

**APPLICATION FOR REVIEW**  
**Filed pursuant to Section 61 of the *Environmental Bill of Rights, 1993***  
**RE: ENVIRONMENTAL BILL OF RIGHTS**  
**& REGULATIONS THEREUNDER**

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**Declaration of Ontario Residency:**

I, Theresa A. McClenaghan, hereby certify that I am an Ontario resident.

December 21, 2010



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DATE

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**Declaration of Ontario Residency:**

I, Richard D. Lindgren, hereby certify that I am an Ontario resident.

December 21, 2010



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RICHARD D. LINDGREN

## **SUBJECT-MATTER OF REQUESTED REVIEW**

The Applicants request a review of an **existing** law and the regulations thereunder, namely:

*Environmental Bill of Rights, 1993, S.O. 1993, c.28, as am.*

**EBR General Regulation (O.Reg.73/94, as am.)**

**EBR Instrument Classification Regulation (O.Reg.681/94, as am.)**

The *Environmental Bill of Rights* (EBR), and the regulations thereunder, are prescribed for the purposes of Part IV of the EBR: see subsections 3(1), 6(1) and 7(1) of O.Reg.73/94.

## **REASONS FOR REQUESTED REVIEW**

The Applicants submit that it is clearly in the public interest to formally review and revise the EBR for three primary reasons:

1. Ontario's EBR was enacted 17 years ago, and has remained essentially unchanged since it came into force in 1994. To date, however, the Ministry of the Environment (MOE) has not undertaken a comprehensive public review of the EBR to systematically evaluate the overall effectiveness of the current EBR regime, or to determine if there are EBR amendments or regulatory changes that would better enable the EBR to achieve its broad legislative objectives (see section 2 of the EBR).
2. On the 10<sup>th</sup> anniversary of the EBR in 2004, the Office of the Environmental Commissioner of Ontario (ECO) organized a series of stakeholder workshops, discussion papers and backgrounders regarding the EBR. These proceedings revealed that there was broad public support for the EBR, and stakeholders generally agreed that in its first decade, the EBR had made a key difference in environmental protection and resource conservation across Ontario. Nevertheless, during these 10<sup>th</sup> anniversary proceedings, stakeholders and ECO staff identified a number of problems with the current EBR regime, and they proposed various reforms to strengthen and improve the EBR regime. Many of these proposals were subsequently conveyed to the Ontario Legislature by the ECO in a Special Report dated March 1, 2005, which contained 16 recommendations for EBR reform. To date, however, it appears that few, if any, of these recommendations have been implemented by the MOE or the Ontario government.

3. Over the years, various commentators (including ECO staff) have identified significant shortcomings and “challenges” within the current EBR regime.<sup>1</sup> Similarly, the ECO’s Annual and Special Reports since 2005 have documented numerous case studies which demonstrate serious systemic problems within the existing EBR regime. In the Applicants’ view, these problems should be rectified through statutory and/or regulatory changes to the EBR regime, as described below.

Accordingly, the Applicants submit that a formal public review of the EBR is both timely and necessary, and should be immediately initiated by the MOE. The overarching purpose of the requested review should be to solicit public input on statutory and regulatory changes which are needed to better achieve the broad purposes of the EBR (i.e., public participation in environmental decision-making; increased governmental accountability; increased access to the courts; and enhanced whistle-blower protection). In essence, the EBR needs to be recast, revitalized, and rebalanced.

Moreover, the Applicants submit that a focused review of the EBR is required, rather than a wholesale reconsideration of the EBR in its entirety. In the Applicants’ view, the EBR is generally sound, but it requires several key changes so that the statute can better deliver on its promises of conserving/restoring environmental integrity, ensuring environmental sustainability, and protecting the public right to a healthful environment (see subsection 2(1) of the EBR).

For the purposes of focusing the requested review of the EBR, the Applicants have identified a number of key issues that require immediate attention by Ontario legislators, MOE officials, ECO staff, and interested stakeholders (see below). It should be noted that the Applicants’ list of issues is merely illustrative of the various matters that should be considered in the proposed EBR review, and it is not intended to be an exhaustive list of every issue that has arisen since the EBR came into force.

In this regard, the Applicants reasonably anticipate that the terms of reference for the public review of the EBR might encompass issues other than those matters set out below. However, the Applicants firmly believe that at a minimum, the requested review of the EBR should incorporate the numerous reform issues described below in this Application for Review.

In responding to this Application for Review, it is unnecessary and inappropriate for the MOE to take a position on the merits of the specific reforms that are recommended herein. Instead, the threshold question under section 67 of the EBR is whether the public interest warrants a review of the EBR in order to protect the environment, and the

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<sup>1</sup> See, for example, J.F. Castrilli, *Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences*, [1998] Vol. IX *Villanova L. Journal* 349; Elaine Hughes & David Iyalomhe, “Substantive Environmental Rights in Canada” (1998-1999), 30 *Ottawa L.R.* 229; and Lynda Lukasik, David McRobert & Lisa Shultz, *Public Participation Rights, Environmental Policy Struggles & E-Democracy: Lessons Learned During the First 11 Years of Ontario’s Environmental Bill of Rights* (November 2006).

Applicants submit that this question can only be answered by the MOE in the affirmative. Once the formal review of the EBR is underway, then the MOE and interested parties can address the pros and cons of the reforms suggested within this Application and/or advocated by other persons participating in the review.

**(a) Background: The Context for Reviewing the EBR**

It must be noted that there was considerable public consultation on the concept and content of the EBR prior to its enactment by the Ontario Legislature in 1993. Indeed, the origin of Ontario's EBR can be traced back to the public and parliamentary debates that accompanied various private members' bills that had been proposed in the late 1970s and 1980s to establish an EBR regime in the province.<sup>2</sup>

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

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

Having regard for the EBR's legislative evolution, there can be little doubt that the passage of the EBR represents an important milestone in Ontario's environmental legislation, and it constitutes an interesting if not novel approach to public policy development in the environmental context.

However, it must also be recognized that the EBR was very much a product of its age, and that societal values and environmental priorities have continued to evolve since the early 1990s. In addition, it must be noted that several key items now found in the EBR (i.e. the section 41 leave test for third-party appeals) were not contained in the text of the draft EBR originally proposed by the Task Force. Moreover, the Task Force itself recommended that certain EBR provisions (i.e. the reform of the public nuisance rule, the new civil cause of action to protect public resources, etc.) should be actively monitored over time and revisited if warranted.<sup>3</sup> In short, the Task Force recognized that its EBR proposals were not cast in stone, and that the operational experience under the EBR should be reviewed and appropriate EBR amendments should be developed where necessary or desirable.

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<sup>2</sup> Generally, see Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995), pages 7 to 11.

