

**THE ENVIRONMENTAL BILL OF RIGHTS :**  
**An Introduction and Its Relation To Occupational Health and Safety Issues**

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## 1. Introduction

### 1.1 Purpose of the Paper

On December 14, 1993, the Environmental Bill of Rights Act (hereinafter referred to as the "EBR") received third reading in the Ontario Legislature. It was proclaimed on February 15, 1994. Put simply, the purpose of the EBR is to ensure the public has effective and fair input into environmentally significant decisions and to promote greater accountability within government for its environmental activities. As such, the Act may impact many aspects of environmental law and policy in the province.

The purpose of this paper is to outline how the EBR was developed, describe its primary components and provide some comments as to its relevance to health and safety issues.<sup>1</sup> Further, progress in enacting environmental rights in other provinces and territories will also be discussed.

There are two caveats that must be made at the outset. First, owing to the novelty of the Act, the best that can be outlined at this time is how the Act was envisioned to work along with a review of its underlying principles. It will only be after some experience with the Act that there can be a determination of whether the theory is consistent with practice. Second, it is very fair to say that the EBR is only as good as it is implemented. The Act, in effect, only creates a framework. Much of the important mechanical workings are left to the implementation of the Act through regulations and other measures.

### 1.2 Overview to the Environmental Bill of Rights

Before one can appreciate the philosophy underlying the EBR, it is worthwhile to briefly review the context of the statute.

#### (a) How the EBR was Developed

The "idea" of having a comprehensive code for public participation in environmental decision-making is certainly not new to the province. There has been various proposals documented as early as the 1970s. Moreover, there has been close to a dozen private members' bills between 1979 to 1990 proposing some type of an environmental bill of rights.<sup>2</sup>

In November of 1990, the new Ontario New Democratic Party government made the EBR a priority. An "advisory committee" was established consisting some 25 stakeholders from many interests, including industry, environmentalists, labour,

municipalities, farmers, among others. That committee met numerous times but did not arrive at an overall consensus.

In September of 1991, the Environmental Bill of Rights Task Force was established. This eight person task force, composed of industrial, environmental and governmental representatives, had a mandate to develop a draft environmental bill of rights. The Task Force deliberated some 50 days throughout its tenure. Moreover, these stakeholders were to report back to their constituencies to receive an on-going feedback loop into the progress of the consultation. In many respects, the EBR is unique in having various stakeholders themselves develop the bill.

It was clear that the EBR resulting from this consultation would be different than previous private members' bills. The key was whether the same principles or objectives of the original bills could be fulfilled while addressing the concerns of the various stakeholders. The inclusion of the many safeguards may explain the length of the bill. While the Task Force was comprised of various stakeholders, it did not comprise the full ambit of stakeholders. For example, labour and agriculture interests were not on the Task Force, although directly consulted. Hence, while there was a consensus at the Task Force level, this is not to suggest there was a broader consensus.

The Task Force issued its report and accompanying draft environmental bill of rights in July of 1992.<sup>3</sup> After a three month consultation, a supplemental report was submitted by the Task Force in December of 1992.<sup>4</sup> The bill was then introduced into the Ontario Legislature on May 31, 1993 with third reading on December 14, 1993 and proclamation on February 15, 1994.

#### **(b) Underlying Goals and Principles in the EBR**

There are different ways to express or categorize the goals and principles of the EBR. One way to express the goals and principles is as follows. The overall goal of the EBR was to:

- \* develop a public participation regime that would ensure that the public would have an effective and fair input to environmentally significant decisions as early in the process as possible;**
- \* promote greater government accountability for their environmental activities through a variety of measures including transparency of their decisions;**
- \* increase access to the courts through a developing a new cause of action and reforming the public nuisance rule; and**

**\* increase employee protection by broadening the application of existing whistle-blower provisions with environmental legislation.**

Within the content of these goals, there were a number of implicit or explicit assumptions. Some of these include:

**\* public participation in decision-making should be undertaken in an accessible way rather than solely through judicial involvement suggesting that, although there is a role for the courts, it should clearly defined;**

**\* the regime must be as certain, predictable and fair as possible; and**

**\* EBR legislation is a framework with the need for implementing regulations.**

As mentioned above, whether these goals and principles will be realized can only be evaluated once there has been some practical experience with the new law.

#### **(c) How the Parts Interrelate**

For the purposes of overview, the EBR can be summarized as follows:

**PART I - Definitions and Purposes:** This part sets out the overall parameters of the Act. The purposes are important for a number of reasons as described below.

**PART II - Public Participation Regime and Statement of Environmental Values:** This part contains two cornerstones of the Act. The public participation regime can be summarized as a "notice and comment" process for proposals for new policies, regulations and instruments. The Statement of Environmental Values is a document produced by each ministry subject to the statute which demonstrates how the purposes of the statute are consistent with the ministry's policy framework.

