



## The *Environmental Bill of Rights* at 10: The Potential for Reforming the Law

A Discussion Paper for the  
*EBR* Law Reform Workshop  
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This paper has been prepared for a workshop to be hosted by the Environmental Commissioner of Ontario (ECO) on June 16, 2004 at the Faculty Club, University of Toronto. The purpose of the paper is to provide background information and promote discussion. The paper may be revised at a later date to reflect the comments advanced at the workshop. For this reason, it is still considered a working draft. It should not be cited or referenced without contacting the ECO beforehand. Any comments or questions regarding this paper should be directed to Legal staff at the ECO.



## **The Environmental Bill of Rights at 10: The Potential for Reforming the Law**<sup>1</sup>

### **Background**

In February 2004, Ontarians celebrated the tenth anniversary of the *Environmental Bill of Rights (EBR)*. The end of the first decade of these legislated environmental rights in Ontario is an excellent opportunity to pause and reflect on the implementation of the *EBR* thus far, and to consider possible options for amendments and improvements to the law. The Environmental Commissioner of Ontario (ECO) is facilitating a process through which Ontario residents may participate in exploring avenues for reform of the legislation.

During the first ten years of the *EBR*'s existence, only a handful of minor legislative amendments were made. There have been significant changes to the framework of environmental laws, regulations and policies in Ontario during that time. Also during this decade, information technology has advanced dramatically, changing the context for participation processes instituted by the *EBR* such as the Electronic Registry. New issues related to the *EBR* have arisen in the past ten years that were never contemplated by the original Environmental Bill of Rights Task Force. Some provisions included in the *EBR* have not worked effectively to further the goals of the legislation.

Public participation in environmental decision-making in Ontario has evolved over the past couple of decades. Before the enactment of the *EBR*, the Ontario government was beginning to conduct more meaningful public participation. Formal legislated requirements for public consultation were still rare prior to the *EBR*, but informal consultation efforts concerning major regulations or policies proposed in the late 1980s and early 1990s were often substantial.<sup>2</sup> At the time, the Ministry of Environment and Energy had developed a formal guideline for public consultation activities and conducted extensive public consultations on major policy initiatives such as the 1986 Municipal-Industrial Strategy for Abatement, the 1987 Clean Air Program, and the 1991 Waste Reduction Action Plan.<sup>3</sup>

The members of the Task Force on the *EBR* clearly intended that the *EBR* notice and comment provisions become the minimum standard for public participation in environmental decision-making. In the December 1992 *Report of the Task Force on the Ontario Environmental Bill of Rights – Supplementary Recommendations*, the Task Force emphasized that

. . . the purpose of the Environmental Registry is to provide a minimum level of reasonable notice to the public of proposed decisions that might have a significant affect [sic] on the environment. . . . It is contemplated that other forms of notice will be used from time to time as well to ensure appropriate participation in significant environmental decision-making. It is not intended that the Registry displace existing legislative requirements for notice that meet or exceed the Bill's standards.<sup>4</sup>

Intended as a “floor” for public consultation, the *EBR* quickly seemed to become the “ceiling,” and was not even met at times. In October 1996 the ECO issued a special report in response to the Ontario government’s “making remarkable changes to environmental safeguards either behind closed doors or with minimal public participation...[in a] clear and unacceptable departure from the goals and purposes of the *Environmental Bill of Rights*.”<sup>5</sup> The special report provided numerous examples of environmentally significant decisions that had not even been posted on the Registry nor open to any other public consultation. When proposals were posted on the Registry, ministries often failed to provide adequate time, information and opportunity to comment, or failed to assess and report the environmental effects of the proposed changes.<sup>6</sup>

Public consultation on environmentally significant decisions has improved in recent years from this low point. One example of extensive public participation beyond the minimum required by the *EBR* was the consultation on Ontario’s Living Legacy initiative conducted by the Ministry of Natural Resource (MNR). Announced in March 1999, this was a large and complex public consultation exercise that commenced in 1997, with more than 8,000 comments submitted through the Registry. MNR has continued to use the Registry while implementing this initiative.<sup>7</sup>

The purpose of this paper is to identify relevant and needed amendments to the *EBR* that would have the potential to make it more effective in ensuring public engagement and participation in environmentally significant decision-making in the present-day context, and thus, to enhance accountability and transparency. The potential changes proposed in this paper pertain mostly to the legislation itself, rather than regulations made under the *EBR*. The paper is structured according to the order of the provisions in the Act, and divided into three sections:

- Registry notice and comment provisions;
- leave to appeal, ECO, review and investigation provisions; and
- litigation rights and judicial review provisions.

Also, some related topics will be addressed through a series of parallel papers that are being prepared for the ECO by outside counsel.

## **Registry Notice and Comment Provisions**

### Notices for Exceptions in Instrument Classification Regulation

In certain circumstances, the *EBR* does provide for the publication of exception notices on the Registry. When a ministry invokes an emergency exception under s. 29 or an exception due to equivalent public participation under s. 30, it is required to post an exception notice on the Registry under ss. 29(3) or ss. 30(3). Public notice is required in these cases to advise the public of the nature of the emergency that prevented an opportunity for notice and comment, or to advise the public of alternate opportunities for public participation that made Registry notice unnecessary.

Other types of exceptions do not require an exception notice. Section 22 provides for public notice of proposals for instruments classified under the *EBR*. Classified instruments are listed in the instrument classification regulation under the *EBR*, O. Reg. 681/94. In a number of cases, exceptions to the notification requirements for certain instruments are included in the classification regulation. For example, a proposed approval for discharging contaminants under ss. 53(1) of the *Ontario Water Resources Act (OWRA)* is a Class II instrument and requires public notice. However, there is an exception to this instrument notice requirement if there is already a ss. 53(1) approval relating to that discharge point and there is no increase in the contaminant discharge.

Therefore, there is a legitimate exception to the requirement to post ss. 53(1) approvals on the Registry, but it is difficult to know whether an unposted approval was subject to the exception, or simply not posted in error. It would be necessary to obtain a copy of the certificate of approval as well as any prior approvals to determine if the instrument was subject to notice on the Registry. This is inefficient and time-consuming. By the time an error was found, it would likely be too late to post the proposed instrument, since the permit might be issued and construction or implementation of the project proceeding.

It is important that the public receive notice of instruments not posted because of exceptions in the classification regulation. Otherwise, these instruments may be perceived as missing from the Registry without reason. There is a real potential for confusion and uncertainty with respect to classified instruments that are not posted due to this reason. It would be beneficial to extend the requirement to post exception notices in these cases.

*Potential Amendment:*

Add a subsection to s. 22 providing that an exception notice be posted for instrument approvals excepted under O. Reg. 681/94 as soon as reasonably possible after the decision is made, including reference to the type of exception being invoked.

*EAA-Related Exceptions*

Ss. 32(1) allows for an exception to the requirement to give notice of proposed instruments for comment on the Registry where it is the minister's opinion that issuing, amending or revoking the instrument would be a step toward implementing an undertaking or other project approved by a decision made under the *Environmental Assessment Act (EAA)* (ss. 32(1)(b)), or by a decision made by a tribunal under an Act after affording an opportunity for public participation (ss. 32(1)(a)). Ss. 32(2) extends that exception to instruments that implement an undertaking exempted from environmental assessment (EA) by a regulation under the *EAA*. Ss. 32(3) extends these EA exception provisions to projects planned using Class EAs.