<sup>3</sup> *Report of the Task Force on the Ontario EBR* (July 1992), pages 107 to 108 [EBR Task Force Report].

Accordingly, the Applicants submit that it is now imperative to formally review and revise the EBR. In the Applicants' view, the mere fact that there was historic public input into the EBR does not detract from the compelling current need for the MOE to initiate an appropriate public process for reviewing and revising the EBR regime. Indeed, given that there is now approximately 17 years' worth of operational experience with the EBR, it is important to: (a) assess the efficacy of current EBR tools; (b) consider possible improvements to the EBR tools; and (c) evaluate the soundness of some of the original assumptions and trade-offs that underlay the EBR when it was first passed.

### **(b) EBR Track Record: Issues and Opportunities**

Over the past 17 years of EBR experience, there have been a number of success stories which illustrate how the EBR can be used effectively to inform and empower the public to protect the environment and conserve resources, particularly at the local level. Some of these success stories have been catalogued by other commentators,<sup>4</sup> and need not be repeated here.

At the same time, however, there have been a number of problematic case studies which amply demonstrate the need for reform efforts in relation to virtually all Parts of the EBR. In the Applicants' view, there are several high-priority issues for EBR reform, which are summarized in the following pages. As noted above, we hasten to add that this Application for Review does not attempt to inventory all EBR-related issues which have arisen since 1993. Instead, we have attempted to identify and evaluate a "Top 10" list of issues which are illustrative of the types of systemic problems which require consideration within the requested review of the EBR and its implementing regulations.

For each issue, we have attempted to briefly state the concern(s) from the public interest perspective, and we offer some suggested reforms on how the issue may be addressed through statutory and/or regulatory reform. It goes without saying that our proposals are not intended to articulate the precise legislative or regulatory language that may be necessary to implement the proposed reform. Instead, the analysis below is intended to simply flag the key issues, describe general concerns, and provide broad suggestions for EBR reform. Thus, we are content to leave the actual wordsmithing details for EBR reform to be publicly developed within the MOE review process requested by this Application for Review.

#### **Issue #1: Updating the Purposes of the EBR**

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

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<sup>4</sup> See, for example, ECO, *Celebrating the 10<sup>th</sup> Anniversary of the EBR and the ECO* (2004).

discharge”, “polluter pays” principle, “precautionary principle”, and the “principle of intergenerational equity.”<sup>5</sup>

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

**Issue #2: The Lack of Environmental Rights in the EBR**

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

Apart from the section 84 statutory tort, citizens' recourse to the courts is precluded (apart from ordinary civil proceedings where personal injury or property damage occurs). The only real "rights" of citizens are rights of notice, opportunities to comment, and the right to have their comments taken into account when government makes its decisions; failure to respect such rights will not invalidate those decisions...

To summarize, while the Ontario EBR no doubt provides a great deal of public notice and input into government decision-making, it provides very little in the way of a remedy if environmental security is, nevertheless, violated. There is no judicial review of government failings and the statutory tort which permits action directly against rights-violators is, as with the Yukon Act, extremely limited. Indeed, given the absence of any equivalent to the Yukon "public trust" action, the Ontario legislation has virtually no potential to fulfill our "strong" rights model.<sup>6</sup>

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

**Suggested Reform:** The obvious remedy for the above-noted concern is to amend the EBR to include a substantive right to a healthful environment. The nature, scope, and legal effect of this new substantive right can be debated and finetuned within the

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<sup>5</sup> ECO Special Report, *Looking Forward: The Environmental Bill of Rights* (March 1, 2005), page 2 [ECO Special Report].

<sup>6</sup> Elaine Hughes & David Iyalomhe, “Substantive Environmental Rights in Canada” (1998-1999), 30 Ottawa L.R. 229, paras. 79 and 81.

requested MOE review of the EBR, but there can be little doubt that such a right is long overdue and represents a fundamental building block of a revitalized EBR.

In making this submission, the Applicants are aware that the Task Force was unable to agree upon the inclusion of a substantive environmental right within the EBR. However, the EBR track record has demonstrated that little, if any, progress has been made on the significant environmental problems and challenges facing Ontarians.<sup>7</sup> In addition, we note that there is a federal private member's bill currently before Parliament that proposes to create a public right to a "healthy and ecologically balanced environment."<sup>8</sup> Accordingly, the Applicants submit that it is now timely and appropriate to revisit the option of including an environmental right in Ontario's EBR.<sup>9</sup>

In addition, the Applicants submit that the overdue creation of substantive environmental rights within the EBR should be tied to improvements in the EBR's legal accountability tools (i.e. civil cause of action, enhanced judicial review, public trust doctrine, etc.), as discussed below.

### **Issue #3: Complying with Meaningful Statements of Environmental Values**

**Concern:** The EBR Task Force described the development and application of Ministry-specific Statements of Environmental Values (SEV) as "the best method of ensuring that the purposes of the EBR" are influencing government decision-making with respect to the environment.<sup>10</sup> Accordingly, section 11 of the EBR imposes a positive legal duty on prescribed Ministers to "take every reasonable step" to ensure that the Ministries' SEVs are considered whenever environmentally significant decisions are being made by the Ministries. .

Over the past 17 years, however, the implementation of this duty – and the substantive content of the SEVs – has been questionable at best. For example, the ECO's Special Report on EBR reform correctly concluded that "SEVs are vague and outdated, and have little impact in the ministries."<sup>11</sup> Even though some SEVs have been revised since the ECO's Special Report in 2005, the SEVs still amount to little more than a verbatim recital of EBR purposes and high-level environmental principles (i.e. ecosystem approach, precautionary principle, etc.), with little or no operational direction on how these purposes and principles are to be put into practice during decision-making in relation to Acts, regulations, policies, or instruments.

Indeed, the MOE has steadfastly argued that its SEV is not even applicable to its decisions respecting prescribed instruments, despite findings to the contrary by the

<sup>7</sup> CELA, *The EBR Turns 10 Years-Old: Congratulations or Condolences?* (June 16, 2004), pages 3, 6 to 7.

<sup>8</sup> *Canadian Environmental Bill of Rights* (Bill C-469), section 9. See also CELA, *In Support of a Federal Environmental Bill of Rights: Submissions to the House of Commons Standing Committee on Environment and Sustainable Development on Bill C-469* (November 1, 2010).

<sup>9</sup> ECO and LURA Consulting, *EBR Law Reform Workshop June 16, 2004: Meeting Report* (October 2004), pages 26 to 27.

<sup>10</sup> EBR Task Force Report, page 23.

<sup>11</sup> ECO Special Report, page 3. See also ECO, 2005-2006 Annual Report, pages 188 to 189.

