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**The Right to a Review and the Right to an Investigation  
Under the Environmental Bill of Rights:  
An Overview and Commentary**

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The Right to a Review and the Right to an Investigation  
Under the Environmental Bill of Rights:  
An Overview and Commentary<sup>1</sup>

Prepared by  
Paul Muldoon<sup>2</sup>

I. Introduction

The Environmental Bill of Rights, 1993<sup>1</sup> [hereinafter referred to as EBR] is a statute that was proclaimed in force on February 15, 1994. One of the main purposes of the EBR are to ensure that the public has an effective and fair opportunity to have input into environmentally significant decisions and to promote greater accountability within government for its environmental activities. The EBR provides the Ontario public with a set of tools or a variety of procedures to achieve these purposes.

Its history, at least the principles behind the new law, date back at least 20 years.<sup>2</sup> It is not surprising, therefore, that the notion of developing an environmental bill of rights has invoked a fairly intense discussion and debate.<sup>3</sup> This debate

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<sup>1</sup>. Parts of this paper were prepared for an upcoming publication by Paul Muldoon and Richard Lindgren titled: The Environmental Bill of Rights: A Practical Guide (Toronto: Emond Montgomery Publications) [Forthcoming].

<sup>2</sup> Counsel, Canadian Environmental Law Association and represented Pollution Probe on the Task Force on the Ontario Environmental Bill of Rights.

has ranged from whether the bill is needed at all to whether certain provisions will be effective in protecting the environment.

There is little doubt that a comprehensive evaluation of the new law will not be possible until the law is fully implemented and there is some experience with it. What is possible at this time, however, is a more detailed analysis of the EBR and how it is intended to function.

The purpose of this paper is to provide a review of two components or tools provided in the Act. These two components are: the right to request a review by government of certain government decisions found in Part IV of the EBR; and the right to request an investigation found in Part V of the law. It should be made clear that these two rights are not neatly related and, in fact, are quite independent of each other. The common thread between the two, however, is that they do provide good examples of the potential and limits of the array of new rights provided in the EBR.

Before the right to a review and to an investigation are outlined, it may first be worthwhile to review the various other components of the EBR. These are as follows:

**PART I - Definitions and Purposes:** This part sets out the overall purposes 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 demonstrate how the purposes of the statute is consistent with the ministry's policy framework.

Part III - The Office of Environmental Commissioner: This office was created to oversee the working of the EBR and report directly to the legislature at least once a year. This office was established as a means to political accountability, a mechanism was used rather than solely relying on judicial review.

Part IV - Application for Review: This part provides a procedure to review existing statutes, 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. This Part also dismantles the public nuisance rule.

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.

One of the primary triggers for the EBR is a government proposal or decision. Proposals and decisions are narrowed to only include Acts, regulations, policies and instruments. The terms, in turn, are defined in the Act.<sup>4</sup>

## II. The Right to Request a Review

### 1. Nature of the Right

#### 1.1 Purpose of the Right/ Interrelationship with Other Rights

Part II of the EBR establishes a regime that facilitates public participation in relation to proposals for new statutes, regulations, policies and instruments. More specifically, Part

II ensures that the public is notified of, and given the opportunity to comment on, environmentally significant proposals. For proposed statutes, regulations and policies, the minister responsible for the proposal has discretion as to whether or not to subject the proposal to public participation. For proposed instruments, there is a classification process in which instruments deemed to be environmentally significant are classified into classes I to III and subject to varying levels of public participation.<sup>5</sup>

Under Part IV of the EBR,<sup>6</sup> Ontario residents have the right to ask for a review of existing statutes, regulations, policies and instruments. Part IV can also be used to request that a statute, regulation or policy be developed if one does not already exist. More specifically, section 61 states:

s. 61(1) Any two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister.

(2) Any two persons resident in Ontario who believe that a new policy, Act or regulation of Ontario should be made or passed in order to protect the environment may apply to the Environmental Commissioner for a review of the need for the new policy, Act or regulation by the appropriate minister.

The primary purpose of Part IV is to provide a procedure for

selectively reviewing the appropriateness or effectiveness of past government decisions, and for filling the gaps in existing environmental law and policy in the province. If a request for review is granted, the statute, regulation, policy or instrument to be reviewed is then treated as a "proposal" and the Part II notice and comment requirements are followed. Part IV thus provides a procedure that "feeds" into Part II. This Part IV right, therefore, is closely connected to, and could have easily been incorporated into Part II of the EBR.