The intent behind providing an exception from *EBR* requirements for instruments related to EA processes was to avoid duplication of public consultation. The *EAA* sets out a

decision-making process used by many provincial government ministries and municipalities to promote good environmental planning. The members of the Task Force on the *EBR* felt that applicants for environmentally significant instruments should not have to conduct public consultation under two pieces of legislation that, in theory, had similar requirements. In the July 1992 *Report on the Task Force on the Ontario Environmental Bill of Rights*, the Task Force wrote that “[g]iven the opportunity for extensive public participation already present in the *Environmental Assessment Act*, later decisions which are required to implement approved undertakings under the Act...are considered to be substantially compliant with the minimum requirements of the *Environmental Bill of Rights*.”<sup>8</sup>

The ECO addressed issues of accountability and transparency related to the *EAA* exception in our 2001-2002 annual report. Research showed that public participation rights on environmentally significant instruments issued through *EAA* processes are not consistently comparable to those provided by the *EBR*. By applying the s. 32 exception broadly, ministries are depriving the public of their right to notification and comment on many instruments that affect Ontario’s environment. This exception applies to many proposals covered by the *EAA*, such as municipal water taking permits, sewage and water works, provincial roads, and the use of natural resources or public land.<sup>9</sup>

The Task Force on the *EBR* expected that, in most cases, the environmental impacts of specific instruments would be considered and addressed as part of an *EAA* approval. The Task Force recognized the challenges associated with integrating the *EBR*’s public participation regime with the consultation processes required under the *EAA*, and wanted to ensure that proponents would not be subject to duplicative processes.<sup>10</sup> However the EA process was different at the time of the Task Force’s report, and MOE’s approach to public hearings on potentially deficient undertakings also has shifted. For example, following significant 1996 amendments to the *Environmental Assessment Act*, only two EAs have been referred for a hearing (five years ago in December 1997), and only one of these resulted in a decision.<sup>11</sup> This decision dealt only with a few issues as defined in scope by the minister.<sup>12</sup>

However, the ECO discovered many cases where these *EAA* approvals or exemptions look only at preliminary planning for a project and do not address the specific environmental controls that an instrument would put into effect. For example, the public might be notified locally that a municipality is making changes to the water supply (although there would be no notice at all for certain projects depending on their Class EA category), but would not likely be told the precise location and volume of the proposed water taking.<sup>13</sup> Also, the EA process is structured such that the proponent conducts public consultation. Thus, comments on the planning process and related environmental issues are provided directly to the proponent for review rather than to MOE. In contrast, when an instrument is posted on the Registry, public comments are received by the ministry making the decision. Similarly, there is no equivalent to the *EBR* third-party leave to appeal provision for these instruments, as this is lost under s. 32. The EA bump-up process is a request to the ministry for an individual EA (instead of a Class EA) or a more stringent EA project, and is almost always denied.

In order to understand the deficiencies in public consultation that may result from the s. 32 exceptions, it is useful to address specific examples in each category of exception. There are probably hundreds of examples of instruments that did not receive adequate public consultation under the *EAA* or *EBR* due to the exception under s. 32. A few selected examples are considered below. The ECO tends to become aware of examples only when MOE has posted them voluntarily as information or exception notices.

As noted above, instruments may be excepted from the requirements of Part II of the *EBR* under ss. 32(2) if they constitute a step toward implementing an undertaking exempted from the EA process by a regulation under the *EAA*. Therefore, many undertakings are excepted from the *EBR* because they have been exempted from the *EAA* by regulation. Unfortunately, this has led to a situation where important, environmentally significant decisions are made without any formal requirement for public consultation.

In a 1999 example, MOE posted exception notices with 30-day comment periods in relation to program approvals for Ontario Hydro's Pickering and Darlington nuclear generating stations (Registry #IA9E0912 and IA9E0913). In these notices, MOE claimed an exception under s. 32. The ECO determined that, in relation to Pickering, MOE was relying on an exemption in s. 4 of Regulation 334, R.R.O. 1990, the general regulation under the *EAA* – the undertaking was grandparented because it was begun before the *EAA* came into effect in 1976. Darlington, on the other hand, was specifically exempted from the *EAA* by a regulation passed in 1977. Therefore, in not posting these proposed program approvals as regular Registry notices, MOE correctly relied on the fact that both of these facilities were exempted from the *EAA* in 1976 and 1977. However, it is questionable that exemptions under the *EAA* are considered to be standing exemptions that never run out. It is debatable whether that was the intent when these exemptions were originally made, especially given that these decisions are now effectively exempted from both the *EAA* and the *EBR*. In many cases, no consultation of any kind is carried out for instruments exempted under the *EAA*. While the exemption of undertakings by a ministry or public body from the requirements of an individual EA may have been reasonable, excepting instruments that carry out these undertakings from the notice and appeal provisions of the *EBR* has created a paradox that is perceived as unfair by the public. The ECO shares this concern.

There are a number of problems with MOE's use of exception and information notices to collect public comments. Although this practice facilitates some public consultation, it does not provide the public with a right to seek leave to appeal under the *EBR*. The ministry is not legally required to consider public comments or prepare a decision notice. Also, MOE need not share comments received pursuant to an information notice with the ECO. This use of exception and information notices to solicit comments was not foreseen by the *EBR* Task Force or the legislature, and it is not explicitly permitted by the Act. Furthermore, the minimum 30-day comment period required for regular Registry notices need not be met when comment periods are offered in exception and information notices. For example, a May 2004 information notice on the Registry provided a

comment period of five days that ran over a weekend (Registry #XA04E0005). (For more on information notices, please see the discussion of s. 6 in Appendix A.)

Another category of exceptions occurs under ss. 32(1)(a), as it excepts instruments that implement a project approved by a tribunal decision following an opportunity for public participation. However, the opportunity for public participation provided in the course of a tribunal hearing may not give the public an adequate opportunity to be involved.

For example, MOE posted notice of a proposed certificate of approval for air emissions under s. 9 of the *Environmental Protection Act (EPA)* in December 1996 to permit Gary Steacy Dismantling Ltd. to operate a 24-hour on-site metals reclamation furnace to destroy low-level PCBs (Registry #IA6E1779). Posted in January 1998, the decision notice stated that approval had been granted following a hearing before the Environmental Assessment Board (EAB), and therefore no right to seek leave to appeal existed with respect to this instrument. This hearing concerned a proposed certificate of approval for the company's waste disposal site under s. 27 of the *EPA* that was referred to the EAB under s. 30 of the *EPA*. The s. 27 approval was never posted on the Registry, and the ECO considered this a serious breach of the *EBR* requirements.<sup>14</sup> In its decision, the Board indicated that there was a lack of intervenor evidence at the hearing (only one local resident intervened).<sup>15</sup> A Registry notice on the proposed s. 27 approval might have promoted the hearing and encouraged participation by interested citizens.<sup>16</sup> A normal decision notice on the s. 9 approval, permitting applications for leave to appeal, would have provided broader notice of an opportunity for public participation in the project.