**Part III - The Office of Environmental Commissioner:** This office is to oversee the working of the law and report directly to the legislature at least once a year. This office was established as a "political" means to enforce or police the law rather than solely relying on judicial review.

**Part IV - Application for Review:** This part provides a procedure to review existing policies, regulations or instruments (as opposed to new proposals in Part II).

**Part V - Application for an Investigation:** This part provides a mechanism to

request an investigation by government for an alleged illegal activity that may cause harm to the environment.

Part VI - Right to Sue for Harm to Public Resource: This part creates a right to sue by citizens concerning the violation of existing laws causing harm to a public resource.

Part VII - Enhanced Work Protection: This part extends existing whistle blower protection for employees.

Part VIII - General Matters: This part deals with transition and other such matters.

## 2. Environmental Rights in Other Provinces and Territories

Before the provisions in the EBR are dealt with in more depth, it is useful to first provide a brief review of efforts in other provinces and territories to enact environmental rights legislation. From this review, it will be apparent that the EBR in Ontario is in fact a part of a trend toward statutorily guaranteed rights for the public to protect the public.

### 2.1 Quebec

Quebec developed environmental rights legislation, which although progressive for a Canadian jurisdiction, was not regarded as a comprehensive code. Enacted in the late 1970s, the *Environment Quality Act*<sup>5</sup> provides a number of rights to its residents.<sup>6</sup> Section 19.1 outlines the basic right:

19.1 Every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this act and the regulations, orders, approvals, and authorizations issued under any section of this act.

To enforce this right, a judge of the Superior Court may grant an injunction to prohibit any act or operation which interferes or might interfere with the exercise of a right conferred by section 19.1.<sup>7</sup> This right is circumscribed, however, since the application for an injunction must be made by a "natural person" (that is, corporations are excluded from such using such rights) and must be domiciled in Quebec frequenting a place or the immediate vicinity of a place where the contravention is alleged.

These provisions do not apply where there is statutory authorization to undertake the activity and the activity is being carry out in conformance with the authorization.<sup>8</sup>

## 2.2 Northwest Territories

The Northwest Territories was the first jurisdiction to enact a comprehensive environmental rights law.

According to the Statement of Purpose of the Northwest Territories *Environmental Rights Act*, the law is intended "to provide environmental rights for the people of the Northwest Territories."<sup>9</sup>

\* Access to Information: The Act gives fairly broad access rights to any person with respect to information held by government concerning the quantity, quality or concentration of any contaminant; to examine any permit, licence, permit or order; and report, such as tests or analyses, related to the above.<sup>10</sup>

\* Request for Investigations: Under the Act, any two residents, under certain conditions, may apply to the minister for an investigation with respect to the release of a contaminant into the environment. The provisions outline certain times, notice and reporting duties of the minister.<sup>11</sup>

\* Private Prosecution: Section 5 of the Act allows a private prosecution of any statute listed in a schedule to the statute. The person prosecuting can get reimbursed for all costs and expenses arising from the prosecution.<sup>12</sup>

\* Cause of Action: The cause of action under the Act is quite specific. It gives every Yukon resident the right to commence an action in court against any person releasing any contaminant into the environment in order to protect the environment and public trust.<sup>13</sup> The defences listed included a defence that the release will remain entirely on-site of the defendant's lands, will not materially impair the quality of the environment; or is in compliance with any law or approval.<sup>14</sup>

\* Informant/ Employee Protection: There is also a "whistle blowers" provision that protects employees from reprisal when the employee is exercising the rights granted under the Act.<sup>15</sup>

\* Annual Reports: There is an obligation that the Minister must report to the Legislative Assembly describing all applications, actions and prosecutions commenced under the Act.<sup>16</sup>

## 2.3 Yukon

The Yukon *Environment Act*<sup>17</sup> law was enacted shortly after the Northwest Territories law. The Yukon, by far, is the most comprehensive and most progressive of the environmental rights initiatives.<sup>18</sup> The *Environment Act* outlines a number of

general objectives and principles that are to apply to the realization of the objectives.<sup>19</sup>

Part I of the statute outlines the environmental rights of the Act. The provisions of the Act can be summarized as follows:

\* **Right to a Healthful Natural Environment:** According to the Act, "The people of the Yukon have the right to a healthful to a healthful natural environment."<sup>20</sup> Further to this right, the law makes a declaration that it is in the public interest to provide every reason in the Yukon with a remedy adequate to protect the natural environment and the public trust."<sup>21</sup>

\* **Public Trust Responsibilities:** Under section 38 (under Part II of the Act), the Yukon government is the "trustee of the public trust" and shall "conserve the natural environment in accordance with the public trust.