Environmental Review Tribunal and the Ontario Divisional Court in the recent “Lafarge” litigation.<sup>12</sup> In the wake of the Lafarge litigation, CELA wrote to the Minister of the Environment to specifically request that he take certain measures to ensure that MOE Directors understand and comply with their legal duty to consider the SEV when making instrument decisions.<sup>13</sup> However, in response to this request, the Minister merely stated that MOE “officials are considering how best to move forward in light of the judgment of the Divisional Court in *Lafarge v. Environmental Review Tribunal et al.*”<sup>14</sup> Thus, it remains unclear to the Applicants whether CELA’s requested measures have been fully implemented by the Minister to date.

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

Most importantly, the SEVs require clearer goals, prescriptive detail, and measurable targets, which will undoubtedly be best achieved through statutory amendments to the SEV provisions in the EBR.<sup>15</sup> To avoid further uncertainty (or more litigation), section 11 of the EBR should be amended to clarify that the SEVs must be considered whenever Ministries are making decisions in relation to prescribed instruments as well as Acts, regulations and policies.<sup>16</sup> The Applicants further submit that the statutory obligation upon prescribed Ministries to consider and apply SEV principles should be triggered regardless of whether the instrument falls within an “exception” (i.e. sections 29 to 33) that dispenses with the general obligation to post notice of the proposal on the EBR Registry.

#### **Issue #4: Use, Misuse and Avoidance of the Environmental Registry**

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

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<sup>12</sup> *Dawber v. Ontario (Director, Ministry of the Environment)*, (2007), 28 C.E.L.R. (3d) 281; affd. (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.); leave to appeal refused (Ont. C.A. File No. M36552, November 26, 2008). See also CELA, *Third-Party Appeals under the Environmental Bill of Rights in the Post-Lafarge Era: The Public Interest Perspective* (February 2, 2009).

<sup>13</sup> Letter from CELA to the Hon. John Gerretsen dated June 24, 2008.

<sup>14</sup> Letter from the Hon. John Gerretsen to CELA dated August 12, 2008.

<sup>15</sup> ECO Special Report, page 3.

<sup>16</sup> *Ibid.*, page 4.

For example, there is ongoing public and ECO concern that the minimum comment periods are too short<sup>17</sup> (or, in some instances, are wholly absent), especially in relation to complex or controversial proposals such as wholesale changes to environmental laws/regulations, provincial plans or policies, or complicated instruments for largescale facilities and projects.<sup>18</sup> The ECO has also documented instances where discretionary “information notices” were misused by prescribed Ministries in relation to significant policy proposals.<sup>19</sup>

The overall result is that despite the mandatory consultation requirements under Part II of the EBR, numerous environmentally significant decisions are still not being posted on the EBR Registry, and are therefore being made without the public review and comment opportunities imposed by law.<sup>20</sup> Conversely, the EBR provisions relating to enhanced notice/comment (i.e. sections 24, 25, 28) appear to be largely unused over the past 17 years.

In addition, the supporting documents (or actual text of the proposed laws, regulations or instruments) are not always included as links or attachments to EBR Registry Notices,<sup>21</sup> thereby making it difficult for the public to access and comment upon the proposals in a timely manner. In some instances, the ECO found that the supporting documents could not even be found by Ministry staff, who appeared to lack efficient centralized systems for storing and accessing files.<sup>22</sup> In other cases, significant delays (of up to two years) have occurred between the original posting of a proposed instrument and the subsequent posting of the decision notice, which has allowed proponents to carry out the activities in question while simultaneously undermining the public’s right to utilize the EBR appeals process in a timely manner.<sup>23</sup> Similarly, the ECO has repeatedly objected to significant delays in prescribing new instruments under the EBR, which again undermines public notice/comment rights, and the public right to apply for reviews, under the EBR.<sup>24</sup>

Moreover, the textual content of EBR Registry Notices can vary considerably, as some Notices are drafted in a fulsome and informative manner, while others simply set out

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<sup>17</sup> ECO, Annual Report 2009-2010, pages 182 to 184. See also ECO, 2007-2008 Annual Report, pages 153 to 154.

<sup>18</sup> For example, the controversial 2006 regulation that exempted Ontario’s Integrated Power System Plan from the *Environmental Assessment Act* was not posted on the EBR Registry for public review/comment. See ECO, “Media Release: Third Decision on Government’s Electricity Plan Evades *Environmental Bill of Rights*, says Environmental Commissioner” (June 19, 2006). See also ECO, 2007-2008 Annual Report, page 154 regarding Ontario’s failure to post an EBR Notice in relation to its “Go Green” Action Plan on Climate Change.

<sup>19</sup> ECO, 2009-2010 Annual Report, page 190. See also ECO, 2008-2009 Annual Report, page 112; ECO, 2006-2007 Annual Report, page 160; and ECO, 2005-2006 Annual Report, pages 178 to 180.

<sup>20</sup> ECO, 2009-2010 Annual Report, pages 186 to 190. See also ECO, 2007-2008 Annual Report, pages 156 to 158.

<sup>21</sup> ECO, 2006-2007 Annual Report, page 157.

<sup>22</sup> ECO, 2009-2010 Annual Report, pages 177 to 178.

<sup>23</sup> *Ibid.*, page 195.

<sup>24</sup> ECO, 2008-2009 Annual Report, page 122.

sparse or inadequate descriptions of the proposal (or its environmental impacts).<sup>25</sup> Similarly, the ECO has found that some Ministry staff remain uncertain or unaware that interested members of the public are entitled to review the proponent's supporting documentation without being forced to file FOI requests.<sup>26</sup> This matter is further discussed below in the context of third-party appeals.

Furthermore, the ECO has expressed concern about incomplete EBR Registry postings in relation to permits or approvals issued by the Ministry of Natural Resources (MNR) for renewable energy projects on Crown lands or waters.<sup>27</sup> There is also ECO concern that certain MNR permits (i.e. under the *Endangered Species Act, 2007*) are not currently prescribed under O.Reg.681/94, which means that such permits are not subject to the public notice/comment and SEV requirements under the EBR (see below).<sup>28</sup> Moreover, the ECO has concluded that the MNR has failed to satisfy its consultation obligations under the EBR in relation to habitat policies developed under the *Endangered Species Act, 2007*, and guidelines developed to direct protected areas planning.<sup>29</sup>

Similar concerns were expressed in relation to exploration plans and permits under the amended *Mining Act*, and nutrient management plans under the *Nutrient Management Act*, none of which are currently prescribed as instruments under the EBR.<sup>30</sup> The ECO has also recommended that certain approvals under the *Niagara Escarpment Planning and Development Act* and *Crown Forest Sustainability Act* should be prescribed as instruments under the EBR.<sup>31</sup>

**Suggested Reform:** Further legislative and/or regulatory direction is required to ensure that members of the public receive clearer and more timely notification on the EBR Registry, and that they obtain longer comment periods which are commensurate with the significance of the proposal under consideration.<sup>32</sup> Similarly, EBR Registry Notices should consistently include either links to, or e-copies of, the supporting documentation submitted by proponents or relied upon by Ministry decision-makers.<sup>33</sup> In every case where ministry decision-makers conclude that Registry notice is not required due to statutory exemptions (see sections 29 to 33 of the EBR), then it should be obligatory upon the decision-makers to post an "exception notice" on the EBR Registry in order to provide clarity, traceability and accountability.<sup>34</sup> Moreover, there should be an open and accessible public consultation undertaken by the Ontario government in relation to O.Reg.681/94 in order to identify which additional permits, approvals, or licences should be prescribed as instruments under the EBR.