Under ss. 32(1)(b), ministries are not required to give notice of proposed instruments that would be a step toward implementing an undertaking or other project approved by a decision made under the *EAA*. In November 2003, MOE posted an information notice concerning the process of reviewing the application by Adams Mine Railhaul for a two-year Permit to Take Water (PTTW) from the south pit of the Adams Mine (Registry #XA03E0019). A regular Registry proposal notice was not necessary because the proposed PTTW was required to implement an undertaking already approved under the *EAA*, in this case the proposed Adams Mine waste disposal site. Despite this, MOE decided to post an information notice requesting public submissions and providing a 52-day comment period, explaining in the notice that the ministry believes it is important to keep the public informed. In a January 2004 update (Registry #XA04E0002), MOE reported that more than 23,000 comments had been received on the proposed PTTW during the comment period. MOE stated that it planned to consider the comments before making a decision and would post an updated information notice summarizing the key concerns and how they were addressed. MOE recognized the overwhelming public interest in this instrument and the need for consultation in posting an information notice soliciting public comments in this case. However, MOE was under no obligation to consult on this PTTW due to the s. 32 exception. As with other examples in this paper, the public had no right to seek leave to appeal under the *EBR*, and there was no requirement that the ministry share any comments received under this information notice with the ECO. It should be noted that MOE later proposed legislation (Bill 49) to void

any permits and approvals related to the Adams Mine project, and posted this proposal on the Registry for notice and comment (Registry #AA04E0001).

Finally, ss. 32(3) extends the s. 32 exceptions to instruments that implement Class EA decisions. In a recent example, MOE posted information notices on the Registry, with a 15-day comment period in June 2003 and a 30-day comment period in March 2004, in relation to proposed PTTWs for dewatering in order to construct sewer tunnels in York Region (Registry #XA03E0012 and XA04E0004). The information notices stated that these permits were excepted from the *EBR* since they were implementing undertakings subject to a Class EA for Sewage and Water completed in December 1999. There was not enough information provided in these notices for the public to understand fully these proposed controversial and environmentally significant permits. Neither notice has been updated to inform the public of what decision was made. However, it is worth noting that normally not even an information notice would be posted, meaning that the public would receive no notification of such instruments. This case is a prime example of a project in which the environmental impacts have proven to be vastly greater than anticipated during the completion of the Class EA process. Issuance of PTTWs has become very controversial and would have benefited from regular *EBR* notice and access to leave to appeal rights.

An additional misuse of the s. 32 exception occurred in the long-delayed classification of instruments by MNR in 2001. MNR's classification of its instruments did not occur until after the ECO issued a special report on the issue in June 2001.<sup>17</sup> MNR decided not to classify for the purposes of the *EBR* instruments typically issued to implement projects approved or exempted under the *EAA*. The decision not to classify these instruments meant that the public was not guaranteed other rights under the *EBR*, such as the right to request reviews and investigations in relation to alleged contravention of these instruments.<sup>18</sup>

In the 2001/2002 annual report, the ECO concluded an analysis of the *EAA* exception by expressing disappointment about the deficiencies of public participation rights on instruments issued through *EAA* processes, especially when compared with those of the *EBR*. The ECO stated that Ontario's environmental assessment program under the *EAA* should operate in a manner compatible with and complementary to the *EBR*.<sup>19</sup>

In its report, the Task Force noted that there was an issue of whether the public was adequately involved in decision-making under the *EAA*,<sup>20</sup> and "expected that over time, existing environmental legislation would be brought into compliance with provisions of the Environmental Bill of Rights respecting the issuance of regulations and instruments."<sup>21</sup> However, in the ten years that the *EBR* has been law in Ontario, MOE has done little to address this gap in compliance. On the contrary, during that time, there has been an expanded scope of approvals subject to streamlined EA requirements that involve less ministry scrutiny than a full EA with MOE review and approval. This has had the effect of removing more instrument decisions from the Environmental Registry and insulating them from consideration by the public and review by the ECO.<sup>22</sup>

Although s. 32 was drafted to protect environmental projects from being subject to duplicate public consultation, the excessive use of that exception can result in minimal or no public consultation on important instruments. The public deserves an opportunity to comment on environmentally significant projects at the planning stage and before specific permits are granted. This fact is recognized by the ministries themselves by the frequency with which they offer comment periods when they choose to post information notices related to the s. 32 exception. Far-reaching use of ministry discretion in providing notice at either the project planning or instrument stage is greatly reducing opportunities for public input, and this is contrary to the goals of the *EBR*.<sup>23</sup> While thousands of private sector instruments are required to be posted on the Registry each year, the public sector has been largely exempted from posting regular Registry notices in the first decade of the *EBR* because of the s. 32 exception. Instead of avoiding double jeopardy, many projects and instruments have received almost no public notice, and this is not what the Task Force intended.

*Potential Amendments:*

Modify ss. 32(1) to state that this exception will not apply to instruments implementing an undertaking unless the proponent is able to demonstrate that public consultation on that undertaking was similar to that required by the *EBR* (including province-wide public notice and an opportunity to comment to the ministry issuing the instrument).

Where an instrument is excepted due to equivalent public participation under ss. 32(1), require that an exception notice be published on the Registry.

Removing ss. 32(1)(b) altogether would provide public notice and allow new technical information to be considered with respect to undertakings that may have been approved under the *EAA* years before.

Repeal ss. 32(2) so that instruments implementing undertakings exempted by a regulation under the *EAA* will be subject to the *EBR*.

Add a regulation-making power in relation to ss. 32(3) so that specific types of instruments that are covered under Class EAs may be made subject to the *EBR* by regulation, where it is in the public interest that they be posted for province-wide notice and comment on the Registry (e.g., municipal class EA water-takings).

Ministries could explicitly be given discretion to post regular Registry proposal notices on any instrument covered by s. 32 that is perceived to require public input.

Amend s. 32 to require that an exception notice be posted on the Registry when a ministry relies on an exception under s. 32. (See Appendix A for more discussion of this potential amendment.)

## Mediation

S. 34 allows a minister to appoint a mediator to assist with resolving issues related to a Class II instrument proposal notice on the Registry, with the consent of the person applying for the instrument or the person who would be subject to it. Also, ss. 24(1) provides for mediation between parties as a possibility that a minister must consider in relation to enhancing public participation on Class II instrument proposals.

