 2009), page 50, Recommendation 5.
[101] ECO, 2009-2010 Annual Report, pages 192 to 193.
[102] ECO, 2007-2008 Annual Report, pages 40 to 41.
[103] EA Advisory Panel Report, page 85, Recommendation 17.

recommendations to amend section 32 have been made in various reports released by the ECO in recent years.[104]

(f) Revisiting the Leave Test and Funding for Third-Party Appeals

Concern: With respect to instruments, the third-party appeal is arguably one of the most important EBR mechanisms for protecting the environment and ensuring governmental accountability. Over the years, however, there has been considerable concern expressed about the relatively short timeframe (15 days) in which EBR leave-to-appeal applications must be served and filed. As noted above, supporting documentation (and even the full text of the instrument itself) is not always posted with the decision notice on the EBR Registry, which makes it exceedingly difficult for citizens to obtain and review such documentation within 15 days. Similarly, the ECO has expressed concern over the 15 day timeframe for filing a third-party appeal in respect of renewable energy approvals issued under the *Environmental Protection Act*.[105]

However, the MOE recently refused to consider the possibility of extending the timeframe to 20 (or 30) days under the EBR, and the ECO has been properly critical of this unpersuasive refusal.[106] Since the ERT has no statutory jurisdiction to extend the deadline (even in hardship cases), some leave applications have been dismissed by the ERT due to filing delays rather than on the merits,[107] which, in CELA's view, tends to bring the EBR appeal process into disrepute.

It is also clear that in many leave cases, the ERT has struggled to meet the 30 day deadline for its decision (see section 17 of O.Reg.681/94), and the ERT has often been forced to extend the decision deadline upon notice to the parties. In CELA's opinion, this situation reflects the legal, technical and scientific complexity of the issues typically raised in EBR leave applications (and governmental and proponent responses thereto), and calls into question the validity or appropriateness of the arbitrary 30 day decision deadline.

More fundamentally, it is highly questionable whether the section 41 leave test should remain intact within the EBR. The leave test has been characterized by Ontario courts as "stringent,"[108] and although cases such as the above-noted Lafarge litigation demonstrate that it is possible for prospective appellants to satisfy the leave test, the fact remains that most EBR leave applications have been dismissed over the years.

---

[104] ECO Special Report, pages 5 to 6. See also ECO, 2007-2008 Annual Report, page 44.
[105] ECO, 2009-10 Annual Report, page 18.
[106] *Ibid.*, pages 157 to 159. For more information about this matter, see also section 5.2.1.15 of the ECO's Supplement to the 2009-2010 Annual Report.
[107] See, for example, *Miller v. Ontario* (2008), 36 C.E.L.R. (3d) 305, where the ERT declined to hear a leave application that was not filed on time due to a courier delivery error. A motion for reconsideration dismissed: (2008), 37 C.E.L.R. (3d) 214 (ERT).
[108] *Smith v. Ontario* (2003), 1 C.E.L.R. (3d) 245 (Div. Ct.) at para.8; *Dawber v.Ontario* (2008), 36 C.E.L.R. (3d) 191 (Div. Ct.) at para.41.

For example, a statistical review of all EBR leave applications brought during the first ten years of the EBR revealed that out of an estimated 14,000 instrument decisions issued by the MOE, only 54 were subject to EBR leave applications, and only 13 of these leave applications were granted (in whole or in part) over the decade.[109] While some leave applications are withdrawn prior to adjudication, the ECO has reported that leave to appeal was granted in only 21% of the applications decided between 1995 and 2003.[110] It thus appears that the EBR leave test is inappropriately preventing concerned citizens from accessing the ERT, even though, by definition, their leave applications pertain to environmentally significant activities which require the issuance (or amendment) of prescribed instruments.

In addition, even for those individuals and groups which have been fortunate enough to obtain leave to appeal, there is no participant or intervenor funding available to help defray the cost of public interest participation under the EBR. In such cases, the costs of participating in ERT proceedings have often been extensive if not unduly prohibitive. In the Lafarge litigation, for example, the successful leave-to-appeal applicants were forced to bear legal and expert costs in excess of $200,000, which were incurred before the main hearing was terminated by the proponent's withdrawal of the impugned instruments.[111]

Suggested Reform: The timeframe for filing an EBR leave application should be extended from 15 days to at least 20 days (see sections 17(24) and 34(19) of the *Planning Act*) or, preferably, 30 days (see Rule 61.04 of the *Rules of Civil Procedure*). At the same time, subsections 17(4) to (6) of O.Reg.681/94 should be deleted in order to remove the 30 day deadline for the ERT to render leave decisions.