\* **Cause of Action:** The Act gives every resident the right to commence an action in court where there is reasonable grounds to believe a person may impair the natural environment or where the Yukon government has failed to meet its responsibilities as trustee of the public trust to protect the natural environment from impairment.<sup>22</sup> Several defences are also established, including statutory authorization; the requirement that there must be the potential for material impairment to the natural environment; and there is no feasible and prudent alternative to the activity.<sup>23</sup> This section does not apply until a regulation is enacted, or until October 1, 1996.<sup>24</sup> Thus far, a regulation to triggered the operation of this section has yet to be enacted.

\* **Reverse Onus:** Where it has been established that there has been an impairment to the natural environment from the release of a contaminant, the onus shifts to the defendant to prove that the defendant did not cause the impairment.<sup>25</sup>

\* **Request for Investigation:** Any two residents of the Yukon can apply the minister for an investigation where they believe on reasonable grounds that an activity may impair the natural environment. The Act then outlines specific timelines and notice requirements.<sup>26</sup>

\* **Protection of Employees:** There is also a "whistle blowers" provision that protects employees from reprisal when the employee is exercising the rights granted under the Act.<sup>27</sup>

\* **Right to Make a Complaint:** The Yukon law has a provision whereby any person or groups of persons can complain to the Minister with respect to any act, recommendation or omission of a government agency.<sup>28</sup> The Minister, in turn, must notify the agency of the complaint and "attempt to resolve the



complaint."<sup>29</sup> The Yukon Council on Economy and the Environment is vested with the power to review the complaint and make certain recommendations.<sup>30</sup>

\* Notice and Comment: There are provisions in the Act where the Minister must ensure that proposals for new regulations undertake a public review.<sup>31</sup> There a register of names to whom notice must be sent.<sup>32</sup> There are provisions for the minister to hold public hearings with respect to the proposal.<sup>33</sup>

\* Petition to the Minister to Review a Regulation: Any resident can ask Minister to review a regulation, although the decision to undertake the review is at the discretion of the minister.<sup>34</sup>

## 2.4 Saskatchewan

In the Spring of 1992, the government of Saskatchewan introduced into first reading their version of an environmental bill of rights - Bill 48, titled, "The Charter of Environmental Rights and Responsibilities".<sup>35</sup> This bill limits itself to creating a right of action, availability of certain information, and protection of persons reporting environmental harm.<sup>36</sup>

In early 1993, the Saskatchewan Standing Committee on the Environment reviewed the bill. The report of that committee recommended that "Minister should use this report as the foundation for further consultation and preparation of news environmental rights and responsibilities legislation... Bill 48 of 1992 should not be reintroduced."<sup>37</sup> The report of legislative committee recommended a declaration of rights of the environment and public trust, citizens' right to request an environmental protection investigation; certain access to information and rights to "Whistle-blower" protection, civil actions, among other features.

## 2.5 British Columbia

In early 1994, British Columbia released a draft *Environmental Protection Act* (EPA) for public comment. The legislation was scheduled for the 1995 legislative session. Part 2 of the proposed statute is a proposed environmental bill of rights for the province.

The draft bill has a number of major components. First, it has a declaration that "every resident of British Columbia has a right to protect the environment and the public trust from any pollution, impairment or destruction."<sup>38</sup> The government is to act as a trustee with a duty to conserve and protect the environment of British Columbia.

Second, the bill includes a very broad of right of action. This provision allows

any resident to commence an action against any person who may degrade the environment and public trust.<sup>39</sup> Once the plaintiff has established a prima facie case, the defendant may rebut the prima facie case by showing that there is no feasible and prudent alternative to the action and that the action was in the best interest of the province.<sup>40</sup> Further, there is only a limited defense of statutory authority. Although the defense may be pleaded, the plaintiff can still establish, on a balance of probabilities, that the standard is inadequate to protect the environment and that the defendant's action may cause severe contamination or degradation of the environment.<sup>41</sup>

Third, there are provisions pertaining to transboundary pollution reciprocal access rights.<sup>42</sup> This provision allows persons from outside the province to bring an action for environmental harm where the offending activity originated in the province so long as the plaintiff's jurisdiction allows similar rights to B.C.'s residents.<sup>43</sup>

Fourth, the draft act has provisions for class actions in an environmental context.<sup>44</sup>

Fifth, whistle blower protections are also included.<sup>45</sup>

### 3. Overview to the Components of the EBR

The Ontario EBR is a comprehensive regime for public participation and government accountability. This section provides an overview to the new law.

#### 3.1 Preamble to the EBR

A preamble to a statute serves a number of purposes. It can serve to provide an unambiguous statement of the intention of the statute. It also can educate the public, bureaucrats and the judiciary about the essential purpose and the goals of the legislation. Preambles can be used to assist in the interpretation of the statute when there is an ambiguity.