14.1.2 The Two Rights of Review: Right to Request Review of Existing Decisions and Right to Request New Initiatives

As noted above, the "right to request a review" actually incorporates two rights, which can be described as follows:

- (a) Section 61(1) confers the right to request a review of an existing policy, Act, regulation or instrument in order to protect the environment; and
- (b) Section 61(2) confers the right to request a review of the need to make or pass a new policy, Act or regulation in order to protect the environment.

There are a number of observations that can be made respecting the types of review contemplated by Section 61. First, the right to request a review of the need to make a new policy, Act or regulation does not apply to instruments. This difference may not be very important since the debate is usually whether the approval is adequate or appropriate. not whether an approval is needed in the first place. However, it is



conceivable that someone may want a ministry to licence a previously unapproved activity, thereby enabling the ministry to impose strong terms and conditions to control the activity. The rationale for excluding the right to request a review of the need to issue a new instrument is unclear. It will be interesting to assess whether this limitation has any practical significance.

Second, there is some uncertainty about the interrelationship between the two rights of review. For example, if one was denied an application to have an existing policy reviewed, could one then creatively fashion a request to establish a new policy that overlaps or supersedes the existing policy? where a review was originally denied?

Hence, while there are distinctions between these two rights, they are very much interrelated. Moreover, for all intents and purposes, the procedure and steps in using these rights are virtually identical, although some differences do exist, as noted below.

## 2. What Decisions are Subject to Review under Part IV?

It should be recalled that the EBR does not apply to all government decisions or matters dealt with by government. Hence, the first issue is to determine whether the EBR is applicable at all.

### 2.1 Decisions that Are Reviewable

As mentioned in Chapter 2, the EBR does not apply to all government proposals and decisions.<sup>7</sup> As with other parts of the EBR, the Act applies only to "prescribed ministries" and

"prescribed statutes." In other words, the ministry or the statute must be "caught" by the EBR before it applies. Hence, any analysis must start with the question as to what proposals are subject to the EBR. The general EBR regulation outlines which ministries and statutes are prescribed and when the EBR applies to them.<sup>8</sup> Table I and Table II summarizes the prescribed ministries and statutes, together with phase-in dates for Part IV. For the EBR generally, there is a five year phase-in period, although the phase-in for Part IV is actually only two years.

## 2.2 Exceptions

Apart from phase-in issues, there are a number of exceptions in the EBR regulation which serve to exclude or exempt certain matters from the application of Part IV. Some of these exceptions include:

- (a) The Game and Fish Act is not prescribed for the purposes of Part IV.<sup>9</sup>
- (b) Part IV does not apply to a review of the need for a new exemption under the Environmental Assessment Act.<sup>10</sup>
- (c) The minister is directed not to grant a review if the decision was made within the preceding five years in a manner that the minister considers consistent with the intent and purpose of Part II.<sup>11</sup> However, the EBR goes on to provide that this exception may not apply where: there is new social, economic, scientific or other evidence; the failure to consider such evidence could result in

significant harm to the environment; and the evidence was not taken into account when the decision sought to be reviewed was made.<sup>12</sup>

The intent of the latter exception is apparent. There is a general intention in the EBR to have some stability or non-reviewable period for regulations, Acts, policies and instruments that have been adopted or issued under a public participation regime like that in Part II of the EBR. However, that general intent can be rebutted with new evidence or change of circumstances to warrant such a review. There is little indication of the threshold that must be met in terms of the kind of evidence needed, or how much evidence is sufficient to justify a review where the impugned decision already went through the public participation regime in the EBR. For the most part, the determination of whether these criteria have been met will have to proceed on a case-by-case basis.

### 2.3 Preconditions and Steps on Using the Right to Request a Review

The EBR lays out a fairly specific procedure or series of steps in invoking this right. These steps can be summarized as follows:

#### **The Application for Review Must be Initiated by Two Persons**

**Resident in Ontario:** Under section 61, the right to request a review can only be used by two persons who are residents of the province. The requirement of having two residents apply probably stems from the desire to ensure that the applications being forwarded are serious ones. Hence, the need for two residents to

complete prescribed forms suggests that such applications will require some effort and forethought by applicants.