The EBR should also contain a consequential amendment to the *Freedom of Information and Protection of Privacy Act* to clarify that all documentation submitted by proponents in relation to proposed instruments shall be immediately disclosed upon request by any person (without filing an FOI request), and that disclosure of such documentation cannot be refused by prescribed Ministries on the grounds that the records were submitted in confidence or contain proprietary information. Where residents have requested such documentation, the running of the leave-to-appeal period should be stopped until the documentation is provided in full by governmental officials.

More importantly, the leave test in section 41 should be deleted so that it no longer serves as an unreasonable barrier to citizen access to the ERT. In CELA's view, if instrument-holders continue to enjoy an unfettered ability to file an instrument appeal as of right, then so should neighbours or other persons who are interested in, or potentially affected by, the impugned instrument. In the unlikely event that a frivolous, vexatious or *ultra*

---

[109] Birchall Northey, *Legal Review of the EBR Leave to Appeal Process* (September 2004), page (i). This paper was prepared as part of the ECO's 10th anniversary review of the EBR.
[110] ECO, *Celebrating the 10th Anniversary of the EBR and the ECO* (2004), page 11.
[111] *Baker v. Ontario* (2009), 43 C.E.L.R. (3d) 285 (ERT). A motion for reconsideration of this cost ruling was dismissed: see (2009), 47 C.E.L.R. (3d) 118 (ERT).

vires third-party appeal is filed, then the ERT has authority to control its process and to summarily dispose of such appeals without a hearing.[112]

It should be noted that the EBR Task Force briefly suggested that there should be some sort of "preliminary merits" screen for third-party appeals.[113] However, there was no consensus among EBR Task Force members on the actual wording of the leave test, and, in fact, the draft EBR within the Task Force Report contained no leave test at all. Thus, it cannot be seriously suggested that the EBR Task Force recommended or supported the "stringent" wording that was ultimately inserted into Part II of the EBR by the Ontario Legislature.[114] In any event, the dismal track record regarding EBR leave applications over the past 18 years amply demonstrates that the current leave test is largely unworkable, unduly complicated, and unnecessarily restrictive. It is therefore time to reconsider the public policy rationale for even having a leave test in the EBR at all.

Indeed, given the MOE's recently proposed initiative to "modernize" Ontario's environmental approvals program, it seems likely that a number of so-called "low-risk" activities will no longer require the issuance of individual, site-specific approvals. If approval requirements are thus confined to fewer and fewer "high risk" activities, then CELA submits that it becomes even more imperative to ensure that citizens enjoy unconstrained access to the ERT in potentially "high risk" situations. In such circumstances, third-party appeals should be routinely available, rather than be arbitrarily restricted to exceptional cases.

With respect to activities that may be subject to forthcoming "permit by rule" standards rather than individual approvals, CELA submits that before proponents are allowed to register with the MOE and proceed with their projects, the proposal should be subject to Part II of the EBR (i.e. Registry notice, public notice/comment, etc.).[115] In order to achieve this result, it may be necessary to amend the definition of "instrument" under the EBR.

Similarly, CELA submits that the "instrument" definition should also be amended to clarify that Part II of the EBR is fully applicable to industrial proposals to alter, waive or vary provincial air pollution standards in O.Reg.419/05 (see sections 32 to 37 of the regulation, which allow for the establishment of site-specific contaminant concentration standards on a case-by-case basis). In CELA's opinion, even if industrial proponents cannot (and likely will not) appeal their requested alterations to the ERT, interested or potentially affected residents should be able to utilize the EBR's third-party appeal rights where MOE Directors decide to grant regulatory alterations.