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<sup>25</sup> ECO, 2009-2010 Annual Report, page 184. See also ECO, 2006-2007 Annual Report, page 159; and ECO, 2005-2006 Annual Report, page 172.

<sup>26</sup> ECO, 2009-10 Annual Report, page 177.

<sup>27</sup> *Ibid.*, page 24.

<sup>28</sup> *Ibid.*, page 47.

<sup>29</sup> *Ibid.*, pages 47 to 48, 51, 77.

<sup>30</sup> *Ibid.*, pages 119 to 120, 134, 168

<sup>31</sup> ECO, 2006-2007 Annual Report, page 135.

<sup>32</sup> ECO Special Report, page 4.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, page 5.

**Issue #5: Fixing the “EA Exception” under Section 32 of the EBR**

**Concern:** Section 32 of the EBR created an “EA exception” to the public notice, comment, and third-party appeal rights which were established under Part II of the EBR. In short, this section provides that the Part II requirements do not apply to instruments which are necessary to implement undertakings which have been approved (or exempted) under Ontario’s *Environmental Assessment Act* (EAA). In 1992, the EBR Task Force rationalized this exception on the grounds that the opportunities for public participation then in existence under the EAA were “substantially compliant” with EBR requirements.<sup>35</sup> The EBR Task Force also drew comfort from the pending release of a major report by the Environmental Assessment Advisory Committee (EAAC) on long overdue reforms to Ontario’s EA program.<sup>36</sup>

Since the early 1990s, however, most of the EAAC’s suggested EA reforms have not been implemented by the Ontario government, and the EAAC itself was abolished in 1995. Moreover, the overbroad “EA exception” in section 32 has been used by ministries to deprive members of the public of their right to notice and comment “on many instruments that affect Ontario’s environment.”<sup>37</sup> In particular, the ECO has scrutinized public participation rights in a number of EA processes (i.e. individual and Class EAs), and concluded that “they are deficient in many respects compared to the EBR process for instrument approvals.”<sup>38</sup> In 2005, the Environment Minister’s EA Advisory Panel (Executive Group) agreed with the ECO that section 32 of the EBR was “being used to ‘shield’ important EA-related approvals from adequate public scrutiny, and that public participation rights are being frustrated as a result.”<sup>39</sup>

The Applicants further note that since the release of the EBR Task Force Report, there have been a number of retrogressive changes which have occurred within Ontario’s EA program (i.e., no public hearing referrals since 1995; proliferation of “scoped” EAs; inadequate consideration of need/alternatives; questionable public consultation; growing number of regulatory exemptions; demise of intervenor funding legislation in 1996; etc.).<sup>40</sup> Thus, the underlying assumptions made by the EBR Task Force about public participation in Ontario’s EA program are no longer valid, and it is now time to revisit and revise the section 32 “EA exception.”

The Applicants’ concern about the overuse or abuse of the section 32 exception is perhaps best exemplified by the 2009 refusal of the Ministry of Natural Resources (MNR) to classify and subject some of its instruments to Part II of the EBR. In essence, the MNR opined that the section 32 “EA exception” made the EBR wholly inapplicable

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<sup>35</sup> EBR Task Force Report, page 33.

<sup>36</sup> *Ibid.*

<sup>37</sup> ECO Special Report, page 5.

<sup>38</sup> ECO 2003-2004 Annual Report, page 53.

<sup>39</sup> EA Advisory Panel (Executive Group), *Improving Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Volume I, page 90 [EA Advisory Panel Report].

<sup>40</sup> The many problems which currently plague Ontario’s EA program have been succinctly described by the ECO in the 2007-08 Annual Report. See also Richard Lindgren and Burgandy Dunn, “Environmental Assessment in Ontario: Rhetoric vs. Reality” (2010), 21 J.E.L.P. 279.

to certain instruments under the *Endangered Species Act, 2007* and the *Provincial Parks and Conservation Reserves Act, 2006*. Although the MNR's questionable claim was strongly contested by CELA,<sup>41</sup> several of these instruments remain outside the scope of mandatory Part II requirements. In 2009, the ECO issued a Special Report which recommended that all instruments under the *Endangered Species Act, 2007* and regulations should be prescribed under the EBR.<sup>42</sup>

Similar concern has been expressed by the ECO in relation to MNR's ongoing reliance upon the EA exception to rationalize its refusal to post prescribed aquaculture licences for facilities in Great Lakes or Crown lands. Alarming, these facilities have been classified by MNR under the relevant Class EA as "Category A" projects, meaning that they are not subject to any public consultation under the EAA or the EBR.<sup>43</sup>

In relation to waste management projects subject to the new "screening process" established by O.Reg. 101/07 under the EAA, the ECO has commented that the EA exception effectively means that there will be a serious loss of transparency, and denial of public participation and appeal rights under the EBR, in the waste management context.<sup>44</sup>

**Suggested Reform:** Given the recent devolution of Ontario's EA program, the Applicants submit that the section 32 "EA exception" is no longer appropriate and should be deleted from the EBR in its entirety. In the alternative, if section 32 is to be retained within the EBR, then the provision should be substantially amended to provide that the EA exception only applies where the undertaking in question has been subject to a public hearing under the EAA. Such a recommendation was made by the EA Advisory Panel in 2005,<sup>45</sup> but it has not been acted upon to date by the Ontario government. Similar recommendations to amend section 32 have been made in various reports released by the ECO in recent years.<sup>46</sup>

### **Issue #6: Revisiting the Leave Test and Funding for Third-Party Appeals**

**Concern:** With respect to instruments, the third-party appeal is arguably one of the most important EBR mechanisms for protecting the environment and ensuring governmental accountability. Over the years, however, there has been considerable concern expressed about the relatively short timeframe (15 days) in which EBR leave-to-appeal applications must be served and filed (see section 40 of the EBR). As noted above, supporting documentation (and even the full text of the instrument itself) is not always posted with the decision notice on the EBR Registry, which makes it exceedingly difficult for citizens to obtain and review such documentation within 15 days. Similarly, the ECO has

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<sup>41</sup> Letter from CELA to the Hon. Donna Cansfield dated April 17, 2009 re EBR Registry No. 010-6162.