A more interesting question is why the applicants have to be "residents" of Ontario and what is meant by the term "resident?" One of the reasons to justify this provision could be that the province may understand that it has no authority to protect environments outside the territorial limits of the province. It is submitted, however, that there is no good policy reason to limit this right to residents of Ontario.<sup>13</sup> First, the way to view the issue is not whether there is authority to protect the environment beyond the borders of the province, but whether the laws within the province are appropriate to protect the environment. Further, it is unlikely that non-residents will be wanting to take advantage of this right to the point that there would be an abuse of this right.

At the present time, the most viable means for non-residents to avoid this barrier is to seek the cooperation of residents in filing the application. In other words, non-residents could simply ask residents to undergo the formal request process.

But what is meant by the term "resident" since the term is not defined in the EBR? Residents do not have to be citizens of Canada. The literal interpretation of this term would suggest, however, there has to be some domicile requirements, although there is little understanding of the nature and extent of those requirements. Does this mean that a foreign student cannot ask that a new regulation be developed, or would a foreign student

satisfy residency requirements? What about a person who owns a cottage in Canada but lives outside of Canada? Is that person excluded for this process?

No doubt there will be confusion at some point of time as to what is meant by the term "resident." Both federal and Ontario statutes are full of different and often contradictory uses of the term resident for both natural and corporate persons. As such, this term will have to be defined at some point to add clarity and ensure consistency.

The current application form to request a review by the Environmental Commissioner has a blank space for the applicant to provide a "Driver's License No. OR Other Proof of Ontario Residency." This statement suggests that, from the perspective of the Environmental Commissioner, a valid driver's license is evidence of residency. Neither the Highway Traffic Act<sup>14</sup> nor its regulations, however, provide any direct residency requirements. It does define the rights and obligations of non-residents in terms of driving privileges in the province.<sup>15</sup> Nevertheless, the approach taken by the Environmental Commissioner's Office in the drafting of the form would seem to suggest that a flexible interpretation of the term "resident" will be used.

It is suggested that a broad and liberal approach to the definition is the proper approach, especially in light of the intent and purposes of the EBR. Residency should be generally defined so as not to exclude those acting for legitimate purposes

and otherwise satisfies the requisites of the EBR request for review provisions.

The application can be directed to a review of an existing Act, regulation, policy or instrument, or to a review of the need for a new Act, regulation or policy. The purpose of the request must be solely to protect the environment.<sup>16</sup>

**(b) The Application Form Must be Prescribed by the Environmental Commissioner:** The Environmental Commissioner has issued a form titled "Application for a Review." This form is available from the Environmental Commissioner's Office, and it must be completed and submitted in order to request a review.

There are a number of technical requirements respecting the content of the application. More specifically, the application must include:

- \* names and addresses of the applicants;
- \* the policy, Act, regulation or instrument sought to be reviewed,<sup>17</sup> or an identification of the new Act, policy or regulation that the applicants believe should be made or passed;
- \* an explanation of why the applicants believe that the review should be undertaken to protect the environment or why there is a need for a new policy, Act or regulation.
- \* a summary of the evidence supporting the applicants' belief that the review applied for should be undertaken.<sup>18</sup>

Further, any other relevant information or documentation should also be attached to the application. Under sections 67 and 68,

the minister is given a number of criteria to use in exercising discretion whether to grant the application. (These criteria are discussed below in section 14.4) Any information that would assist the minister in exercising this discretion should be included in the application.

For convenience, the Request for a Review application is reproduced in Appendix \_\_\_.

**Forwarding the Application:** Once completed, the application is to be sent to the Environmental Commissioner. The Commissioner has no discretion or power to refuse to forward the application to the appropriate minister. However, where there is an application respecting a ministry that is not prescribed under Part IV, the Commissioner must give notice to the applicants that the EBR does not apply to the minister responsible for the matter subject of the application.<sup>19</sup>

**Acknowledgement and Notice:** Once a minister receives an application for review from the Environmental Commissioner, the minister is obliged to acknowledge the receipt of the application within 20 days.<sup>20</sup> Where the applicant has requested a review of an instrument the minister is also obliged to give notice of the application to any person that might have a direct interest in matters raised in the application. There is no definition of "direct interest" in the EBR.<sup>21</sup> It should be noted that any notice under Part IV cannot disclose the names or addresses of the applicants or any other personal information about them.<sup>22</sup>

**Ministerial Review Based on the Public Interest:** Upon receipt,

of the application the minister must consider each application for review in a preliminary way to determine whether the public interest warrants a review of the matters raised in the application.<sup>23</sup> Section 67 (2) sets out a number of factors that the minister may consider in determining whether the public interest requires a review, as discussed below.