---

[112] See section 4.6 of the *Statutory Powers Procedure Act* and Rules 119 to 123 of the ERT Rules of Practice (July 2010).
[113] EBR Task Force Report, page 55.
[114] In the Lafarge litigation, the Divisional Court characterized the wording of section 41 as "unusual": see *Dawber v. Ontario* (2008), 36 C.E.L.R. (3d) 191 (Div. Ct.) at para.40.
[115] CELA, CIELAP and Ecojustice, *Modernizing Environmental Approvals (EBR Registry No. 010-9143)* (April 16, 2010), pages 10 to 14.

CELA further submits that the establishment of a participant or intervenor funding program is long overdue under the EBR in order to facilitate meaningful public usage of the review, comment and appeal provisions of the EBR in relation to instruments.[116] In 2005, the ECO agreed that "this may be an appropriate moment to consider some form of participant funding under the EBR," and suggested that this could initially take the form of a pilot project.[117] However, CELA notes that Ontario has already gleaned years of experience under the former *Intervenor Funding Project Act*. Thus, the appropriate question is not whether funding should be available under the EBR, but how such funding programs will be designed and implemented under the EBR.

(g) Enhancing the Powers of the Environmental Commissioner

Concern: As noted above, Part III of the EBR confers a number of important powers upon the ECO to review and collect information on various issues (see section 57), and to prepare annual and special reports to the Ontario Legislature on EBR matters, energy conservation, and greenhouse gas emissions (see sections 58, 58.1 and 58.2). While the ECO's review and reporting responsibilities have increased under the EBR in recent years, there remains concern that the ECO's evidence-gathering powers have remained unchanged since 1993. For example, although the ECO may examine a public servant under oath (and require him/her to produce documents for the examination: see section 60), the EBR does not compel prescribed Ministries to cooperate with the ECO, or to provide disclosure or production upon request. In some instances, the ECO has lamented the lack of cooperation that has been received from certain Ministries in recent years.[118]

Interestingly, sections 57 to 58.2 of the EBR do not expressly empower the ECO to make recommendations in Annual or Special Reports filed with the Ontario Legislature. Traditionally, the ECO has interpreted its reviewing/reporting powers as including the authority to make recommendations, and over the past 18 years the ECO's reports have included numerous procedural and substantive recommendations (including those relating to EBR reform).

However, the EBR does not legally require the MOE (as the Ministry responsible for administration of the EBR) to actually respond to any of the ECO's important and well-founded recommendations. The result is that many key ECO recommendations languish for years without implementation or even a formal acknowledgement or response by prescribed Ministries to the Ontario Legislature:

> Thus, accountability for government failures is primarily political. To enable greater political pressure to be brought to bear, the Act establishes the office of the Environmental Commissioner, whose duties include monitoring the statute's implementation and reporting any deficiencies to the Legislature. However, the Environmental Commissioner has few powers and to date, despite the

[116] CELA, *EBR Registry #XQ04E0002: Looking Forward: The EBR Discussion Paper* (January 24, 2005), page 9.
[117] ECO Special Report, page 9.
[118] ECO, 2008-2009 Annual Report, page 112.

> Commissioner's scathing reviews of government inadequacies and reports of blatant violations of the Ontario EBR, it seems that the legislature in receipt of those reports is unmoved.[119]

Suggested Reform: As recommended by the ECO in 2005, the EBR should be amended to impose a positive legal duty upon Ministry staff to provide information and produce documents relevant to the matters under review by the ECO.[120] These new provisions could be modeled on the disclosure/cooperation obligations imposed upon Ministries and Crown agencies under sections 10 to 11.2 of Ontario's *Auditor General Act.* When analyzing the nature and scope of the ECO's current powers, consideration should also be given to creating further or better discovery mechanisms or compliance tools within the EBR to empower the ECO to investigate or enjoin governmental conduct that contravenes the EBR.

Moreover, for the purposes of greater certainty and accountability, the EBR should be amended to expressly empower the ECO to make recommendations in the Annual and Special Reports, and to impose a positive legal duty upon the MOE (or other prescribed Ministries) to provide the Ontario Legislature with a written response to the ECO's recommendations within 90 days of their public release.