The preamble of the EBR is succinct. It states:

The people of Ontario recognize the inherent value of the natural environment;  
The people of Ontario have the right to a healthful environment;  
The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations;  
While the government has the primary responsibilities for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

These statements, although brief, are important. They give the clear indication as to

the value of the natural environment and the role of the public in attempting to protect and conserve the environment.

### 3.2 Definitions within the EBR

The EBR provides ten definitions used throughout the Act. A number of these are discussed in the context of the provisions that they are most relevant.

Apart from these definitions, there are a number of other definitions worthy of comment.

#### 3.2.1 "Environment"

The definition of the term "environment" in the EBR restricts the bill to protection of the "natural" environment. Section 1 states:

s. 1 - "environment" means the air, water, land, plant life and ecological systems of Ontario.

The EBR definition of the "natural environment" differs from the definition found in the *Environmental Protection Act*<sup>46</sup> which defines it as the "air, land and water, or any combination or part thereof, of the Province of Ontario."

Both of these definitions differ from the definition in the *Environmental Assessment Act*.<sup>47</sup>

A question does arise as to what the implications are of excluding some of the components of a broader definition. For example, the *Environmental Assessment Act* includes the notion of a "cultural", "social", and "economic" dimension of environment. What considerations are excluded by the omission of these components? These questions will have to be answered once there has been experience with the law.

#### 3.2.2 "Air"

While the definition of "environment" includes the term "air," the term "air," in turn, is defined to exclude indoor air quality. During the consultations on the draft Environmental Bill of Rights, environmentalists criticized the proposal for providing a blanket exemption for indoor air quality.<sup>48</sup> However, how can indoor air pollution be protected by a law like the EBR? Are there distinctions between public and private indoor air spaces? What standards are applicable?

Although indoor air pollution issues are excluded, it will be interesting to assess if, and how, other measures are used in the EBR to address the indirectly.

### 3.2.3 Environmental Significance

Is it possible to prioritize governmental action so as to focus on the "significant" problems? The EBR takes this approach by focusing on significant "decisions" and significant "harm",<sup>49</sup> without attempting to define the term "significant." Indeed, the right to participatory rights under Part II or the right of action under Part VI are both premised on the "environmental significance" of the proposal or harm respectively. Clearly, what is an insignificant environmental issue to one person may be very significant to another.

The term "environmental significance" is not uniformly applied in the EBR. In most instances, the term is a matter of discretion for a minister in deciding whether or not put a regulation, Act, or policy through the public participation regime under Part II or a judge in adjudication an action under Part IV.

For the classification of instruments, the Environmental Bill of Rights Task Force suggested the following criteria:

- (a) potential for significant environmental impact;
- (b) geographical extent of significant environmental impact (ie., local, regional, and provincial);
- (c) public interest in the decision to be made (ie., local, regional, and provincial); and
- (d) provincial policy interest in the decision to be made.<sup>50</sup>

### 3.3 Purposes of the Act

Perhaps the most important provision of the EBR are its purposes. Because of its importance to the Act, section 2 of the proposed Act, the purpose section, is cited in full:

2 (1) The purposes of this Act are:

- (a) to protect, conserve and, where reasonable, restore the integrity of the environment as provided in this Act;
- (b) to provide sustainability of the environment for the benefit of present and future generations as provided in this Act; and
- (c) to protect the right of the present and future generations to a healthful environment as provided in this Act.

(2) The purposes set out in subsection (1) include the following:

- 1. The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.
- 2. The protection and conservation of biological, ecological and genetic

diversity.

3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.
4. The encouragement of the wise management of our natural resources, including plant life, animal life and ecological system.
5. The identification, protection and conservation of ecologically sensitive areas or processes.

(3) In order to fulfil the purposes set out in subsections (1) and (2), this Act provides:

- (a) means by which residents of Ontario may participate in the make of environmentally significant decisions by the Government of Ontario;
- (b) increased accountability of the Government of Ontario for its environmental decision making;
- (c) increased access to the courts by residents of Ontario for the protection of the environment; and
- (d) enhanced protection for employees who take action in respect of environmental harm.

### 3.4 Public Participation in Environmental Decisions

The public participation regime is the heart of the EBR. The framework created under the law is that all proposed decisions that may significantly affect the environment are categorized as "policies," "regulations", or "instruments" (which would include environmental approvals). The basis of this component is that all environmentally significant decisions relating to policies, regulations or instruments should have some provisions for public notice and an opportunity to comment.

Section 3 states that:

This Part sets out minimum levels of public participation that must be met before the Government of Ontario makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments.