**Decision to Review and Notice Thereof:** The minister has 60 days to decide whether a review is warranted. If the minister decides a review is warranted, the review must be undertaken in a reasonable time.<sup>24</sup> Further, notice must be given, together with a brief statement of the reasons for the decision, to the applicants, the Environmental Commissioner and any other person who the minister considers ought to get the notice because the person might be directly affected by the decision.<sup>25</sup>

**Notice of Outcome of Review:** Once the review is completed, the minister must give notice of the outcome of the review, and what action, if any, will result, to those who received notice of the intention to review.<sup>26</sup> As mentioned above, the notice still cannot disclose the names or addresses of the applicants or any other personal information about them.<sup>27</sup>

#### 2.4 Disclosure of Names of Applicant

It should be mentioned that it is the intent of the EBR not to have the names of the applicants disclosed.<sup>28</sup> Moreover, some protection can be gained from the Freedom of Information and Protection of Privacy Act. However, these provisions are only designed to protect the applicants where they are unsuccessful in



input, ministries subject to the EBR should carry on some internal review with a view to establishing criteria as to when and under what circumstances applications for review will be granted. This may also assist ministries in prioritizing which statutes, regulations, policies and instruments, or classes of instruments, should be subject to review. Such an internal review would be helpful to both those applying for reviews and those who may be affected by such reviews. Moreover, it would provide a more rational framework for the exercise of ministerial discretion, a subject upon which the Environmental Commissioner has the ability to comment on every year.

What kind of criteria then should be considered when a minister receives a request for a review? There are probably different criteria for policies, Acts, regulations and instruments. Some of the common criteria, however, should include impact on the environment, extent of public interest, previous public participation in the matter, among other issues. It would probably be a reasonable suggestion to have a public advisory committee to review applications for review. This public advisory committee would add transparency and openness to the exercise of discretion by the ministry. It would also assist the Environmental Commissioner in assessing the exercise under the discretion of the EBR.

Over the next few years, it will be interesting to examine how many requests for reviews will be formally submitted and then how many granted. No doubt the early experience with this

section will provide a very important signal as to the utility and effectiveness of this Part IV.

TABLE I

Prescribed Ministries and Phase-In Dates for Part IV  
of the EBR

Ministry of Agriculture and Food	April 1, 1996
Ministry of Consumer and Commercial Relations	April 1, 1996
Ministry of Environment and Energy	February 1, 1995
Ministry of Municipal Affairs	April 1, 1998

Ministry of Natural Resources	April 1, 1996
Ministry of Northern Development and Mines	April 1, 1996

Source: Ontario Regulation 73/94 made under the Environmental Bill of Rights, 1993, February 16, 1994 (O.Reg. 73/94), s. 5.

TABLE II

Prescribed Statutes for Part IV

Aggregate Resources Act	April 1, 1996
Conservation Authorities Act	April 1, 1996
Crown Timber Act	April 1, 1996
Endangered Species Act	April 1, 1996
Energy Efficiency Act	November 15, 1994
Environmental Assessment Act	November 15, 1994
Environmental Bill of Rights, 1993	November 15, 1994
Environmental Protection Act	November 15, 1994
Gasoline Handling Act	April 1, 1996
Lakes and Rivers Improvement Act	April 1, 1996
Mining Act	April 1, 1996
Niagara Escarpment Planning and Development Act	November 15, 1994

Ontario Waste Management Corporation Act	November 15, 1994
Ontario Water Resources Act	November 15, 1994
Pesticides Act	November 15, 1994
Petroleum Resources Act	April 1, 1996
Planning Act	April 1, 1996
Provincial Parks Act	April 1, 1996

Source: Ontario Regulation 73/94 made under the Environmental Bill of Rights, 1993, February 16, 1994 (O.Reg. 73/94), ss. 6 and 3.

### III. The Right to Request an Investigation

#### 1. Overview to the Right

The right to notice and comment under Part II of the EBR, and the right to request a review under Part IV of the EBR, are meant to allow the public to participate effectively in environmental decision-making. The rights contained in Parts II and IV are particularly important since they are designed to ensure that the public is included as early as possible in the decision-making process and at a point in time before environmental harm occurs.