Alternatively, the Ontario Legislature could create a new standing committee (or use an existing committee) to review and report upon ECO recommendations and responses thereto by prescribed Ministries. This arrangement could be structured in a manner that required Ministry officials to testify before the committee on a regular basis about matters raised in ECO reports. Thus, this reform would be analogous to the obligation upon the federal government to respond to parliamentary committee reports regarding reform or renewal of Canadian environmental laws (i.e. *Canadian Environmental Assessment Act, Canadian Environmental Protection Act, 1999,* etc.).

(h) Prescribing Additional Ministries and Statutes under the EBR

Concern: The overall objective in prescribing Ministries under the EBR is to ensure that all Ministries making environmentally significant decisions are caught by, and subject to, the EBR. Since 1993, however, a number of originally prescribed Ministries are no longer subject to the EBR, and the Ontario government has failed or refused to prescribe other key or newer Ministries whose decisions may affect the environment and public resources. In turn, these omissions have prompted many Ontarians to file Applications for Review to request prescribing Ministries which were still outside the scope of the EBR coverage.

More recently, the ECO has criticized the exclusion of the Ministry of Finance as a prescribed ministry under the EBR, particularly since this Ministry oversees the

[119] Elaine Hughes & David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999), 30 Ottawa L.R. 229, para.80.
[120] ECO Special Report, page 7.

administration of the province's Greenhouse Gas Reduction Fund.[121] Indeed, the very first Special Report of the ECO addressed the Ontario government's ill-advised decision in 1996 to suddenly remove the Ministry of Finance as a prescribed Ministry under the EBR.[122]

Similarly, the ECO has expressed concern about environmentally significant statutes which have not yet been prescribed under the EBR. For example, the ECO has noted that the continuing exclusion of Ontario's *Drainage Act* from EBR coverage means that residents are unable to file Applications for Review or Investigation, even where provincially significant wetlands are adversely affected by drainage activities.[123] Similarly, the ECO has criticized the Ontario government's long-standing refusal to fully prescribe the *Building Code Act, 1992* under the EBR, particularly since this statute is now used to govern green building materials and energy technologies.[124] Similarly, the recently enacted Bill 72 (*Water Opportunities and Water Conservation Act, 2010)* amends the *Building Code Act* in relation to water conservation standards. More generally, the ECO has also lamented the Ontario government's lengthy delay in prescribing newly passed environmental laws under the EBR.[125]

Suggested Reform: In consultation with the ECO, stakeholders and the public at large, the Ontario government must review and revise O.Reg.73/94 forthwith to ensure that all relevant Ministries and Crown agencies are prescribed by regulation under the EBR. As a starting point, CELA suggests that the following Ministries or agencies should become prescribed under the EBR: Ministry of Finance; Ministry of Health Promotion; Ministry of Education;[126] Algonquin Forest Authority;[127] Ontario Realty Corporation; Ontario Power Authority; and Ontario Power Generation.

A similar consultation exercise should be carried out in relation to O.Reg. 681/94 in order to identify other provincial statutes which should be prescribed for EBR purposes. As a starting point, the Applicants suggest that the following statutes should be fully prescribed under the EBR: *Drainage Act; Far North Act, 2010; Building Code Act, 1992;* and *Places to Grow Act.*[128]

In the future, as new Ministries are created (or merged), and as new statutes are passed, the EBR should compel governmental officials to prepare a Cabinet submission, and to undertake public consultation, on whether the new Ministry or statute should be

---

[121] ECO, 2009-10 Annual Report, page 29. On the general topic of prescribing Ministries and statutes in a timely manner under the EBR, see also ECO, *Supplement to the 2009-2010 Annual Report,* pages 357 to 372.
[122] ECO, *Ontario Regulation 482/95 and the EBR* (January 17, 1996), pages 4 to 7.
[123] ECO, 2009-10 Annual Report, pages 109, 112.
[124] *Ibid.*, page 169.
[125] ECO, 2007-2008 Annual Report, at pages 165 to 166. See also ECO, 2006-2007 Annual Report, page 170; and ECO, 2005-2006 Annual Report, page 186.
[126] ECO, 2006-2007 Annual Report, page 185. See also ECO, 2005-2006 Annual Report, page 128.
[127] ECO, 2005-2006 Annual Report, page 131.
[128] ECO, 2007-2008 Annual Report, page 167.

prescribed under the EBR. Ideally, this determination should be made within three months.