In its July 1992 report, the Task Force considered the role of alternative dispute resolution (ADR) in the context of the Environmental Registry, emphasizing that a person with an environmental concern should take every opportunity to work out the problem on an informal basis without resorting to courts, tribunals or other formal processes:<sup>24</sup>

By learning everyone's views, needs and interests a solution can be developed to suit all interested parties. A facilitation of this goal by government would go a long way to ensuring an effective implementation and use of the Environmental Bill of Rights over time.<sup>25</sup>

The Task Force saw a place for the use of ADR in resolving issues arising with proposed Class II and III instruments posted on the Registry. It stated that the Ontario government would need to develop, in consultation with interested groups, specific procedures for developing and approving instruments.<sup>26</sup> The Task Force set out a list of issues to be considered in developing ADR procedures:

- need for guidelines to help ministries identify instruments, circumstances or disputes appropriate for ADR;
- need for guidelines to assist users with selecting the appropriate process – mediation, arbitration or direct negotiation;
- how ministries would manage such processes to ensure proper representation, assignment of skilled third-party neutrals and funding;
- establishment of a registry of third-party neutrals for use by ministries;
- structure and content of negotiated settlements, and the need to ratify or review them to protect the public interest;
- timing for use of such processes, whether they should be voluntary and rules for document exchanges; and
- how material about ADR could be made available to potential users.<sup>27</sup>

In its Supplementary Recommendations of December 1992, the Task Force recommended that a provision be included in the proposed Environmental Bill of Rights to permit a minister to appoint a mediator. This recommendation was given legal effect by section 34. In recommending this provision, the Task Force noted that it would be necessary to develop rules and guidelines on delivering mediation services and other forms of ADR, and that the regulations establishing these services should be developed through consultation with interested parties.<sup>28</sup>

Ss. 121(1)(o) of the *EBR* provides Cabinet with the power to make regulations concerning mediation under s. 34, including but not limited to regulations respecting the costs of mediation, the confidentiality of representations made during mediation and the procedures to be followed in mediation. However, in the first ten years of the *EBR*, the government has not made regulations on mediation, nor done anything else to further the use of mediation in relation to instrument proposals on the Registry. In addition, few Class I instruments have been bumped up to Class II. MOE's *EBR* web site refers to the potential use of mediation, but does not set out any details about its use.<sup>29</sup>

Mediation could be an effective option for resolving disputes about proposed instruments. In cases where members of the public successfully apply for leave to appeal an instrument decision, these disputes are often settled through some form of ADR. It would be more timely and cost-effective to use ADR at an earlier stage to pre-empt tribunal proceedings, which result in further delay and expenses.

The Ontario government envisions the use of mediation in resolving other types of environmental disputes. The *Environmental Assessment Act* provides for mediation, and in 1997 (and then again, substantially revised, in 2001), MOE posted a proposed guidance document entitled "The Use of Mediation in Ontario's Environmental Assessment Process" on the Environmental Registry. Although this document was apparently never finalized, it does set out a fairly comprehensive overview of how the mediation provisions in the *EAA* are to be applied. The document addresses: how and where mediation fits into Ontario's EA process; when mediation is appropriate; what types of mediation are possible in the EA process; how participants are to be identified; how mediation is initiated; how a mediator is selected; timeframes and costs for mediation; and the issue of confidentiality.<sup>30</sup> These same types of issues must be considered in the context of the *EBR* if mediation is to become a realistic option to assist with instrument decisions.

*Potential Amendment:*

Add a provision to s. 34 requiring MOE to use its regulation-making power to set out appropriate guidelines and procedures for the use of mediation in the context of the *EBR*.

Other Potential Amendments – Registry Notice and Comment Provisions (Appendix A)

- **S. 1:** Add a definition of "resident" for the purposes of the *EBR*.
- **S. 6:** Specify whether or not comments may be solicited under information notices, and if so, that they be provided to the ECO for review.
- **Ss. 10(1):** Instead of providing that a minister may amend the ministry SEV from time to time, specify a set periodic review.
- **S. 11:** State specifically that SEVs apply to ministry decisions on instruments.
- **S. 14:** Clarify the meaning of "environmental significance."

- **Ss. 15(2), 16(2):** Require notice of decisions excepted as predominantly financial or administrative in nature.
- **S. 19:** Provide a mechanism to ensure that ministries consider new instruments and instruments created under new legislation for inclusion in their instrument classification regulations.
- **Ss. 21(1):** Instead of providing that a minister may amend the ministry instrument classification regulation from time to time, specify a set periodic review.
- **Ss. 27(2):** Require that there be electronic links to background information in Registry proposal notices.
- **Ss. 27(3):** Include a right to submit comments by electronic mail in response to Registry notices. Add requirements to protect personal information and privacy.
- **Ss. 27(4)&(5):** Strengthen the use of Regulatory Impact Statements.
- **Ss. 9(2), 30(2):** Remove the requirement that a minister must give direct notice of these exceptions to the ECO.
- **S. 32:** Require that there be a Registry exception notice where a ministry relies on a s. 32 exception.
- **S. 33:** Require that there be a Registry exception notice where a ministry relies on a s. 33 exception.
- **S. 36:** Require that a decision notice be posted on the Registry within a fixed period of time after the decision is implemented.

## **Leave to Appeal, ECO, Review and Investigation Provisions**

### Deadline for Seeking Leave to Appeal

S. 40 requires that an application for leave to appeal be received no later than the earlier of 15 days after notice of the ministry decision is given on the Environmental Registry, and 15 days after another person (normally the applicant) files an appeal under another statute. The Environmental Review Tribunal (ERT) requires only that applicants give notice within the 15-day period, allowing additional time to file their applications.

The requirement that applications for leave to appeal be filed within 15 days of the Registry notice of the decision has been recognized as a tight deadline.<sup>31</sup> At the ECO's May 2000 *EBR* Litigation Rights workshop, participants expressed concern that unrealistic time lines to be met in applying for leave to appeal presented a significant barrier. It was suggested that more flexible time lines would improve the effectiveness of the right to seek leave to appeal in the *EBR*.<sup>32</sup>

Another problem that has been encountered in connection with the deadline for filing leave to appeal is the interpretation of s. 40 when the 15<sup>th</sup> day falls on a weekend or holiday. Subsection 28(h) of Ontario's *Interpretation Act* provides that in all legislation passed in Ontario, unless the contrary intention appears, a time limit expiring on a holiday will be extended to the next day that is not a holiday. A holiday is defined as a

Sunday or one of the specified public holidays (*Interpretation Act*, ss. 29(1)). This definition does not include a Saturday, despite the fact that government offices are closed and mail is not delivered on Saturday.

The 15-day period for filing leave to appeal applications is also problematic when the Registry has been out of service during the appeal period. For example, this situation arose due to the closure of most Ontario government offices during late August 2003 in the wake of an electricity blackout. Following the blackout, the ERT extended the deadline to accept applications for leave to appeal because the Registry had not been available during the government office closure. MOE challenged the authority of the ERT to make this extension. The ERT upheld the extension, noting that the public interest was served by extending the time period, given the extenuating circumstances of the blackout.<sup>33</sup>

The recent *Safe Drinking Water Act (SDWA)* contains a provision giving the ERT discretion to extend the 15-day appeal period set out in that Act. Ss. 129(2) of the *SDWA* provides that, on application by a person notified of a reviewable decision under the Act, the Tribunal must extend the time in which a hearing notice may be served if the Tribunal considers that service of the decision notice did not give the person adequate notice of the decision, or it is otherwise just to do so. A similar provision could be included in the *EBR* to give the Tribunal more flexibility around time extensions in unusual circumstances.

#### *Potential Amendments:*

Amend s. 40 to extend the deadline for seeking leave to appeal from 15 to 20 days.

Amend s. 40 to give the tribunal the specific authority to extend the time in which an application for leave to appeal must be received where the tribunal considers that service of the decision notice did not give the person adequate notice of the decision, or it is otherwise just to do so.

Amend the *Interpretation Act* to specify that a time limit expiring on a holiday, defined as a Saturday, Sunday or public holiday, will be extended to the next day that is not a holiday.

#### Non-compellability of ECO

The *EBR* does not contain a provision stating that the Environmental Commissioner is not compellable as a witness. A non-compellability provision would ensure that the Commissioner or ECO staff could not be compelled to give evidence in a court or tribunal concerning information related to the Commissioner's role or functions.