What happens, however, if environmental problems result despite the fact that the public was involved in the decision-making process? The EBR recognizes that even with the best environmental decision-making processes, there is still the

possibility that unlawful environmental harm may arise. Thus, the EBR provides two mechanisms to address activities that have or are continuing to cause environment harm: the right to an investigation, and the right to sue those violating environmental laws in the province. This latter right is reviewed in the next chapter. This section will examine the right to request an investigation.

The right to request an investigation is found in Part V of the EBR.<sup>30</sup> This right provides an opportunity for any two Ontario residents to request that a government ministry investigate an alleged violation of an environmental law. The key provision states:

s. 74(1) Any two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation for the alleged contravention by the appropriate minister.

Part V of the EBR imposes a number of requirements upon the applicants, and then imposes certain duties on the relevant ministers to decide if an investigation is warranted, and if so, to report to the applicants respecting the outcome of the investigation.

The right to request an investigation is important for a number of reasons. First, it is a tool that most members of the public would have expected to be in the EBR since, as the preamble of the EBR states, the government has the "primary

responsibility" for the protection of the environment.<sup>31</sup> In other words, if someone is allegedly violating environmental laws in the province, it only makes sense that the government be notified and given the opportunity to enforce its own laws. Moreover, environmental investigations are not easily conducted by private citizens since they neither have the resources nor the trained personnel with appropriate legal powers to undertake the necessary tasks. Thus, the right to request an investigation is meant to provide a practical means for members of the public to remedy environmental problems.

Second, the right to request an investigation is important because the procedure for requesting an investigation must be used as a precondition to employing the "right to sue" provisions in the EBR.<sup>32</sup> Generally speaking, a person can only use the "right to sue" provisions if the person has requested an investigation, and the investigation was not undertaken within a reasonable time or has resulted in an unreasonable response from the government. Hence, any person wanting to use the the right to sue provisions of the EBR must become familiar with the right to request an investigation.

Third, the investigation provisions in the EBR very much mirror the provisions in the federal Canadian Environmental Protection Act.<sup>33</sup> Although the provisions in the Canadian Environmental Protection Act have not been extensively used, commentators have suggested that they have served a useful purpose.<sup>34</sup> One of the consequences for Ontario of including

the right to request an investigation in the EBR is that it satisfies one of preconditions to have the determination of equivalency under the Canadian Environmental Protection Act.<sup>35</sup> If the conditions are met for equivalency, a federal regulation under the Canadian Environmental Protection Act may be made inoperative in the province where the provincial regulation is "equivalent", or more stringent than the federal regulation.<sup>36</sup>

## 2. Significance of the Right In Relation to Present Practice

When reviewing the EBR provisions governing the right to request an investigation, a question arises as to whether the right to request an investigation improves upon the present informal practice of contacting ministry officials with a complaint. In other words, what is the difference between the existing informal request process to an investigation and the formal process contained in Part V of the EBR? Cannot anyone at the present time simply contact the relevant ministry and report an environmental problem?

The right to an investigation in the EBR does provide an improvement over the present process. First, there is some benefit from the fact that the process is now formalized. It provides a certain, more predictable process with legislated deadlines and clear delineation of responsibilities. Second, the formal process provides the potential to reduce the bureaucratic maze for the public. Because the application is forwarded to the Environmental Commissioner, who then must determine the identity of the relevant ministry, the applicants are spared the problem

of determining jurisdictional boundaries between various ministries.

Third, the EBR right will, at least to some degree, constrain government discretion in refusing to do anything. Although there is no requirement to investigation once a request is made, the minister will have to accept or reject the request based on explicit criteria. Moreover, one of duties of the Environmental Commissioner is to review the exercise of discretion under the law. The ministry record in granting or rejecting requests for an investigation will be publicly disclosed and reviewed each year. Finally, the fact that citizens now have the right to sue under the EBR may provide some incentive to government ministries to investigate and deal with the matter at hand. A ministry's failure to investigate a matter which eventually then becomes the subject matter of a successful lawsuit by a member of public could be a source of embarrassment for that ministry.

### 3. Preconditions and Steps on Using the Right

The preconditions and steps to use the right to request an investigation are neither onerous nor complex. Nevertheless, there are a number of important points to be made. The preconditions and steps in this regard can be identified as follows:

(a) The application must be initiated by two persons resident in Ontario. The right to request an investigation is initiated by filing an application with the Environmental Commissioner. This application must be made by two residents of Ontario. The



requirements of having two residents resident in Canada are the same requirements discussed in the context of a request for a review in section 14.3. Hence, reference should be made to that section for a fuller discussion on these issues. However, there are some particular implications of these requirements for the right to request an investigation which should be mentioned.