(i) Improving Responses to Applications for Reviews and Investigations

Concern: Part IV of the EBR enables citizens to file Applications for Review of Acts, regulations, policies and instruments, while Part V of the EBR allows citizens to file Applications for Investigation of suspected environmental offences. However, the decision whether to carry out the requested review or investigation rests within the discretion of the relevant Ministry, and over the years there have been many instances where such applications are improperly refused by Ministries on unconvincing or irrelevant grounds. Thus, CELA submits that the purpose, value and utility of Parts IV and V of the EBR are being undermined, and that the public is growing increasingly frustrated, where meritorious applications are being turned down (or delayed) for specious reasons.

For example, the ECO recently criticized the distressing tendency among prescribed Ministries to refuse applications for investigation on the grounds that the Ministries have already internally commenced an "investigation" of the matter.[129] As pointed out by the ECO, even where such claims are true, there are public interest benefits in having EBR safeguards apply to such applications in order to ensure timeliness, adequacy, and accountability.[130]

The ECO has also criticized the Ministry of Municipal Affairs for rejecting every single Application for Review that it has ever received under the EBR. As noted by the ECO, summary dismissal of duly filed Applications for Review (and serious issues raised therein) does not constitute good public policy.[131] The ECO has also expressed concern about unwarranted delays by prescribed Ministries in their preliminary responses to Applications for Review.[132]

Suggested Reform: Parts IV and V of the EBR should be amended to clarify that nothing prevents prescribed Ministries from granting Applications for Review or Investigation, even if the subject-matter of the application is already known to, or under consideration by, the Ministries. It would also be helpful to restrict (or even eliminate) the grounds upon which Ministries' preliminary responses to Applications for Review or Investigation may be delayed beyond the prescribed timeframes under the EBR. For both types of Applications, the EBR should prescribe 60 days as the deadline for the Ministry's preliminary response, and should further specify that it is a contravention of

---

[129] ECO, 2009-2010 Annual Report, page 162.
[130] *Ibid.*
[131] ECO, 2008-2009 Annual Report, page 18.
[132] ECO, 2006-2007 Annual Report, pages 135, 143 to 144. See also ECO, 2005-2006 Annual Report, pages 138, 157.

the EBR for Ministries to provide their preliminary responses after the prescribed deadline (or, alternatively, more than 30 days after the deadline if an extension was invoked by the Ministry).

(j) Facilitating Access to Environmental Justice

Concern: When enacted in 1993, the EBR attempted to strike a balance between political accountability and judicial accountability for environmental decision-making, standard-setting and permit-issuing in Ontario. In this regard, the EBR Task Force reported that "political accountability is at the foundation of the proposed EBR,"[133] but cautioned that meaningful judicial accountability is also required:

> Is political accountability enough? The Task Force is of the opinion that in some circumstances, political accountability may be insufficient. Government's failure to protect the environment and, in particular, our public resources, should involve more than political risk. It should result in the ability of the public to trigger an examination of government's failure to protect the environment…
>
> The Task Force, in this section, has recommended two significant reforms concerning access to the courts for protection of the environment. The reform proposed with respect to public nuisance removes an impractical barrier to our court system… The Task Force's goal in creating the new cause of action for harm to a public resource was to develop a method by which the public could act to hold the government to its responsibility to protect public resources.[134]

Despite the Task Force's laudable intentions, CELA submits that the EBR track record over the past 18 years amply demonstrates that the political accountability mechanisms in the EBR (i.e. SEVs, the EBR Registry, etc.) have not fully prevented acts or omissions which result in environmental degradation or resource depletion, nor have they deterred governmental non-compliance with EBR requirements. At the same time, the EBR mechanisms for judicial accountability (i.e. judicial review, statutory cause of action, etc.) have, in most instances, been generally ineffective or almost entirely non-existent. Accordingly, CELA strongly recommends that it is now time to reconsider whether there is an imbalance between political and judicial accountability within the EBR, and if so, to undertake appropriate measures to enhance public access to the courts and tribunals under the EBR.