<sup>42</sup> ECO, *The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk* (February 2009), page 50, Recommendation 5.

<sup>43</sup> ECO, 2009-2010 Annual Report, pages 192 to 193.

<sup>44</sup> ECO, 2007-2008 Annual Report, pages 40 to 41.

<sup>45</sup> EA Advisory Panel Report, page 85, Recommendation 17.

<sup>46</sup> ECO Special Report, pages 5 to 6. See also ECO, 2007-2008 Annual Report, page 44.

expressed concern over the 15 day timeframe for filing a third-party appeal in respect of renewable energy approvals issued under the *Environmental Protection Act*.<sup>47</sup>

However, the MOE recently refused to consider even reviewing the possibility of extending the timeframe to 20 (or 30) days under the EBR, and the ECO has been properly critical of this unpersuasive refusal.<sup>48</sup> Since the ERT has no statutory jurisdiction to extend the deadline (even in hardship cases), some leave applications have been dismissed by the ERT due to filing delays rather than on the merits,<sup>49</sup> which, in the Applicants' view, tends to bring the EBR appeal process into disrepute. It is also clear that in many leave cases, the ERT has struggled to meet the 30 day deadline for its decision (see section 17 of O.Reg.681/94), and the ERT has often been forced to extend the decision deadline upon notice to the parties. In the Applicants' view, this situation reflects the legal, technical and scientific complexity of the issues typically raised in EBR leave applications (and governmental and proponent responses thereto), and calls into question the validity or appropriateness of the arbitrary 30 day decision deadline.

More fundamentally, the Applicants submit that it is highly questionable whether the section 41 leave test should remain intact within the EBR. The leave test has been characterized by Ontario courts as "stringent,"<sup>50</sup> and although cases such as the above-noted Lafarge litigation demonstrate that it is possible for prospective appellants to satisfy the leave test, the fact remains that most EBR leave applications have been dismissed over the years.

For example, a statistical review of all EBR leave applications brought during the first ten years of the EBR revealed that out of an estimated 14,000 instrument decisions issued by the MOE, only 54 were subject to EBR leave applications, and only 13 of these leave applications were granted (in whole or in part) over the decade.<sup>51</sup> While some leave applications are withdrawn prior to adjudication, the ECO has reported that leave to appeal was granted in only 21% of the applications decided between 1995 and 2003.<sup>52</sup> It thus appears that the leave test is inappropriately preventing concerned citizens from accessing the ERT, even though, by definition, their leave applications pertain to environmentally significant activities which require the issuance (or amendment) of prescribed instruments.

In addition, even for those individuals and groups which have been fortunate enough to obtain leave to appeal, there is no participant or intervenor funding available to help

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<sup>47</sup> ECO, 2009-10 Annual Report, page 18.

<sup>48</sup> *Ibid.*, pages 157 to 159. For more information about this matter, see also section 5.2.1.15 of the ECO's Supplement to the 2009-2010 Annual Report.

<sup>49</sup> See, for example, *Miller v. Ontario* (2008), 36 C.E.L.R. (3d) 305, where the ERT declined to hear a leave application that was not filed on time due to a courier delivery error. A motion for reconsideration dismissed: (2008), 37 C.E.L.R. (3d) 214 (ERT).

<sup>50</sup> *Smith v. Ontario* (2003), 1 C.E.L.R. (3d) 245 (Div. Ct.) at para.8; *Dawber v. Ontario* (2008), 36 C.E.L.R. (3d) 191 (Div. Ct.) at para.41.

<sup>51</sup> Birchall Northey, *Legal Review of the EBR Leave to Appeal Process* (September 2004), page (i). This paper was prepared as part of the ECO's 10<sup>th</sup> anniversary review of the EBR.

<sup>52</sup> ECO, *Celebrating the 10<sup>th</sup> Anniversary of the EBR and the ECO* (2004), page 11.

defray the cost of public interest participation under the EBR. In such cases, the costs of participating in ERT proceedings have often been extensive if not unduly prohibitive. In the Lafarge litigation, for example, the successful leave-to-appeal applicants were forced to bear legal and expert costs in excess of \$200,000, which were incurred before the main hearing was terminated by the proponent's withdrawal of the impugned instruments.<sup>53</sup>

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

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

More importantly, the leave test in section 41 should be deleted so that it no longer serves as an unreasonable barrier to citizen access to the ERT. In the Applicants' view, if instrument-holders continue to enjoy an unfettered ability to file an instrument appeal as of right, then so should neighbours or other persons who are interested in, or potentially affected by, the impugned instrument. In the unlikely event that a frivolous, vexatious or *ultra vires* third-party appeal is filed, then the ERT has authority to control its process and to summarily dispose of such appeals without a hearing.<sup>54</sup>

In making these submissions, the Applicants are fully aware that the EBR Task Force had suggested that there should be a "preliminary merits" screen for third-party appeals.<sup>55</sup> However, there was no consensus among EBR Task Force members on the actual wording of the leave test, and, in fact, the draft EBR within the Task Force Report contained no leave test at all. Thus, it cannot be seriously suggested that the EBR Task Force recommended or supported the "stringent" wording that was ultimately inserted into Part II of the EBR by the Ontario Legislature.<sup>56</sup> In any event, the dismal track record regarding EBR leave applications over the past 17 years amply demonstrates that the current leave test is largely unworkable, unduly complicated, and unnecessarily restrictive. It is therefore time to reconsider the public policy rationale for even having a leave test in the EBR at all.

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<sup>53</sup> *Baker v. Ontario* (2009), 43 C.E.L.R. (3d) 285 (ERT). A motion for reconsideration of this cost ruling was dismissed: see (2009), 47 C.E.L.R. (3d) 118 (ERT).

<sup>54</sup> See section 4.6 of the *Statutory Powers Procedure Act* and Rules 119 to 123 of the ERT Rules of Practice (July 2010).

<sup>55</sup> EBR Task Force Report, page 55.

<sup>56</sup> In the Lafarge litigation, the Divisional Court characterized the wording of section 41 as "unusual": see *Dawber v. Ontario* (2008), 36 C.E.L.R. (3d) 191 (Div. Ct.) at para.40.

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

With respect to activities that may be subject to "permit by rule" standards rather than individual approvals, the Applicants submit that before proponents are allowed to register with the MOE and proceed with their projects, the proposal should be subject to Part II of the EBR (i.e. Registry notice, public notice/comment, etc.).<sup>57</sup> The Applicants recognize that in order to do so, it may be necessary to amend the definition of "instrument" under the EBR. Similarly, the Applicants submit that the "instrument" definition should also be amended to clarify that Part II of the EBR is fully applicable to industrial proposals to alter, waive or vary provincial air pollution standards in O.Reg.419/05 (see sections 32 to 37 of the regulation, which allow for the establishment of site-specific contaminant concentration standards on a case-by-case basis). In our view, even if industrial proponents cannot (and likely will not) appeal their requested alterations to the ERT, interested or potentially affected residents should be able to utilize the EBR's third-party appeal rights where MOE Directors decide to grant regulatory alterations.