As noted in section 14.3, the requirement of having two residents apply probably stems from the desire to ensure that the applications being forwarded are serious ones. Hence, the requirement that two residents must complete the prescribed forms suggests that such applications will require some effort and forethought by applicants.

Why do applicants have to be "residents" of Ontario and what is meant by the term "resident?" This provision could possibly be supported by the view that the province may understand that it has no authority to protect environments outside the territorial limits of the province. As argued in the context of the right to review, there are stronger grounds to support having the right to apply to anyone rather than limiting the right to residents of Ontario.<sup>37</sup> First, the way to view the issue is not whether there is authority to protect the environment beyond the borders of the province, but whether there is inappropriate conduct within the province that should give rise to an investigation. Further, it is unlikely that non-residents will be wanting to take advantage of this right to the point that there would be an abuse of this right. More important, why should non-residents

who may be affected from unlawful activities within the province be excluded from the use of such tools to protect the environment?

At the present time, the most viable means to avoid this barrier is for non-residents to seek the cooperation of residents in filing the application. There is nothing in the EBR that would exclude the application just because the impacts of the unlawful conduct may include extra-provincial effects, so long as the alleged violation was committed within the province. Alternatively, non-residents can continue to use informal means, such as letters or telephone calls, to request environmental investigations.

But what is meant by the term "resident" since the term is not defined in the EBR? Again reference should be made to section 14.3 for a more complete discussion of this issue. Suffice to state, however, that residents do not have to be citizens of Canada. Further, it is unclear whether there needs to be some domicile requirements, and if so, the extent of those requirements.

For instance, could someone from New York state who owned and seasonally resided at a cottage in northern Ontario be able to take advantage of this right if someone was polluting the lake near that property? Could a federally incorporated company with headquarters in Manitoba but with a number of employees in Ontario be a "resident?"

As with the request for a review, the prescribed form issued

by the Environmental Commissioner's Office suggested that for a request for an investigation suggests that a valid driver's permit for the province is proof of residency. However, neither the Highway Traffic Act<sup>38</sup> nor its regulations, however, provide any direct residency requirements. It does define the rights and obligations of non-residents in terms of driving privileges in the province.<sup>39</sup> If nothing else, the suggestion that a driver's license is evidence of residency does indicate a broad view as to the definition of residency.

It is suggested that the term will have to be clarified at some point to ensure there is certainty and consistency with term. Unfortunately, neither federal nor provincial legislation is very helpful in arriving at a common or consistent definition. It is suggested that the broad and liberal approach to the definition is the proper approach, especially in light of the intent and purposes of the EBR. Residency should be generally defined so as not to exclude those acting for legitimate purposes and otherwise satisfies the requisites of the EBR request for investigation provisions.

(b) The application must filled in a form prescribed by the Environmental Commissioner. The Environmental Commissioner has issued a form titled "Application for an Investigation" which is available from the Commissioner's Office. This form is the official request form which must be completed and submitted in order to request an investigation.

Each section of this form must be completed. The most

should be made to ascertain what statute, regulation or instrument is being violated, the absence of this specific information is not fatal to the application. It should be noted that the precondition for requesting an investigation is that the applicants "believe" there is a violation of a law or instrument.

They do not have to meet a quasi-criminal threshold where it is necessary to demonstrate that there is a "reasonable and probable cause" before a charge is laid.<sup>42</sup>

It is necessary that the violation sought to be investigated must be under an Act, regulation and instrument that is "prescribed" or caught under the EBR. Tables III and IV outlines the prescribed ministries and statutes to which Part V applies, along with the applicable implementation and phase-in dates.

(d) **Affidavit to Accompany Application:** An affidavit by each applicant which includes a statement by each applicant or, where an applicant is a director of a corporation, stating that the applicant believes that the facts alleged in the application are true.<sup>43</sup> This affidavit must be sworn by someone with the authority to swear affidavits which includes: a Judge, Justice of the Peace, Commissioner of Oaths (which usually includes a lawyer).

(e) **Forwarding the Application and Notice:** Within ten days of receiving a copy of the request for an investigation, the Environmental Commissioner must forward the application to the minister who is responsible for the statute under which the contravention is alleged to have been committed.<sup>44</sup> Within 20

days of receiving it, the minister must acknowledge receipt of the application to the applicants.<sup>45</sup>

(f) **Duty to Investigate:** The minister must investigate all matters to the extent that the minister considers necessary in relation to a contravention alleged in the application.<sup>46</sup> A more detailed discussion of this discretion is discussed below.