In 2005, for example, the ECO endorsed public interest concerns that the new cause of action (section 84) was "essentially useless" because it was burdened with too many conditions precedent and other restrictive provisions.[135] In CELA's view, these statutory

[133] EBR Task Force Report, page (vi).
[134] *Ibid.*, pages 83 to 84, 107 to 108.
[135] ECO Special Report, page 7.

limitations undermine the availability and utility of the new cause of action, and they undoubtedly explain why only one action has ever been brought under section 84 over the past 18 years. On this point, the ECO agreed that "the test for bringing an action in harm to a public resource is too strict."[136]

Suggested Reform: With respect to the new cause of action, the ECO has identified potential reforms which could be considered by the Ontario Legislature (i.e. deleting the need for plaintiffs to demonstrate statutory contraventions or "significant" harm). However, as the ECO correctly notes, such reforms will be "very complex" and likely require consequential amendments to other EBR provisions.[137] CELA further suggests that consideration be given to removing the filing of an Application for Investigation (and waiting for an answer from government) as the precondition to commencing the section 84 action.[138] In short, section 84 needs to be transformed into a meaningful "citizens' suit" provision which enables Ontarians to commence a civil action in respect of breaches of environmental laws and regulations. As a potential model for this approach, CELA would point to the new civil action contained within the proposed federal EBR.[139]

CELA further submits that the constraints on judicial review imposed by section 118 should be wholly removed from the EBR. In CELA's view, where the Ontario government has failed to meet its mandatory obligations under the EBR in relation to Acts, regulations or policies, residents should have an unfettered ability to seek judicial review of the non-compliance, and to request appropriate orders to remedy the non-compliance. If the rule of law is to fully apply to matters under the EBR, then the important right to seek judicial review should not be arbitrarily limited to instruments (see section 118(2)). In short, the privative clause in section 118 is an anachronism which no longer belongs in the EBR, particularly in light of the standard of review analysis now mandated by the Supreme Court of Canada.[140] CELA further notes that the proposed federal EBR confers a broad public right of judicial review of governmental acts or omissions relating to the environment.[141]

In addition, CELA maintains that it is time to expressly entrench the "public trust doctrine" into the EBR. In essence, this doctrine posits that governments do not "own" public resources, but instead have a positive (or fiduciary) duty to hold and manage public resources in trust on behalf of the public at large. Where it is alleged that governments have failed to properly discharge this duty, then the trust beneficiaries – members of the public – should be entitled to go to court to seek appropriate remedies.[142]

---

[136] *Ibid.*, page 8.
[137] *Ibid.*, pages 8 to 9.
[138] CELA, *EBR Registry #XQ04E0002: Looking Forward: The EBR Discussion Paper* (January 24, 2005), page 6.
[139] Bill C-469, section 23.
[140] See, for example, *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9.
[141] Bill C-469, section 16.
[142] Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995), pages 122 to 123.

The public trust doctrine was one of the legal options examined by the EBR Task Force in the early 1990s,[143] but the doctrine was not included in the EBR as enacted, presumably because the Task Force anticipated that the SEV requirements and other political accountability mechanisms would effectively prevent environmentally unsound decisions by government in relation to public resources. As described above, however, it appears that the existing EBR provisions have been inadequate to achieve this important societal objective. In these circumstances, CELA submits that it is in the public interest to now entrench the public trust doctrine directly into the EBR. On this point, it should be noted that the recently proposed federal EBR includes provisions which incorporate the public trust doctrine,[144] as discussed below in Part V of this paper.

***

For the foregoing reasons, it is readily apparent that a large number of substantive and procedural issues have arisen in the first 18 years of EBR experience in Ontario. Accordingly, CELA submits that the lessons learned under the EBR to date should be formally reviewed by MOE in an open and public process, with the express objective of developing and implementing the reforms necessary to address the various issues, concerns and opportunities outlined above.

PART V – THE PROPOSED FEDERAL EBR

In October 2009, Bill C-469 was given First Reading by the House of Commons after it was introduced as a private member's bill by Linda Duncan MP. If enacted, this Bill would establish the *Canadian Environmental Bill of Rights* ("CEBR") at the federal level. In June 2010, the CEBR was referred to the Standing Committee on Environment and Sustainable Development, and the Committee held public meetings on the CEBR in late 2010. On November 1, 2010, CELA, Ecojustice, Friends of the Earth, and MiningWatch Canada appeared before the Committee to make submissions in support of the CEBR.