#### Notice and Comment

With respect to instruments,<sup>51</sup> the general principle is that the more important the decision, the more enhanced are the notice requirements and comment opportunities. To facilitate the implementation of this principle, all instruments caught under the law are categorized as Class I, II or III. Class I instruments, for example, are those instruments with the least environmental impact while Class III instruments are those where there exists the potential for widespread environmental impact and

the public interest in the issue is high.

Moving from Category I to III, there are progressively more enhanced notice requirements. Similarly, the opportunities to comment are also enhanced up to Category III, where full public hearings are prescribed.

Underlining the "notice" provisions of the law is the establishment of the Environmental Registry in sections 5 and 6. This registry is a computer data base that will provide an inventory, and give the status, of environmentally significant decisions. The registry is now up and running and can be used for free by any person in the province.

The public participation requirements for policies and regulations are less stringent. Notice of proposed policies would be given before the policy is adopted. The appropriate Minister would be required to "take every reasonable step to ensure all comments relevant to the proposal that are received as a result of public participation process... are considered when decisions on this proposal are made in the Ministry".<sup>52</sup>

For regulations, notice would also be given and placed on the registry, discussed below. At the discretion of the Minister, a "regulatory impact statement" may also be required, outlining the objectives and justification for the regulation.<sup>53</sup>

#### Right to Request Review

The focus of the notice and comment provisions for environmental decisions pertains to *new* policies, regulations and instruments. Section 61 of the EBR, however, provides a procedure that allows the public to request that a policy, regulation or instrument be reviewed if there is one in place, or develop one if there is none in place.

Section 67 requires the Minister responsible for the policy, regulation or instrument to consider each application "to determine whether the public interest warrants the review."

#### Appeal and Review Rights

The public participation provisions also include expanded appeal routes for instruments.<sup>54</sup> Traditionally, for many instruments such as, licences, permits, and orders, and certainly those emanating from the Ministry of the Environment and Energy, only the person applying for the licence or permit or ordered to take some action has the right to appeal (in the case of the Ministry of the Environment and Energy instruments, to the Environmental Appeal Board).<sup>55</sup> The EBR creates an opportunity for citizens to appeal decisions, at least in some instances. These appeal

rights that would differ from the proponents' appeal rights in that citizens would be required to obtain with leave to appeal various criteria for deciding whether to grant this leave outlined.

### 3.5 Increased Government Accountability

The second key component of the EBR pertains to government accountability. This is achieved through two mechanisms.

#### Statement of Environmental Values

The EBR provides that ministries prescribed under the Act must undertake to develop a "Statement of Environmental Values." This statement is analogous to a strategic plan which sets out a process to determine whether existing policies and regulations of the Ministry are consistent with the purposes of the Act and how the purposes will be considered in future environmental decisions of the Ministry.<sup>56</sup> A process is also put in place to ensure that there is public input into the development of the "Statement of Environmental Values."

#### Environmental Commissioner

Who is to monitor -and indeed enforce- whether ministries are living up to their Statements of Environmental Values? The EBR establishes an Environmental Commissioner who would report directly to the Ontario Legislature. The Environmental Commissioner is to: oversee the implementation of the Act and monitor the compliance of ministries with the requirements of the Act; provide guidance to ministries on how to comply with requirements of the Act; monitor the exercise of discretion by the Ministers under the Act; and prepare a biennial report for the Legislature, among other functions.<sup>57</sup> In effect, the Commissioner is also the clearinghouse for all applications for reviews, investigations, and other such tools provided to citizens by the Act.

### 3.6 Access to Courts

The Environmental Bill of Rights enhances enforcement citizen enforcement and access to the courts in a number of ways.

#### Request for an Investigation

First, the EBR provides a mechanism to have a problem dealt with, at least at first instance, outside the court system. The Act provides that any two Ontario residents can apply to the Environmental Commissioner for an investigation if they believe that an Act, regulation, or instrument that is covered by the EBR has been contravened.<sup>58</sup>

Once a request has been filed, the Commissioner refers the application to the appropriate Ministry. The Minister responsible for the Act must investigate the alleged violation unless the application is frivolous or vexatious, a minor contravention of the law, or not likely to cause environmental harm.

### New Cause of Action

Under existing law, the only persons granted standing to sue for environmental harm in the civil courts remain those directly affected by the environmentally harmful activity.<sup>59</sup> The Environmental Bill of Rights creates a new cause of action that allows members of the public, although they do not have a direct interest in the matter, to bring an action to enforce an environmental law that is alleged to be violated.<sup>60</sup>

### Public Nuisance

In addition to creating a new cause of action, the proposed Environmental Bill of Rights removes, at least to a large extent, the public nuisance standing rule.<sup>61</sup> Professor Cromwell states the general rule as: a "private plaintiff may sue in public nuisance only with permission of the appropriate Attorney General to bring a relator action or, failing that, upon show some special or peculiar damage."<sup>62</sup>

The proposed Environmental Bill of Rights attempts to dismantle this rule in section 103.