The Applicants further submit that the establishment of a participant or intervenor funding program is long overdue under the EBR in order to facilitate meaningful public usage of the review, comment and appeal provisions of the EBR in relation to instruments.<sup>58</sup> In 2005, the ECO agreed that "this may be an appropriate moment to consider some form of participant funding under the EBR," and suggested that this could initially take the form of a pilot project.<sup>59</sup> However, the Applicants submit that Ontario has already gleaned years of experience under the former *Intervenor Funding Project Act*, and that the appropriate question is not whether funding should be available under the EBR, but how such funding programs will be designed and implemented under the EBR.

### **Issue #7: Enhancing the Powers of the Environmental Commissioner**

**Concern:** Part III of the EBR confers a number of important powers upon the ECO to review and collect information on various issues (see section 57), and to prepare annual and special reports to the Ontario Legislature on EBR matters, energy conservation, and greenhouse gas emissions (see sections 58, 58.1 and 58.2). While the ECO's review and reporting responsibilities have increased under the EBR in recent years, there remains

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<sup>57</sup> CELA, CIELAP and Ecojustice, *Modernizing Environmental Approvals (EBR Registry No. 010-9143)* (April 16, 2010), pages 10 to 14.

<sup>58</sup> CELA, *EBR Registry #XQ04E0002: Looking Forward: The EBR Discussion Paper* (January 24, 2005), page 9.

<sup>59</sup> ECO Special Report, page 9.

concern that the ECO's evidence-gathering powers have remained unchanged since 1993. For example, although the ECO may examine a public servant under oath (and require him/her to produce documents for the examination: see section 60), the EBR does not compel prescribed Ministries to cooperate with the ECO, or to provide disclosure or production upon request. In some instances, the ECO has lamented the lack of cooperation that has been received from certain Ministries in recent years.<sup>60</sup>

Interestingly, sections 57 to 58.2 of the EBR do not expressly empower the ECO to make recommendations in Annual or Special Reports filed with the Ontario Legislature. Traditionally, the ECO has interpreted its reviewing/reporting powers as including the authority to make recommendations, and over the past 17 years the ECO's reports have included numerous procedural and substantive recommendations (including those relating to EBR reform). However, the EBR does not legally require the MOE (as the Ministry responsible for administration of the EBR) to actually respond to any of the ECO's important and well-founded recommendations. The result is that many key ECO recommendations languish for years without implementation or even a formal acknowledgement or response by prescribed Ministries to the Ontario Legislature:

Thus, accountability for government failures is primarily political. To enable greater political pressure to be brought to bear, the Act establishes the office of the Environmental Commissioner, whose duties include monitoring the statute's implementation and reporting any deficiencies to the Legislature. However, the Environmental Commissioner has few powers and to date, despite the Commissioner's scathing reviews of government inadequacies and reports of blatant violations of the Ontario EBR, it seems that the legislature in receipt of those reports is unmoved.<sup>61</sup>

**Suggested Reform:** As recommended by the ECO in 2005, the EBR should be amended to impose a positive legal duty upon Ministry staff to provide information and produce documents relevant to the matters under review by the ECO.<sup>62</sup> These new provisions could be modeled on the disclosure/cooperation obligations imposed upon Ministries and Crown agencies under sections 10 to 11.2 of the *Auditor General Act*. When analyzing the nature and scope of the ECO's current powers, consideration should also be given to creating further or better discovery mechanisms or compliance tools within the EBR to empower the ECO to investigate or enjoin governmental conduct that contravenes the EBR.

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

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<sup>60</sup> ECO, 2008-2009 Annual Report, page 112.

<sup>61</sup> Elaine Hughes & David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999), 30 Ottawa L.R. 229, para.80.

<sup>62</sup> ECO Special Report, page 7.

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

**Issue #8: Prescribing Additional Ministries and Statutes under the EBR**

**Concern:** The overall objective in prescribing Ministries under the EBR is to ensure that all Ministries making environmentally significant decisions are caught by, and subject to, the EBR. Since 1993, however, a number of originally prescribed Ministries are no longer subject to the EBR, and the Ontario government has failed or refused to prescribe other key or newer Ministries whose decisions may affect the environment and public resources. In turn, these omissions have prompted many citizens to file Applications for Review to request prescribing Ministries which were outside the scope of the EBR coverage. More recently, the ECO has criticized the exclusion of the Ministry of Finance as a prescribed ministry under the EBR, particularly since this Ministry oversees the administration of the province's Greenhouse Gas Reduction Fund.<sup>63</sup> Indeed, the very first Special Report of the ECO addressed the Ontario government's ill-advised decision in 1996 to suddenly remove the Ministry of Finance as a prescribed Ministry under the EBR.<sup>64</sup>

Similarly, the ECO has expressed concern about environmentally significant statutes which have not yet been prescribed under the EBR. For example, the ECO has noted that the continuing exclusion of the *Drainage Act* from EBR coverage means that citizens are unable to file Applications for Review or Investigation, even where provincially significant wetlands are adversely affected by drainage activities.<sup>65</sup> Similarly, the ECO has criticized the Ontario government's long-standing refusal to fully prescribe the *Building Code Act, 1992* under the EBR, particularly since this statute is now used to govern green building materials and energy technologies.<sup>66</sup> Similarly, the recently enacted Bill 72 (*Water Opportunities and Water Conservation Act, 2010*) amends the *Building Code Act* in relation to water conservation standards. More generally, the ECO has also lamented the Ontario government's lengthy delay in prescribing newly passed environmental laws under the EBR.<sup>67</sup>

**Suggested Reform:** In consultation with the ECO, stakeholders and the public at large, the Ontario government must review and revise O.Reg.73/94 forthwith to ensure that all

<sup>63</sup> ECO, 2009-10 Annual Report, page 29. On the general topic of prescribing Ministries and statutes in a timely manner under the EBR, see also ECO, *Supplement to the 2009-2010 Annual Report*, pages 357-72.

<sup>64</sup> ECO, *Ontario Regulation 482/95 and the EBR* (January 17, 1996), pages 4 to 7.

<sup>65</sup> ECO, 2009-10 Annual Report, pages 109, 112.

<sup>66</sup> *Ibid.*, page 169.