(g) **Notice of Decision Not to Investigate:** Within sixty days of receiving the application, if the minister decides the investigation is not warranted, the minister must give notice to the applicants, the Environmental Commissioner and anyone named in the application that is alleged to be involved in the contravention and an address has been given in the application.<sup>47</sup>

(h) **Time Required for the Investigation:** If there is an investigation, the investigation must be completed within 120 days of receiving the application or an estimated time needed to complete the investigation. Within that time period, the minister must either complete the investigation or give a revised time estimate.

(i) **Notice of Outcome:** Within 30 days of completing an investigation, the minister shall give notice of the outcome of the investigation, including a description of what action will be taken, if any, to the applicants, the Environmental Commissioner and each person alleged in the application to have been involved in the commission of the contravention.<sup>48</sup>

#### 4. Ministerial Discretion and Criteria for that Discretion

significant environmental harm to trigger the right to an investigation. The lack of significant environmental harm, however, may be a ground to reject the application. The implication of these provisions that the minister may grant an investigation, even if the violation may not lead to serious environmental harm, although there is discretion to do so. For example, a citizens' group may request an investigation into the failure of a facility to submit monitoring reports required under a regulation. Although the minister may reject the application on the grounds that there is no threat to the environment, the investigation may nevertheless be granted on the grounds that reporting is an important public accountability mechanism.

Hence, it remains for future practice to determine the extent to which these provisions do constrain discretion to reject requests. However, it should be recalled that although there is discretion to reject such requests, the Environmental Commissioner has the express function of reviewing the exercise of discretion under the right to an investigation.<sup>51</sup>

Finally, it should be noted that there are really two types of discretion under these provisions. The first type is whether there should be an investigation; the second relates to the extent or magnitude of the investigation. For instance, should the investigation require a quick review of the evidence or a full and comprehensive report? This second type of discretion will probably be dictated by criteria commonly used by investigation branches, such as the possible seriousness of the

offence, the likelihood of environmental harm, proximity to sensitive areas, among a whole host of other such criteria.

#### 5. Disclosure of the Names of the Applicants

The EBR seeks to protect the names of those requesting that the government investigate an alleged violation. Section 81 states that the names and addresses of the applicants shall not be disclosed in the notices required under the EBR that an investigation will not occur or outlining the results of the investigation. Moreover, the Freedom of Information and Protection of Privacy Act may further assist in the protection of these names.

Despite this protection, however, it should be made clear that the names of the applicants for an investigation may be disclosed if the investigation results in an administrative action, a court action or other legal action. In some cases, the applicants may be called as witnesses since they may have actual knowledge of the alleged violation. If the applicants do not want their names revealed at any time, and would never want to contribute to a prosecution or other enforcement action, then EBR's right to investigation procedure may not be appropriate.

#### 6. Application of the Right

At the present time, it is difficult to provide any reliable estimate how often the right to an investigation will be used and in what context. These estimates may be a little misleading since some requests will be filed to fulfill the condition precedent to employing the cause of action. Nevertheless, if

nothing else, there is a benefit to formalizing the complaint and investigation process. The fact there will be greater certainty of the process, and the existence of governmental duties to keep the complainant cognizant of the status of the investigation suggests that the new right is a positive step. The success of this provision may be more dependent on whether the government allocates sufficient resources to the various investigation branches than any design or format of the provisions of the EBR.

#### IV. Summary and Conclusions

The right to review and the right to an investigation are important provisions in the EBR. It will be some time before there can be a detailed analysis of the practice of these sections. However, this paper has reviewed the intent and procedures with respect to these provisions. The next step is to examine how they were interpreted and applied, issues which will determine their eventual effectiveness.



TABLE III

Prescribed Statutes for Part V

Aggregate Resources Act	April 1, 1996
Conservation Authorities Act	April 1, 1996
Crown Timber Act	April 1, 1996
Endangered Species Act	April 1, 1996
Energy Efficiency Act	August 15, 1994
Environmental Assessment Act	August 15, 1994
Environmental Protection Act	August 15, 1994
Game and Fish Act	April 1, 1996
Gasoline Handling Act	April 1, 1996
Lakes and Rivers Improvement Act	April 1, 1996
Mining Act	April 1, 1996
Ontario Water Resources Act	August 15, 1994
Pesticides Act	August 15, 1994
Petroleum Resources Act	April 1, 1996
Provincial Parks Act	April 1, 1996
Public Lands Act	April 1, 1996
Waste Management Act	August 15, 1994

Source: Ontario Regulation 73/94 made under the Environmental Bill of Rights, 1993, February 16, 1994 (O.Reg. 73/94), s. 9.