Although absent from the *EBR*, this type of provision is included in other legislation creating officers of the legislature. For example, ss. 55(2) of the *Freedom of Information and Protection of Privacy Act* provides that:

[t]he Commissioner or any person acting on behalf or under the direction of the Commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise or performance of a power, duty or function under this or any other Act.

Based on information in its two 1992 reports, the Task Force may not have considered the issue of non-compellability, or may have believed that the ECO could give evidence in Harm to a Public Resource actions. The Task Force may not have contemplated that there would be a demand for the Commissioner or ECO staff as witnesses in other legal proceedings. However, the ECO has faced this situation several times in the past few years. In May 2001, an ECO staff member testified before the Walkerton Inquiry. In June 2001, the Commissioner testified in a hearing before the Environmental Review Tribunal relating to OMYA's proposed water-taking from the Tay River, after being summonsed by the Council of Canadians. Again, in February 2003, the Commissioner was compelled to testify in a private prosecution of the Ontario Realty Corporation concerning alleged violations of its Class Environmental Assessment.

Attempts by some stakeholders to engage the Commissioner and ECO staff as witnesses in legal proceedings may foster a negative perception of the ECO's impartiality. Also, ministries may become reluctant to share sensitive information with the ECO. It would be awkward and expensive for the ECO to attempt to oppose these requests on a case-by-case basis in the courts based on legal arguments that the ECO should not have to provide evidence on information possessed due to the performance of duties as Commissioner. It seems unlikely that the Task Force or the legislature intended that the ECO be placed in this situation.

*Potential Amendment:*

Add a provision similar to ss. 55(2) the *Freedom of Information and Protection of Privacy Act* stating that the Commissioner and ECO staff are not compellable to give evidence in a court or proceeding of a judicial nature concerning anything coming to their knowledge in exercising or performing a power, duty or function under the *EBR* or another Act.

ECO Power to Request Documents

Ss. 60(1) provides the Environmental Commissioner with the power to examine any person under oath or solemn affirmation on any matter related to the performance of the Commissioner's duties under the *EBR*, and to require the production of documents or other things in the course of the examination. Ss. 60(2) bestows on the ECO the powers

conferred on a commission under Part II of the *Public Inquiries Act* in conducting an examination under oath.

While it is important that the ECO have the ability to employ an examination under oath when necessary, the *EBR* does not provide any less cumbersome powers to assist in carrying out the mandate and responsibilities of the ECO. S. 57 sets out the ECO's numerous functions that include reviewing ministry compliance with the *EBR* and the exercise of ministerial discretion under the *EBR*. However, when requesting information, the ECO must rely on voluntary cooperation from ministries (and reporting on any lack of ministry cooperation) unless willing to use the power of examination under oath.

Another officer of the Legislative Assembly of Ontario, the Ombudsman, possesses a number of powers in addition to examination under oath. Ss. 19(1) of the *Ombudsman Act* allows the Ombudsman to require any officer, employee or member of a governmental organization to provide information or produce documents related to any matter being investigated by the Ombudsman. The *Ombudsman Act* provides certain exceptions to this power, for example where ministry staff are bound by secrecy under an Act other than the *Public Service Act* (ss. 19(3)), or where the Attorney General certifies that giving information or producing a document might interfere with an investigation or disclose deliberations or confidential proceedings of the Executive Council (ss. 20(1)).

It would benefit the ECO to have guaranteed access to ministry information needed to review ministry decisions and ministry compliance with the *EBR*. This would enhance the accountability and transparency mechanisms in the *EBR*. While the ECO currently has the power to conduct an examination under oath, this is a major undertaking that the ECO is hesitant to embark upon unless there is an extreme case of non-cooperation by a ministry. Therefore, this power has not yet been used. If the ECO were provided with a power like that of the Ombudsman to require that information or documents be provided, it would assist in obtaining information now difficult to find, such as determining whether exceptions under the *EBR* claimed by ministries for instrument proposals not posted for public comment on the Registry have been properly applied.

#### *Potential Amendment*

Add a provision similar to ss. 19(1) of the *Ombudsman Act*, with appropriate exceptions such as those in ss. 19(3) and 20(1) of the *Ombudsman Act*, to provide the ECO with powers to require ministry staff to provide information or produce documents relevant to matters under review by the ECO.

#### Other Potential Amendments – Leave to Appeal, ECO, Review and Investigation Provisions (Appendix B)

- **S. 38 to 46:** Provide for funding to assist successful leave to appeal applicants in appeal hearings.

- **S. 50:** Return to this provision the requirement that the Commissioner's salary be comparable to that of a Deputy Minister.
- **S. 58:** Provide for role for review by legislative committee.
- **Ss. 58(2)(c):** Remove requirement that the annual report must include a list of all Registry proposal notices during the reporting period.
- **S. 61:** Set out a minimum age for applicants.
- **S. 69:** Require a ministry to commit to a completion date, with the potential for extensions, when it accepts an application for review.
- **S. 70, 78:** Provide for circumstances in which a ministry is permitted an extension of the deadline for a decision (strike, etc.).

## **Litigation Rights and Judicial Review Provisions**

### Test for Action in Harm to a Public Resource

Ss. 84(1) provides a legal right to any resident of Ontario to bring a civil action in harm to a public resource under the *EBR* “[w]here a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario.”

This provision of the *EBR* created a new statutory cause of action allowing residents to go to court to protect the environment. Before the *EBR* was enacted, a person could start a civil action in relation to environmental harm only under limited circumstances (for example, in an action for public nuisance where a person had to show they had standing by obtaining permission from the Attorney General to bring the action or by demonstrating that he or she had suffered a special or particular damage beyond that suffered by the public at large). In general, however, only a government could take action against those causing environmental harm, through a quasi-criminal prosecution, administrative action or civil lawsuit, and there were few options open to residents if the government failed to take legal action.<sup>34</sup>

At the ECO's May 2000 *EBR* Litigation Rights workshop, participants expressed concern that this was too strict a test because the plaintiff is required to show **both** that the defendant has contravened or will imminently contravene a prescribed Act, regulation or instrument **and** that significant harm to a public resource has been, or will imminently be, caused. Participants also noted that “significant” harm was too high a standard in this test. These problems were mentioned as barriers to bringing an action for harm to a public resource.<sup>35</sup>

The Task Force recognized in 1992 that the Ontario government is primarily responsible for setting and enforcing standards to protect the environment from harm, and that the government has some tools available to do this. However, the Task Force expressed concern that “individual residents under the current law would have no entitlement to engage the justice system for protection of a public resource where government fails to

meet its responsibility.”<sup>36</sup> Therefore, the Task Force recommended the creation of a new statutory cause of action on the basis that

a resident who had a reasonable belief that a person was causing or about to cause significant harm to a public resource through non-compliance with existing law and who used the Application for Investigation to no avail, should be entitled to use our courts to protect the public resource.<sup>37</sup>

It is clear that the Task Force envisioned that the elements of both contravention or imminent contravention of a law and resulting significant harm to a public resource would be present in this cause of action, as well as an unsuccessful application for investigation (there will be more discussion of this requirement in the next section of this paper).