(a) Environmental Rights in the CEBR

Like Ontario's EBR, the CEBR includes a preamble containing various environmental principles, and states that "Canadians have an individual and collective right to a healthy and ecologically balanced environment."[145] However, unlike the provincial EBR, the CEBR contains a number of provisions which arguably give greater legal effect to its preamble statements.

For example, section 3 of the CEBR specifies that the Act must be interpreted "consistently with existing and emerging principles of environmental law, including the precautionary principle, the polluter pays principle, the principle of sustainable

[143] EBR Task Force Report, pages 84 to 85.
[144] Bill C-469, sections 6, 9(3) and 16.
[145] The CEBR also proposes to insert this environmental right into the *Canadian Bill of Rights*: CEBR, section 28.

development; the principle of intergenerational equity, and the principle of environmental justice."[146]

Similarly, section 6 of the CEBR states that its legislative purposes are to:

- safeguard the right of present and future generations of Canadians to a "a right to a healthy and ecologically balanced environment";[147]

- confirm the Government of Canada's "public trust"[148] duty to protect the environment under its jurisdiction;

- ensure that all Canadians have access to adequate environmental information, justice in an environmental context, and effective mechanisms for participating in environmental decision-making;

- provide adequate legal protection for "whistleblowers";[149] and

- enhance public confidence in the implementation of environmental law.

To give effect to these purposes, section 9 of the CEBR expressly provides that:

- all Canadian residents have a right to a healthy and ecologically balanced environment;

- the Government of Canada has an obligation, within its jurisdiction, to protect this public environmental right; and

- the Government of Canada is the trustee of Canada's environment within its jurisdiction and has the obligation to preserve it in accordance with the public trust for the benefit of present and future generations.

(b) Legal Remedies in the CEBR

The CEBR creates various legal remedies to safeguard and enforce the above-noted environmental rights, which are intended to be applicable to "all decisions emanating from a federal source" (i.e. federal departments, agencies and Crown corporations), or related to federal land or federal works and undertakings.[150]

---

[146] All of these principles are concisely defined in the legislation: CEBR, section 2.
[147] This term is defined as "an environment of a quality that protects human and cultural dignity, health and well-being and in which essential ecological processes are preserved for their own sake, as well as for the benefit of present and future generations": CEBR, section 2.
[148] "Public trust" is defined as "the federal government's responsibility to preserve and protect the collective interest of the people of Canada in the quality of the environment for the benefit of present and future generations": CEBR, section 2.
[149] See CEBR, sections 24 to 25.
[150] CEBR, section 8.

For example, section 16 empowers Canadian residents or entities to commence an "environmental protection action" in the Federal Court where the Government of Canada is failing its duties as trustee of the environment, failing to enforce an environmental law, or violating the right to a healthful and ecologically balanced environment.[151] Interim relief is available in such actions, and the plaintiff's undertaking as to damages (if required) is capped by the CEBR at $1,000.[152] If the action is successful, the Federal Court may award costs, provide declaratory or injunctive relief, order the parties to negotiate a restoration plan, suspend or cancel instruments held by the defendant, require financial assurance or monetary payments from the defendant, or impose various other terms and conditions in the Court's order.[153]

In addition, section 22 of the CEBR creates a broad public right to seek judicial review of federal governmental decisions in the Federal Court, provided that the matter involves environmental protection, and that the applicant satisfies some basic standing requirements (i.e. serious issue, genuine interest, no other reasonable or effective way for the matter to get before the court).

Moreover, section 23 of the CEBR creates a new statutory cause of action which empowers Canadian residents and entities to commence a civil action in provincial superior courts where the defendant has contravened (or is likely to contravene) a federal law, regulation or instrument, and the contravention resulted (or will likely result) in "significant environmental harm."[154] The CEBR establishes a reverse onus in such actions: once the plaintiff demonstrates a *prima facie* case of significant environmental harm, the burden of proof shifts to the defendant to prove that its actions or inactions will not result in significant environmental harm.[155] The CEBR further provides that statutory authority is not a defence to this action, and that a defendant cannot escape liability even if there was no reasonable or prudent alternative that would have prevented the environmental harm.[156]

(c) Procedural Rights in the CEBR

The foregoing environmental rights and judicial accountability mechanisms in the CEBR are accompanied by several other provisions which confer public procedural rights similar to those found in Ontario's EBR, such as: right of access to environmental information;[157] right to participate in federal environmental decision-making;[158] right to

---

[151] A similar right of action currently exists in section 22 of the *Canadian Environmental Protection Act, 1999.*

[152] CEBR, section 17.