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ENDNOTES

1. Environmental Bill of Rights Act, 1993 S.O. 1993, c. 28 [hereinafter referred to the "EBR"]
2. For a more detailed review of its history, see: Paul Muldoon and John Swaigen, "Environmental Bill of Rights" in D. Estrin and J. Swaigen (eds.) Environment on Trial: A Guide to Ontario Environmental Law and Policy (3rd ed.) (Toronto: Emond-Montgomery Press, 1993) 793, at 795-7.
3. Some of these discussions and the various arguments are found in the reports of the task force that assisted in developing the bill. See: Ministry of the Environment, Report of the Task Force on the Ontario Environmental Bill of Rights (July, 1992). Report of the Task Force on the Ontario Environmental Bill of Rights: Supplementary Recommendations, December, 1992.
4. In section 1 of the EBR,  
  
"Policy" is defined as: "a program, plan or objective and includes guidelines or criteria to be used in making decisions about the issuance, amendment or revocation of instruments but does not include an Act, regulation or instrument."  
  
"Regulation" "...has the same meaning as in the Regulations Act."  
  
"Instrument" "means any document of a 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.
5. See: EBR, ss. 19-21.
6. EBR, s. 61 to 73.
7. For definition of a "proposal," see above on note 4.
8. Se: Regulation Made Under the Environmental Bill of Rights, 1993, Ontario Regulation Number 73/94, published in Ontario Gazette, March 12, 1994.
9. Ibid., s.6(2).

10. EBR, s. 63(2).

11. EBR, s. 68(1).

12. EBR, s. 68(2).

13. In fact, there are many reasons to suggest that barriers to cross border litigation should be removed. See: Paul Muldoon, with David Scriven and James Olson, Cross Border Litigation: Environmental Rights in the Great Lakes Ecosystem (Toronto: Carswell, 1986).

14. R.S.O. 1990, c. H-8.

15. For example, see section 15 of the Highway Traffic Act. Section 15(1) states:

s. 15(1) Section 7 and subsection 13(1) do not apply to a motor vehicle owned by a person who does not reside or carry on business in Ontario for more than six consecutive months in each year if the owner thereof is a resident of some other province of Canada and has complied with the provisions of the law of the province in which the person resides as to registration of a motor vehicle and the display of the registration number thereon, and provided the province of residence grants similar exemptions and privileges with respect to motor vehicles owned by residents of Ontario for which permits are issued and in force under the Act and the regulations.

16. s. 61(1) and (2).

17. EBR, s. 61(2).

18. s. 61(3).

19. EBR, s. 62.

20. EBR, s. 65.

21. EBR, s. 66.

22. EBR, s. 73.

23. EBR, s. 67(1).

24. EBR, s. 69.

25. EBR, s. 70.

26. EBR s. 71.

27. EBR, s. 73.

28. Ibid.

29. EBR, s. 67(2)(3).

30. EBR, ss. 74-81.

31. The relevant part of the Preamble of the EBR states:

While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

32. EBR, s. 84(2).

33. R.S.C. c. C-15.3, ss. 108-110.

34. See: K. Webb, "Taking Matters into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement" (1991), 36 McGill L. J. 771, at 819.

35. Canadian Environmental Protection Act, R.S.C. c. C.-15.3, s. 34(6).

36. For a fuller discussion, see: Resource Futures International, Final Report, Evaluation of the Canadian Environmental Protection Act, A report submitted to Environment Canada, Evaluation Branch, December 1993, pp. 101-104.

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40. EBR, s. 74(2).

41. EBR, s. 74(1).

42. R.S.O. 1990, c. P-33, s. 23.

43. EBR, s. 74(3)(4).

44. EBR, s. 75.

45. EBR, s. 76.

46. EBR, s. 77,

47. EBR, s. 78.

48. EBR. s. 80.

49. EBR, s. 77.

50. See: Re Halton Region Aggregate Producers Group et al. and the Minister of Housing et al. (1981), 10 C.E.L.R. 86 (Div. Ct.).

51. EBR, s. 57(g)(j).