However, the Task Force may not have foreseen the practical difficulties of bringing an action under s. 84. Although s. 84 actions were intended to be used as a last resort, participants at the ECO's May 2000 workshop were very concerned that the possibility of bringing such an action was too remote and that this did not serve the purposes of the *EBR*.<sup>38</sup> In the ten years since the *EBR* came into force, only two legal actions have been initiated under s. 84.<sup>39</sup> Neither action proceeded to trial. In contrast, there have been six Public Nuisance actions under s. 103 of the *EBR* during that period of time.

*Potential Amendment:*

Amend test to state that a plaintiff need only show a contravention or imminent contravention of a law, without being required to show that significant harm to a public resource has been or will be caused. A less preferable alternative would be to remove the word “significant” from the test in order to reduce the degree of harm that must be shown.

Application for Investigation Prior to Action in Harm to a Public Resource

Before bringing an action in harm to a public resource for an alleged contravention of an Act, regulation or instrument, a potential plaintiff must have applied for an investigation under Part V of the *EBR*. Ss. 84(2) provides that an action may not be brought in respect of an actual contravention unless the plaintiff has applied for an investigation into the contravention under Part V and either has not received a response within a reasonable time, or has received a response that is not reasonable. Removing the requirement that plaintiff must have received an unreasonable ministry response would make s. 84 legal actions more accessible to the members of the public wishing to pursue them.

The Task Force envisioned that Ontario residents with reason to believe that environmental harm to a public resource was occurring would use the application for investigation procedure. It considered going to the courts with an action for harm to a

public resource to be a last resort, where the government did not respond appropriately or in a timely manner to the application for investigation.<sup>40</sup>

However, the application for investigation requirement has been perceived as an additional barrier to launching an action in harm to a public resource. Participants at the May 2000 *EBR* Litigation Rights workshop suggested that the *EBR* is too onerous in requiring that plaintiffs prove that the ministry's response to a request for investigation is unreasonable.<sup>41</sup> It should be sufficient that the plaintiff has attempted to engage the ministry through the *EBR* application for investigation process without having to address the question of whether or not the ministry response is reasonable. The court should be given the opportunity to take a fresh look at the alleged contravention.

*Potential Amendment:*

Amend ss. 84(2) to remove requirement that the plaintiff has received an unreasonable ministry response to an application for investigation.

Other Potential Amendments – Litigation Rights and Judicial Review Provisions (Appendix C)

- **S. 82:** Expand the definition of a “public resource” to apply beyond only public land.
- **S. 84:** Consider establishment of a fund similar to the Law Society's Class Proceedings Fund to support actions for harm to a public resource.
- **Ss. 84(8):** Lower the burden of proof required to show a contravention from a “balance of probabilities” (more likely than not) to a “*prima facie* case” (minimum amount of evidence necessary to allow action to continue in judicial process).
- **Ss. 85(3):** Amend reasonable interpretation defence to require that a defendant show it has complied with a strict interpretation of the instrument in question.
- **Ss. 90(1):** Narrow the court's power to stay Harm to a Public Resource actions, as “in the public interest” is too broad.
- **S. 92:** Change the common law test of granting an interlocutory injunction, because it has generally not resulted in injunctions in environmental cases
- **S. 103:** Clarify the relationship of Public Nuisance actions to class actions.
- **S. 103:** Provide for greater access to funding from the Class Proceedings Fund administered by the Law Society of Upper Canada to advance funds toward disbursements and indemnify a plaintiff ordered to pay a defendant's costs.
- **S. 121:** Consider reforms required to regulations under the *EBR*.

## **Appendices – Other Potential Amendments**

### **Appendix A – Registry Notice and Comment Provisions**

#### **S. 1 – Definition of “resident”**

The *EBR* provides rights for “residents of Ontario” to participate in environmental decision-making in Ontario, including the right to request a review or investigation. In accepting applications for review and investigation for forwarding to the ministries, the ECO may be called upon to determine whether an applicant is in fact a “resident of Ontario.” S. 1 sets out a number of definitions for the purposes of the *EBR*, but does not define the term “resident” or set out appropriate indicia to be considered as proof of Ontario residency. To date, the ECO has relied on interpretations of the word “resident” from other regulatory schemes, such as health care and general welfare laws and policies, to inform its approach.

The rights provided by the *EBR* are intended to be broadly available to anyone in Ontario who is affected by Ontario’s environment, and this should include not only Canadian citizens and permanent residents living in Ontario, but also persons such as foreign students and foreign citizens owning property in Ontario.

S. 1 could be amended to define a “resident” as a person with some ongoing connection to Ontario, including foreign students and foreign citizens owning property in Ontario, but excluding tourists, transients and visitors. Proof of residency could be established using a health card number for most residents, or a student card number or property lot and plan number if a person has no Ontario health card.

#### **S. 6 – Comments on Information Notices**

Ss. 6(1) states that the purpose of the Environmental Registry is to provide a means of giving information about the environment to the public. Ss. 6(2) specifies that information about the environment includes, but is not limited to, information about: proposals, decisions and events that could affect the environment; court actions under the *EBR*; and things done under the *EBR*.

Ministries frequently use the Registry to publish information notices under s. 6 concerning proposals or decisions that the *EBR* does not require to be posted. In some cases, information notices invite the public to provide comments on a proposal during a specified comment period. This is contrary to the ECO’s opinion, expressed in the 2000/2001 annual report:

As in past years, some ministries sought public comment through information notices. This practice causes confusion for the public, since, as noted above, there is no legal requirement for the ministries to consider public comments or to post a final decision with regard to information notices. Therefore, if a prescribed ministry decides that it is appropriate to

seek public comment on a policy, Act or regulation proposal through the Registry, the correct procedure is to post a regular notice, not an information notice.<sup>42</sup>

Under sections 15, 16 and 22 of the *EBR*, ministries must send public comments provided through the Registry to the ECO to assist in reviewing ministry decisions subject to the Act. However, ministries need not share comments received pursuant to an information notice with the ECO, although they may do so voluntarily.

Given that ministries continue to post information notices requesting comments, a subsection could be added to s. 6 to specify that where public comments are solicited under an information notice, the comments should be provided to the ECO for review, and that the information notice must be updated so that the public is informed about the ministry's response to comments received and the ministry's decision.

#### Ss. 10(1) – Periodic Review of Statements of Environmental Values

Ss. 10(1) provides that a minister may amend a ministry's statement of environmental values (SEV) "from time to time." This gives ministers a great deal of discretion as to when they review and consider changes to the ministries' SEVs.

In the ten years since the *EBR* came into existence, there have been very few changes made to the SEVs. Of these changes, most have been made when ministries were reorganized and newly created ministries were made subject to the *EBR*. Ministries such as MOE and MNR have made no changes to their SEVs during this time. This is despite the fact that the ECO and other observers have noted the following significant weaknesses in the SEVs: they are vague; they are not integrated with ministry business plans; there is no consistency among the ministries in applying SEVs to activities; and they are now out of date.<sup>43</sup> Although MOE informed the ECO that it was undertaking a broad cross-ministry review of SEVs in 2002,<sup>44</sup> no changes have been made to date. In April 2004, MOE provided the ECO with a progress report on the SEV review, noting that it has been delayed by the change in government, but is continuing.