<sup>67</sup> ECO, 2007-2008 Annual Report, at pages 165 to 166. See also ECO, 2006-2007 Annual Report, page 170; and ECO, 2005-2006 Annual Report, page 186.

relevant Ministries and Crown agencies are prescribed by regulation under the EBR. As a starting point, the Applicants suggest that the following Ministries or agencies should become prescribed under the EBR: Ministry of Finance; Ministry of Health Promotion; Ministry of Education;<sup>68</sup> Algonquin Forest Authority;<sup>69</sup> Ontario Realty Corporation; Ontario Power Authority; and Ontario Power Generation.

A similar consultation exercise should be carried out in relation to O.Reg. 681/94 in order to identify other provincial statutes which should be prescribed for EBR purposes. As a starting point, the Applicants suggest that the following statutes should be fully prescribed under the EBR: *Drainage Act*; *Far North Act, 2010*; *Building Code Act, 1992*; and *Places to Grow Act*.<sup>70</sup>

In the future, as new Ministries are created (or merged), and as new statutes are passed, the EBR should compel governmental officials to prepare a Cabinet submission, and to undertake public consultation, on whether the new Ministry or statute should be prescribed under the EBR. Ideally, this determination should be made within 3 months.

#### **Issue #9: Improving Responses to Applications for Reviews and Investigations**

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

For example, the ECO recently criticized the distressing tendency among prescribed Ministries to refuse applications for investigation on the grounds that the Ministries have already internally commenced an “investigation” of the matter.<sup>71</sup> As pointed out by the ECO, even where such claims are true, there are public interest benefits in having EBR safeguards apply to such applications in order to ensure timeliness, adequacy, and accountability.<sup>72</sup>

The ECO has also criticized the Ministry of Municipal Affairs for rejecting every single Application for Review that it has ever received under the EBR. As noted by the ECO, summary dismissal of duly filed Applications for Review (and serious issues raised

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<sup>68</sup> ECO, 2006-2007 Annual Report, page 185. See also ECO, 2005-2006 Annual Report, page 128.

<sup>69</sup> ECO, 2005-2006 Annual Report, page 131.

<sup>70</sup> ECO, 2007-2008 Annual Report, page 167.

<sup>71</sup> ECO, 2009-2010 Annual Report, page 162.

<sup>72</sup> *Ibid.*

therein) does not constitute good public policy.<sup>73</sup> The ECO has also expressed concern about unwarranted delays by prescribed Ministries in their preliminary responses to Applications for Review.<sup>74</sup>

**Suggested Reform:** Parts IV and V of the EBR should be amended to clarify that nothing prevents prescribed Ministries from granting Applications for Review or Investigation, even if the subject-matter of the application is already known to, or under consideration by, the Ministries. It would also be helpful to restrict (or even eliminate) the grounds upon which Ministries' preliminary responses to Applications for Review or Investigation may be delayed beyond the prescribed timeframes under the EBR. For both types of Applications, the EBR should prescribe 60 days as the deadline for the Ministry's preliminary response, and should further specify that it is a contravention of the EBR for Ministries to provide their preliminary responses after the prescribed deadline (or, alternatively, more than 30 days after the deadline if an extension was invoked by the Ministry).

### **Issue #10: Facilitating Access to Environmental Justice**

**Concern:** When enacted in 1993, the EBR attempted to strike a balance between political accountability and judicial accountability for environmental decision-making, standard-setting and permit-issuing in Ontario. In this regard, the EBR Task Force reported that "political accountability is at the foundation of the proposed EBR,"<sup>75</sup> but cautioned that meaningful judicial accountability is also required:

Is political accountability enough? The Task Force is of the opinion that in some circumstances, political accountability may be insufficient. Government's failure to protect the environment and, in particular, our public resources, should involve more than political risk. It should result in the ability of the public to trigger an examination of government's failure to protect the environment...

The Task Force, in this section, has recommended two significant reforms concerning access to the courts for protection of the environment. The reform proposed with respect to public nuisance removes an impractical barrier to our court system... The Task Force's goal in creating the new cause of action for harm to a public resource was to develop a method by which the public could act to hold the government to its responsibility to protect public resources.<sup>76</sup>

Despite the Task Force's laudable intentions, the Applicants submit that the EBR track record over the past 17 years amply demonstrates that the political accountability mechanisms in the EBR (i.e. SEVs, the EBR Registry, etc.) have not fully prevented acts or omissions which result in environmental degradation or resource depletion, nor have

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<sup>73</sup> ECO, 2008-2009 Annual Report, page 18.

<sup>74</sup> ECO, 2006-2007 Annual Report, pages 135, 143 to 144. See also ECO, 2005-2006 Annual Report, pages 138, 157.

<sup>75</sup> EBR Task Force Report, page (vi).

<sup>76</sup> *Ibid.*, pages 83 to 84, 107 to 108.

they deterred governmental non-compliance with EBR requirements. At the same time, the EBR mechanisms for judicial accountability (i.e. judicial review, statutory cause of action, etc.) have, in most instances, been generally ineffective or almost entirely non-existent. Accordingly, the Applicants submit that it is now time to reconsider whether there is an imbalance between political and judicial accountability within the EBR, and if so, to undertake appropriate measures to enhance public access to the courts and tribunals under the EBR.

In 2005, for example, the ECO endorsed public interest concerns that the new cause of action (section 84) was “essentially useless” because it was burdened with too many conditions precedent and other restrictive provisions.<sup>77</sup> In the Applicants’ view, these statutory limitations undermine the availability and utility of the new cause of action, and they undoubtedly explain why only one action has ever been brought under section 84 over the past 17 years. On this point, the ECO agreed that “the test for bringing an action in harm to a public resource is too strict.”<sup>78</sup>

**Suggested Reform:** With respect to the new cause of action, the ECO has identified potential reforms which could be considered by the Ontario Legislature (i.e. deleting the need for plaintiffs to demonstrate statutory contraventions or “significant” harm), but the ECO correctly notes that such reforms will be “very complex” and likely require consequential amendments to other EBR provisions.<sup>79</sup> The Applicants would further suggest that consideration be given to removing the filing of an Application for Investigation (and waiting for an answer from government) as the precondition to commencing the section 84 action.<sup>80</sup> In short, section 84 needs to be transformed into a meaningful “citizens’ suit” provision which enables Ontarians to commence a civil action in respect of breaches of environmental laws and regulations. As a potential model for this approach, the Applicants would point to the new civil action contained within the proposed federal EBR.<sup>81</sup>

The Applicants further submit that the constraints on judicial review imposed by section 118 should be wholly removed from the EBR. In our view, where the government has failed to meet its mandatory obligations under the EBR in relation to Acts, regulations or policies, residents should have an unfettered ability to seek judicial review of the non-compliance, and to request appropriate orders to remedy the non-compliance. If the rule of law is to fully apply to matters under the EBR, then the important right to seek judicial review should not be arbitrarily limited to instruments (see section 118(2)). In short, the privative clause in section 118 is an anachronism which no longer belongs in the EBR, particularly in light of the standard of review analysis now mandated by the Supreme Court of Canada.<sup>82</sup> The Applicants further note that the proposed federal EBR confers a

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<sup>77</sup> ECO Special Report, page 7.