### 3.7 Employee Protection

"Whistler blower" protection was a component of one of the very early proposals for Environmental Bill of Rights put for in the early movement of an environmental bill of rights. A whistle blower provision was adopted by the government in 1981.

Under the *Environmental Protection Act*, an employee cannot be dismissed, disciplined, penalized, coerced, or otherwise intimidated for "blowing the whistle" on an employer who is breaking any of five environmental laws or their regulations.<sup>63</sup>

The Ontario Labour Relations Board can order the offending company to reinstate and/or compensate any employee who is unjustly fired or in any way harassed for simply reporting a pollution problem to the Ministry of the Environment.

However, there are no corresponding provisions to protect workers who try to prevent violations of environmental statutes administered by other ministries.

The EBR extends those worker safeguards to all statutes prescribed in the bill. It will also guarantee that employees cannot be disciplined for exercising any of their



new rights under the bill: requesting an investigation, taking part in the development of a new environmental regulation, or testifying at a trial.<sup>64</sup>

### 3.8 Application and Implementation of the EBR

The EBR should be considered as a legislative framework. Like many other statutes, its effectiveness will depend on the extent to which it is fully implemented and implemented in the spirit in which it was enacted. As a framework, therefore, implementation depends on a large part on implementing regulations and statutory interpretation by the ministries subject to the statute.

There are three questions which always must be kept in mind when asking whether the issue at hand is subject to the provisions of the EBR. These questions are as follows:

- Is the proposed decision one that may be subject to the EBR?
- Is the ministry or statute under which the decision is being made is prescribed, i.e., specifically listed as being included or caught by the EBR?
- Has the provision which is relevant to the situation been phased-in according to the schedule outlined in the regulations?

Is the proposed decision one that may be subject to the EBR?

The question of which proposed decisions are subject to the EBR is important for Part II and IV of the law, namely public participation and the right to request to review, respectively.

Is the Ministry or Statute Prescribed?

The next step in the analysis of determining what decisions are within the ambit of the EBR is assessing whether the ministry (for the purposes of policies and regulations) or the statute (under which the instrument would be issued) is "prescribed." Prescribed means that the ministry or statute is listed as being "caught" by the EBR under its regulations.

Generally, 14 ministries are subject to the EBR. However, it should be made clear that not all of the ministries are subject to all the provisions.

Table I provides a summary of those ministries subject to the EBR and the phase-in dates.

TABLE I

TIME FRAME WITH RESPECT TO THE 14 ONTARIO GOVERNMENT MINISTRIES\*

With the February 15, 1994 proclamation of the Bill, Regulation 73/94 outlines the timetable for the Ministries as follows:

Draft SEV on Registry	All ministries	May 15, 1994
Public Comments on SEVs	All ministries	Aug. 15, 1994
Final SEV on Registry	All ministries	Nov. 15, 1994
Policies/Acts on Registry	MOEE	Aug. 15, 1994
	All other ministries	Apr. 1, 1995
Regulations/Instruments on Registry	MOEE	Nov. 15, 1994
	MNR, MNDM, MCCR	Apr. 1, 1996
	MMA	Apr. 1, 1998
	All other ministries	N/A
Request for Review	MOEE	Feb. 1, 1995
	MNR, MNDM, MCCR, OMAF	Apr. 1, 1996
	MMA	Apr. 1, 1998
	All other ministries	N/A
Request for Investigation	MOEE **	Aug. 15, 1994
	MNR, MNDM, MCCR	Apr. 1, 1996
	All other ministries	N/A
Employer Reprisals/ Public Nuisance	All ministries	Feb. 15, 1994

\* Ministry subject to some provisions of the law:

Ministry of Agriculture, Food and Rural Affairs  
 Ministry of Consumer and Commercial Relations  
 Ministry of Culture, Tourism and Recreation  
 Ministry of Economic Development and Trade  
 Ministry of Environment and Energy  
 Ministry of Finance  
 Ministry of Health  
 Ministry of Housing  
 Ministry of Labour  
 Management Board Secretariat  
 Ministry of Municipal Affairs  
 Ministry of Natural Resources  
 Ministry of Northern Development and Mines  
 Ministry of Transportation

\*\* Access to the courts for alleged contraventions linked to MOEE statutes can be initiated after MOEE becomes subject to the Request for Investigation provision in Aug. 15, 1994.

## **Has the EBR Been Phased-In for That Decision?**

Under the EBR, the implementation philosophy is to implement the Act over a five year period. Hence, although the decision may be subject to the EBR, it is necessary to examine the implementation schedule to identify the date for the Act to be implemented.