[153] CEBR, sections 19 to 21. If the action is unsuccessful, the Court is prohibited from making an adverse cost award against the plaintiff, unless the Court finds that the action was frivolous, vexatious, or harassing: CEBR, subsection 21(1). Interestingly, the plaintiff can request "costs in advance" and the Court is empowered to order such costs if it is in the public interest to do so: CEBR, subsection 21(2).

[154] This term is defined as "harm whose effects on the environment are long lasting, difficult, or irreversible, widespread, cumulative or serious": CEBR, section 2.

[155] CEBR, subsection 23(2).

[156] CEBR, subsection 23(3).

[157] CEBR, section 10.

[158] CEBR, sections 11 and 12.

request reviews of federal Acts, regulations, policies and instruments;[159] and right to request investigations of contraventions of federal Acts, regulations or instruments.[160] The CEBR would also require the federal Auditor General to "examine" every regulation and every public Bill introduced in the House of Commons, and to report whether they are consistent with the purposes and provisions of the CEBR.[161]

In comparison, Ontario's EBR contains more prescriptive detail than the CEBR in relation to public participation in governmental decision-making (i.e. creation of EBR Registry; instrument classification system; specific notice/comment requirements; third-party appeal mechanism, etc.). However, unlike the EBR, the CEBR creates substantive environmental rights, entrenches the public trust doctrine, and makes it easier for citizens to go to the courts for redress in environmental matters. However, it remains to be seen whether the CEBR will be enacted and proclaimed into force by the current Parliament.

PART VI – CONCLUSIONS

The past 18 years' worth of experience under Ontario's EBR is instructive for all Canadian jurisdictions which presently have – or are proposing to enact or amend – statutory environmental rights.

In particular, the following three lessons can be learned from the current content and ongoing implementation of the Ontario EBR:

1. From a fairness and public policy perspective, it is extremely important for environmental legislation to entrench procedural rights which entitle all persons to participate in environmental decision-making at all levels (i.e. law/policy development, standard-setting, permit-issuing, etc.). However, these procedural rights may be illusory unless they are accompanied by necessary implementation details that facilitate meaningful public participation (i.e. timely notice; adequate comment periods; full access to relevant documentation; participant/intervenor funding where appropriate; instrument appeals to administrative tribunals, etc.).

2. Procedural rights, in and of themselves, are unlikely to significantly improve environmental decision-making by governments in order to achieve ecological or societal sustainability. Thus, the exercise of governmental discretion in environmental decision-making must not remain largely unfettered, uncertain and unpredictable. Instead, to the maximum possible extent, these decisions should be governed or directed by substantive rules which are developed in an open, accessible, and traceable process, and which are codified in an effective and enforceable manner.

---

[159] CEBR, section 13.
[160] CEBR, section 14. A similar right to request an environmental investigation is found in section 17 of the *Canadian Environmental Protection Act, 1999*, and section 93 of the *Species at Risk Act.*
[161] CEBR, section 26.

3. There are limits to the efficacy of political accountability mechanisms (i.e. annual reports, independent "watchdogs", etc.) for environmental protection purposes. While they play an important function in our democratic society, political accountability mechanisms cannot be relied upon as the sole (or predominant) means of achieving environmental protection. Thus, statutory rights legislation should include substantive rights, and should entitle citizens to go to the courts to ensure greater judicial accountability for governmental acts, omissions or decisions that contravene public rights and substantive rules established under environmental law.

If Ontario and other jurisdictions carefully consider the EBR experience to date, then it is clearly time for Canadian legislatures to move beyond the *status quo*, and to develop stronger environmental rights legislation. Given the lamentable absence of an environmental rights amendment to Canada's *Charter of Rights and Freedoms*,[162] this statutory law reform agenda should be viewed as an overdue but necessary step in protecting our common future.

February 2011

[162] David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003), at pages 267 to 268, 293 to 294.