A potential amendment to ss. 10(1) would be to require a periodic review of each ministry's SEV every five years.

#### S. 11 – Application of Statements of Environmental Values

S. 11 provides as follows: "The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry."

A plain-language reading of s. 11 ("whenever decisions...are made") would suggest that a minister must consider the ministry SEV when making any environmentally significant decision, whether on a policy, Act, regulation or instrument. However, MOE has

consistently refused to consider its SEV when making decisions on instruments, even those prescribed for the purposes of the *EBR*.

S. 11 could be amended to include more explicit language requiring that ministries consider their SEVs when making decisions on instruments.

#### S. 14 – Meaning of “Environmental Significance”

S. 14 sets out the factors a minister must consider in determining whether a proposed policy, Act or regulation will have a significant effect on the environment, and therefore whether or not it should be posted on the Environmental Registry. The factors to be considered are:

1. The extent and nature of the measures that might be required to mitigate or prevent any harm to the environment that could result from a decision whether or not to implement the proposal.
2. The geographic extent, whether local, regional or provincial, of any harm to the environment that could result from a decision whether or not to implement the proposal.
3. The nature of the private and public interests, including governmental interests, involved in the decision whether or not to implement the proposal.
4. Any other matter that the minister considers relevant.

There have been numerous occasions when the ECO and a ministry have had different opinions as to whether or not a proposal is environmentally significant. In many of these cases, the proposals are ultimately not posted on the Registry and the public does not have the opportunity to comment. The question of the extent and nature of measures required to mitigate or prevent environmental harm has been controversial.

The current definition of “environmental significance” is rather vague and allows the ministries a great deal of discretion in determining which proposals are environmentally significant. It should be interpreted in the context of the purposes of the *EBR* set out at in ss. 2(1) and (2) that emphasize an ecosystem-based understanding of the meaning of “environment.”

S. 14 could be amended to clarify the meaning of “environmental significance” by adding additional factors for consideration, including explicit reference to the purposes of the *EBR*.

### Ss. 15(2), 16(2) – Predominantly Financial or Administrative Exception

Ss. 15(2) provides an exception to the requirement that proposals for environmentally significant policies and Acts be posted on the Registry, where they are predominantly financial or administrative in nature. Ss. 16(2) provides for the same exception in relation to regulations.

In a 1997 guidance document, the ECO recommended that ministries use this exception only for proposals that have little environmental significance or where there is no discretion to examine alternatives to the proposal.<sup>45</sup> However, some ministries have applied it as a broad exception to exclude a wide range of implementation decisions from being posted on the Registry. At least one ministry applies this exception to proposals before considering them in light of its Statement of Environmental Values.

Ss. 15(2) and 16(2) could be amended to require that ministries maintain a list of new decisions to which the predominantly financial or administrative exception has been applied, and that it be available to the ECO on request.

### S. 19 – Additions to Instrument Classification Regulation

S. 19 requires a ministry subject to posting instruments for comment on the Registry to propose a regulation to classify instruments for the purposes of the *EBR* within a reasonable time after this section begins to apply to the ministry. All ministries subject to these provisions have now finalized regulations classifying instruments.

However, these ministries have continued in many cases to pass new environmentally significant Acts and regulations, creating new environmentally significant instruments. As the *EBR* is currently drafted, there is no requirement that ministries evaluate these new instruments to determine whether they should be classified under the *EBR*.

S. 19 could be amended to add a requirement that subject ministries consider all new instruments created under new legislation or regulations for inclusion in the instrument classification regulation.

### Ss. 21(1) – Periodic Review of Instrument Classification Regulation

Ss. 21(1) requires a minister to review the instrument classification regulation from time to time, and to propose amendments concerning instruments under Acts administered by the ministry that the minister considers advisable.

This gives ministers a great deal of discretion as to when they review and consider changes to the instrument classification regulation. A set periodic review would ensure that the instrument classification regulation is kept up to date and captures all environmentally significant instruments according to the criteria set out in the *EBR*.

A potential amendment to ss. 21(1) would be to require a periodic review of a subject ministry's instrument classification regulation every five years.

#### Ss. 27(2) – Electronic Registry Links

Ss. 27(2) sets out a list of the required contents of a Registry proposal notice. This includes a number of elements, such as: a brief description of the proposal; a statement of how and when the public may participate in the decision-making process; a statement of where and when the public may review written information about the proposal; and an address to which the public may direct written comments and questions.

Because the *EBR* was drafted before the Internet became widely accessible, the Task Force did not contemplate the usefulness of requiring electronic links to draft proposals in the notice. Such links are now regularly included in many proposal notices, however, and contribute greatly to quick access to proposals and background information on a tight 30-day time line to submit comments. While most ministries include electronic links in many or all of their proposal notices, supporting documentation is not always made available in this manner.

A requirement could be added to ss. 27(2) that ministries include, where possible, electronic links to proposals and background information in Registry proposal notices.

#### Ss. 27(3) – Right to Submit Comments by Email

Ss. 27(3) requires that Registry proposal notices include a statement describing the following rights of public participation in decision-making: the right to submit written comments as specified in the notice; as well as any additional rights of public participation.

Just as electronic links to information on the Internet have made the process of commenting on proposals more accessible, permitting the submission of comments by electronic mail would also promote this.

Ss. 27(3) could be amended to state that members of the public have the right to submit comments by electronic mail.

#### Ss. 27(4)&(5) – Regulatory Impact Statements

Ss. 27(4) requires a minister to include regulatory impact statements in proposal notices for regulations if the minister considers it necessary to permit more informed public consultation on the proposal. Ss. 27(5) sets out the information that must be included in a regulatory impact statement: a brief statement of the objectives of the proposal; a preliminary assessment of the environmental, social and economic consequences of implementing the proposal; and an explanation of why the environmental objectives, if any, of the proposal would be appropriately achieved by making, amending or revoking a regulation.

The ECO stated in a 1996 special report that only four out of 42 proposals posted on the Registry by MOE as of August 31, 1996, had been accompanied by a regulatory impact statement, each of which was about two sentences long and provided little information about environmental, social or economic effects. The ECO also noted that in many cases ministries had prepared the kind of information required in a regulatory impact statement, but chose not to make it public.<sup>46</sup> Although regulation proposal notices have increasingly included regulatory impact statements over the years, the quality of the information provided has been very uneven. For example, the ECO's 1998 annual report noted that MOE's regulatory impact statements did not address the environmental impacts of proposed regulations, looking only briefly at their social and economic implications.<sup>47</sup>

Ss. 27(4)&(5) could be amended to make regulatory impact statements mandatory to ensure that information about environmental, social or economic effects is included. The use of regulatory impact statements could be made more meaningful by adding further specific criteria for Regulatory Impact Statements to better ensure their quality.

#### Ss. 29(2), 30(2) – Notice to ECO of Exceptions

Ss. 29(2) states that a minister who does not post a regular notice of a proposal due to the emergency exception must give notice of the decision to the public and the Environmental Commissioner. Ss. 30(2) is a similar notice provision that applies when a minister uses the exception for an equivalent process of public participation.

Notice is given to the public through an exception notice on the Environmental Registry (s. 31). The additional requirement that a minister give direct notice to the ECO has become redundant and not been done since 1995. It is no longer necessary due to widely available Internet access.