Again, a more specific discussion of what is prescribed will be described in the context of the analysis of each Part of the EBR.

### **4. Relevance of the EBR to Health and Safety Issues**

Generally, it is submitted that most provisions of the EBR does have relevance to health and safety issues, although some are more direct than others. Some of the important or more direct provisions are outlined below.

#### **4.1 Employee Protection**

The Employee Reprisal provisions are found in the EBR under Part VII, sections 104 to 116. Once a person files a complaint that an employer has taken reprisals again an employee on a prohibited ground, the onus is on the employer to establish that there was not such reprisal.

##### **4.1.1 How the Provisions Work**

**Step 1 - Any person can file a written complaint with the Ontario Labour Relations Board alleging that an employer has taken "reprisals" against an employee on a "prohibited ground." In this context, a "reprisal" means that the employer has, or attempted to, dismiss, discipline, penalize, coerce, intimidate, or harass an employee.**

**Step 2 - An employer has taken reprisals on a "prohibited ground" if the employer has taken reprisals because the employee in good faith did or may:**

- (a) participate in decision-making about a ministry statement of environmental values, a policy, an Act, a regulation or an instrument under Part II of the EBR;**
- (b) apply for a review of a policy, Act, regulation or instrument under Part IV of the EBR;**
- (c) apply for an investigation under Part V of the EBR;**
- (d) seek the enforcement of a prescribed Act, regulation or instrument;**
- (e) give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument;**
- (f) give evidence in a proceeding under the EBR or an Act prescribed under**

the EBR.

**Step 3 - The Ontario Labour Relations Board may authorize a labour relations officer to inquire into a complaint. If so, the officer is to inquire into the complaint as soon as reasonably possible and attempt to settle the matter. The officer then reports back to the Board.**

**Step 4 - If the labour relations officer either cannot settle the matter or the Ontario Labour Relations Board dispenses with the inquiry, the Board may inquire into the complaint.**

**Step 5 - Where the Board undertakes the inquire, the onus is on the employer to prove that the employer id not take reprisals on a prohibited ground.**

**Step 6 - If the Board find that there has been a reprisal, it can determine what the employer should do or not do about reprisals. For example, the Board could order the employers to cease doing something, to rectify the act complained of or directing the employer to reinstate or hire the employee, with or without compensation, among other options.**

**Step 7 - If the employer does not follow the Board decision or a settlement agreement, the complainant is to notify the Board. The Board must file its decision with the Ontario Court (General Division) and the determination may be enforced as if it were an order of the court.**

#### **4.2 Statement of Environmental Values**

**One of the least obvious provisions of the law that has direct relevance to health and safety matters relates to the requirement of each of 14 designated ministries to develop "Statement of Environmental Values"(SEVs). The Ontario Ministry of Labour is a designated ministry.**

**Under law, all ministries had to place draft Seas on the environmental registry on May 15, 1994. They are to be finalized on November 15, 1994. Although they are to be finalized in the near future, it can be anticipated that they will be periodically reviewed.**

**The importance of this provisions, as mentioned above, is that they are intended to demonstrate how the ministry will translate the section 2 purposes of the EBR into the activities and practices of each designated ministry. As such, it is anticipated that the Statement for each ministry will, over time, affect the type and nature of the new policies and other activities. Each year, the Environmental Commissioner will report to the Ontario Legislature on instances where a ministry is not complying with the SEV developed for that ministry.**

### 4.3 Other Provisions

One of the most useful mechanisms is the environmental registry. From this registry, it will not only be possible to get a snapshot of all of the proposed policies, statutes, regulations and instruments in the province, but also provide the opportunity to develop some history or institutional memory of the nature and kind proposals being put forth over time.

In addition to the registry, what is also of importance are the rights pertaining to the right to an investigation, the right to request a review and, of course, the right to participate in environmental decisions. These rights, although not directly related to health and safety issues, can be used to at least indirectly assist in improving health and safety issues.

### 5. Summary and Conclusions

The EBR should be considered an important new law. It was developed with the intend of taking into account the views of different stakeholders during its drafting. In the end, the success of the law will depend on how well it is implemented and applied.

In a few years, it may be interesting to provide an assessment of its effectiveness and attempt to identify its strengths and weaknesses.