<sup>78</sup> *Ibid.*, page 8.

<sup>79</sup> *Ibid.*, pages 8 to 9.

<sup>80</sup> CELA, *EBR Registry #XQ04E0002: Looking Forward: The EBR Discussion Paper* (January 24, 2005), page 6.

<sup>81</sup> Bill C-469, section 23.

<sup>82</sup> See, for example, *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 2009.

broad public right of judicial review of governmental acts or omissions relating to the environment.<sup>83</sup>

In addition, the Applicants submit that it is time to expressly entrench the “public trust doctrine” into the EBR. In essence, this doctrine posits that governments do not “own” public resources, but instead have a positive (or fiduciary) duty to hold and manage public resources in trust on behalf of the public at large. Where it is alleged that governments have failed to properly discharge this duty, then the trust beneficiaries – members of the public – should be entitled to go to court to seek appropriate remedies.<sup>84</sup>

The public trust doctrine was one of the legal options examined by the EBR Task Force in the early 1990s,<sup>85</sup> but the doctrine was not included in the EBR as enacted, presumably because the Task Force anticipated that the SEV requirements and other political accountability mechanisms would effectively prevent environmentally unsound decisions by government in relation to public resources. As described above, however, it appears that the existing EBR provisions have been inadequate to achieve this important societal objective. In these circumstances, the Applicants submit that it is in the public interest to now entrench the public trust doctrine into the EBR. On this point, we note that the recently proposed federal EBR includes provisions which incorporate the public trust doctrine.<sup>86</sup>

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For the foregoing reasons, it is readily apparent that a large number of substantive and procedural issues have arisen in the first 17 years of EBR experience. Accordingly, the Applicants submit that these and other relevant issues should be formally reviewed by MOE in an open and public process, with the express objective of developing and implementing the reforms necessary to address the various issues, concerns and opportunities outlined above.

### **(c) MOE Statement of Environmental Values**

In determining whether the public interest warrants the requested review of the EBR, subsection 67(2)(a) of the EBR directs the Minister to consider the relevant SEV.

In this case, it is the MOE that has been assigned responsibility for the administration of the EBR: see Order-in-Council 1709/2003. The MOE’s current SEV clearly states that the Ministry’s mandate is ensure “clean and safe air, land and water that contributes to healthy communities, ecological protection, and environmentally sustainable development for present and future generations.” In carrying out this mandate, the SEV commits the MOE to a number of important environmental principles, such as the ecosystem approach, precautionary principle, cumulative effects analysis, sustainable development, adaptive management, pollution prevention, public consultation, and other

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<sup>83</sup> Bill C-469, section 16.

<sup>84</sup> Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995), pages 122 to 123.

<sup>85</sup> EBR Task Force Report, pages 84 to 85.

<sup>86</sup> Bill C-469, sections 6, 9(3) and 16.

matters. In the Applicants' view, carrying out the long overdue public review of the EBR is wholly consistent with the commitments and principles entrenched within the MOE's SEV.

**(d) Absence of Periodic Review**

In determining whether the public interest warrants the requested review of the EBR, subsection 67(2)(c) of the EBR directs the Minister to consider whether "the matters sought to be reviewed are otherwise subject to periodic review."

At the present time, aside from using Part IV of the EBR, there are no other mandatory means for ensuring the formal public review of the EBR. For example, there is no built-in mechanism for an automatic or periodic review of the EBR by the Ontario Legislature, or by special or general legislative committees. While the MOE's SEV indicates that the Ministry internally reviews EBR implementation and interacts with the ECO on this matter, there are no legally guaranteed opportunities for stakeholders or the public at large to participate in an open, accessible and transparent review of the EBR or the regulations.

Acting on its own initiative, the ECO used the 10<sup>th</sup> anniversary of the EBR to convene proceedings which identified potential ways to improve and strengthen the EBR. However, to the Applicants' knowledge, the recommendations flowing from the ECO proceedings in 2005 have not been acted upon or adopted by the Ontario government to date.

Accordingly, the Applicants submit that the requested review of the EBR should be undertaken because there is no other formal public mechanism in place to systematically review or revise the EBR in a public and traceable manner.

**EVIDENCE SUPPORTING THE REQUESTED REVIEW**

The documentary evidence supporting the requested review of the EBR is attached hereto as follows:

<b><u>Tab</u></b>	<b><u>Description of Document</u></b>
1.	ECO Special Report, <i>Looking Forward: The Environmental Bill of Rights</i> (March 1, 2005)
2.	ECO Discussion Paper, <i>The Environmental Bill of Rights at 10: The Potential for Reforming the Law</i> (June 16, 2004)
3.	CELA, <i>The Environmental Bill of Rights Turns 10 Years-Old: Congratulations or Condolences?</i> (June 16, 2004)
4.	Stratos Inc, <i>ECO 10 Year Review of the EBR: Results of the Pre-Consultation Questionnaire</i> (August 30, 2004)
5.	ECO Discussion Paper, <i>Looking Forward: The Environmental Bill of Rights</i> (November 2004)

6. ECO and LURA Consulting, *EBR Law Reform Workshop June 16, 2004: Meeting Report (Draft)* (October 2004)
7. ECO, *Celebrating the 10<sup>th</sup> Anniversary of the EBR and the ECO* (2004)
8. CELA, *EBR Registry #XQ04E0002: Looking Forward: The EBR Discussion Paper* (January 24, 2005)
9. Excerpts from ECO Annual Reports & Special Reports (2004 to 2010)
10. Excerpts from the 1992 Report of the Minister's Task Force on the EBR
11. Letter from CELA to the Hon. Donna Cansfield dated April 17, 2009 re EBR Registry No. 010-6162
12. Letter from CELA to the Hon. John Gerretsen dated June 24, 2008
13. Letter from the Hon. John Gerretsen to CELA dated August 12, 2008
14. Excerpts from EA Advisory Panel (Executive Group), *Improving Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Volume I
15. Excerpts from Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery, 1995)
16. Excerpts from CELA, CIELAP and Ecojustice, *Modernizing Environmental Approvals (EBR Registry No. 010-9143)* (April 16, 2010)
17. Lynda Lukasik, David McRobert & Lisa Shultz, *Public Participation Rights, Environmental Policy Struggles & E-Democracy: Lessons Learned During the First 11 Years of Ontario's Environmental Bill of Rights* (November 2006)

**CELA Publication 761**