## ENDNOTES

1. This paper draws from other papers or publications either being drafted or already presented. These include: Paul Muldoon, Presentation to a Workshop on the Environmental Bill of Rights, "Putting the New Regime into Practice" sponsored by the Canadian Environmental Defense Fund, January 22, 1994; Ontario, Environmental Bill of Rights Users' Guide (1994, forthcoming); Paul Muldoon and Richard Lindgren, The Environmental Bill of Rights: A Practical Guide (Toronto: Emond-Montgomery Press, forthcoming).
2. For a more detailed review of its history, see: Paul Muldoon and John Swaigen, "Environmental Bill of Rights" in Environment on Trial: A Guide to Ontario Environmental Law and Policy (Toronto: Emond-Montgomery Press, 1993) 793, at 795-7.
3. Ministry of the Environment, Report of the Task Force on the Ontario Environmental Bill of Rights (July, 1992).
4. Report of the Task Force on the Ontario Environmental Bill of Rights: Supplementary Recommendations, December, 1992.
5. R.S.Q. c. Q-2, as amended.
6. See generally: Y. Duplessis, Jean Hetu and Jean Piette, La protection juridique de l'environnement au Quebec (Montreal: Les editions Themis, 1982), at 61-19.
7. R.S.C. , c. Q-2, s. 19.2.
8. See generally: *Bechard v. Selenco* (1989), 3 C.E.L.R. (N.S.) 307 (Que. C.A.).
9. *Environmental Rights Act*, S.N.W.T. 1990, c. 28.
10. *Ibid.*, s. 3.
11. *Ibid.*, s. 4.
12. *Ibid.*, s. 5.

13. Ibid., s. 6(1).
14. Ibid., s. 6(5).
15. Ibid., s. 7.
16. Ibid., s. 8.
17. Bill 20, *Environment Act*, 2nd Sess., 27th Leg., Yuk. Terr. 1991, Assented to May 29, 1991.
18. Although the most comprehensive in its scope, its actual application is quite limited. According to section 3, the Act does apply throughout the Yukon, however, it does not apply to the extent that there is a conflict between the Act and a lands claims agreement and self-government agreement.
19. Ibid., s. 5(1) and (2).
20. Ibid., s. 6.
21. Ibid., s. 7.
22. Ibid., s. 8.
23. Ibid., s. 9.
24. Ibid., s. 8(2).
25. Ibid., s. 11.
26. Ibid., s. 19.
27. Ibid., s. 20.
28. Ibid., s. 22(1).

29. Ibid., s. 23(1)(c).
30. Ibid., ss. 24-28.
31. Ibid., ss. 29-30.
32. Ibid., s. 30(3).
33. Ibid., s. 31.
34. Ibid., s. 33.
35. Saskatchewan, Bill 48 of 1992.
36. In terms of the right of action, section 4(2) states that:  
  
An applicant may apply to the court for leave to commence an action against a person where the application considers that an activity by that person is or is likely to result in an environmental offence.
37. Legislative Assembly of Saskatchewan, First Report of the Standing Committee on the Environment, Report on Environmental Rights and Responsibilities, April 19, 1993, p. ii.
38. Ibid., s. 30(1).
39. Ibid., s. 31(1).
40. Ibid., ss. 33(1)(2).
41. Ibid., s. 33(3).
42. The notion of reciprocal assess rights is discussed in: Paul Muldoon, Cross Border Litigation: Environmental Rights in the Great Lakes Ecosystem (Toronto: Carswell, 1986), pp. 16-19.
43. Ibid., s. 35.
44. Ibid., s. 36.



45. Ibid., s. 40.

46. R.S.O. 1990, E -19.

47. R.S.O. 1990, E-18.

48. See: *Draft Summary of the ENGO-EBR Consultation Meetings September-November 1992* Submission to the Environmental Bill of Rights Task Force from the Ontario Environment Network, November 6, 1992, p. 9.

49. For example, see: Section 3 where the public participation regime is triggered with respect to "certain kinds of environmentally significant proposals." Similarly, the right of action under s. 84 is premised on "significant harm."

50. Report of the Environmental Bill of Rights Task Force, July 1992, p. 42.

51. "Instrument" is defined in section 1:

means any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act, but does not include a regulation.

52. Environmental Bill of Rights, s. 35.

53. Environmental Bill of Rights, s. 27(4).

54. Environmental Bill of Rights, ss. 38-48.

55. See: Part XIII of the *Environmental Protection Act*.

56. Environmental Bill of Rights, ss. 7-11.

57. Environmental Bill of Rights, ss. 57.

58. Environmental Bill of Rights, Part V, ss. 74-81.

59. See *note 1* for further discussion.
60. Environmental Bill of Rights, s. 84 and Part VI generally.
61. The classic case which demonstrated the problem caused by this rule is: *Hickey v. Electric Reduction Co. of Can.* (1970), 2 Nfld. & P.E.I.R. 246, 21 D.L.R. (3d) 368 (Nfld. T.D.)
62. Thomas A. Cromwell, *Locus Standi - A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), p. 15.
63. See: Environmental Protection Act, s. 174.
64. Environmental Bill of Rights, Part VII, ss. 104-116.