Ss. 29(2) and 30(2) could be amended to remove the requirement that the minister give notice of the use of these exceptions directly to the ECO.

#### S. 32, 33 – Exception Notices

As described above, s. 32 provides for an exception to posting regular notices on the Registry for instruments implementing decisions under the *EAA* or tribunal decisions. S. 33 provides for an exception to posting proposals that implement a budget or economic statement.

Unlike the exceptions provided in s. 29 and 30, ministries are not required to post exception notices on the Registry in relation to s. 32 and 33 exceptions. This lack of information for the public results in potential confusion and uncertainty with respect to the instruments not posted due to these types of exceptions.

S. 32 and 33 could be amended to require that exception notices be posted on the Registry when a ministry relies on these exceptions.

S. 36 – Time Limit for Posting Decision Notices, Updates

Ss. 36(1) requires that ministers give notice of the implementation of proposals for policies, Acts or regulations posted for comment on the Registry as soon as reasonably possible after they are implemented. Ss. 36(2) imposes a similar requirement to provide notice as soon as reasonably possible after a decision is made whether or not to implement a proposal for an instrument. This is important for members of the public wishing to seek leave to appeal an instrument decision.

Despite this clear requirement to post decision notices as soon as reasonably possible, ministries at times fail to post decision notices promptly. Also, although not legally required to do so, ministries sometimes do not provide updates on the status of old, undecided proposals. In these cases, the public does not know whether or not the ministry is still considering the proposal or has even implemented a decision on the proposal. This makes the Registry less effective and less reliable.

S. 36 could be amended to include a time limit, such as 30 days, within which decision notices must be posted on the Registry after decisions are implemented. A shorter time limit, such as 15 days, might be more appropriate for instruments. S. 36 could also require that the decision notice state the date that the decision was made or the instrument issued. A requirement could also be added that updates be posted on the status of old, undecided proposals every six months.

## **Appendix B – Leave to Appeal, ECO, Review and Investigation Provisions**

### S. 38 to 46 – Funding for Successful Leave to Appeal Applicants

S. 38 to 46 provide a process for seeking leave to appeal certain instrument decisions.

As noted above, applicants for leave to appeal normally have limited financial resources, and face a difficult test to obtain leave to appeal these decisions. In many cases, applicants are not able to obtain legal representation. Where applicants are successful in obtaining leave to appeal, they are faced with the additional costs of pursuing the appeal. While obtaining leave to appeal often provides the applicants with some leverage in reaching a settlement with the ministry and the proponent, a few of these appeals do proceed to a hearing. Funding would assist these members of the public who are representing the public interest in pursuing these appeals.

S. 38 to 41 could be amended to provide for funding to assist successful leave to appeal applicants in appeal hearings.

### S. 50 – ECO's Salary

Ss. 50(1) requires that the Environmental Commissioner be paid a salary fixed by Cabinet. Ss. 50(2) does not allow the Commissioner's salary to be reduced, except on the address of the Legislative Assembly.

The current language of ss. 50(1) is the result of a 1999 legislative amendment providing that the salary be fixed by Cabinet. Prior to that, the provision required that the Commissioner be paid a salary within the range of salaries paid to deputy ministers in the Ontario civil service. Legislation concerning the salaries of other officers of the legislature was similarly amended in 1999. However, several months later, the amendment was reversed for the Provincial Auditor, returning that salary to the deputy minister range. Beyond the issue of appropriate remuneration, it is important that officers of the legislature have the stature and respect of government officials to carry out their duties effectively. The Task Force recognized this, stating that it considered the seniority of the ECO's position to be equivalent to that of the Ombudsman or Provincial Auditor.<sup>48</sup>

S. 50 could be amended to return to the requirement that the Environmental Commissioner's salary be within the range of salaries paid to deputy ministers.

### S. 58 – Review by Legislative Committee

S. 58 requires the Environmental Commissioner to report annually to the Speaker of the Legislative Assembly.

The *EBR* does not specify that the annual report be referred to a legislative committee for further review. In contrast, the *Audit Act* contemplates a review of the Provincial Auditor's annual report by the Standing Committee on Public Accounts. Standing Order

106(g) empowers the Standing Committee on Public Accounts to review and report to the House its observations, opinions and recommendations on the Auditor's report. S. 16 of the *Audit Act* provides for the Auditor's attendance to assist the Public Accounts Committee in its review of the annual report. This committee has the power to call ministry representatives to speak to the Auditor's recommendations and provide responses. A similar arrangement under the *EBR* would ensure that the ECO's recommendations receive responses from the ministries.

A standing order could be made to empower a different legislative committee, such as the Standing Committee on General Government, to review and report to the House with respect to the Environmental Commissioner's annual report. The *EBR* could be amended to provide for the Commissioner's attendance to assist the committee in its review of the annual report.

#### Ss. 58(2)(c) – List of Registry Proposal Notices in Annual Report

Ss. 58(2)(c) requires that the ECO's annual report include a list of all proposal notices for policies, Acts, regulations and instruments placed on the Registry during the reporting period for which no decision notices were posted during that same period.

Each reporting year, a great number of proposal notices are posted on the Registry, many of which are not decided during that time period. For example, more than a thousand proposals were posted on the Registry in 2002/2003, making the list of undecided proposal notices during that reporting period approximately 100 pages long. This requirement is currently met by the preparation of an appendix to the Supplement of the annual report. It is included in the electronic version of the Supplement available on the ECO's web site, but print versions are available by special request only. During the three years that the print version has been available by request, it has not been requested. There does not appear to be a great demand for this information.

Ss. 58(2)(c) could be removed to eliminate this requirement.

#### S. 61, 74 – Minimum Age for Applicants

S. 61 provides that any two Ontario residents may apply for a review of an existing policy, Act, regulation or instrument if they believe it should be amended or repealed to protect the environment, or for a review of the need for a new policy, Act or regulation to protect the environment. S. 74 permits any two Ontario residents to apply for an investigation of an alleged contravention of a prescribed Act, regulation or instrument.

Both of these sections apply to any two Ontario residents. As noted earlier in this paper, the term "resident" is not defined in the *EBR*. Although the rights provided by the *EBR* are intended to be broadly available to anyone in Ontario who is affected by Ontario's environment, there is a question as to whether young children have the competence to request a review or investigation. In at least one case, ECO staff suspected that an applicant for a review may have been a young child. It would be appropriate to set an

age of competence at 12 years old. For example, s. 94 of the *Provincial Offences Act* provides that no person can be convicted of an offence committed while less than 12 years old.

S. 61 and 74 could be amended to set out a minimum age for applicants, such as 12 years old.

#### S. 69 – Completion Date for Applications for Review

S. 69 requires that when a minister decides to conduct a review in response to an application, it must be conducted within a reasonable time. The minister may develop plans and set priorities for the reviews to be conducted.

Therefore, when a ministry undertakes to conduct a review, it does not need to commit to a completion date. It needs to meet only the vague requirement of “a reasonable time.” It is frustrating for applicants to have no sense of when they can expect the results of a review. While it may be difficult for a ministry to commit absolutely to a completion date, it could project such a date and then extend it if circumstances prevent the ministry from completing the review in that time.

S. 69 could be amended to require a ministry to project a completion date, with the possibility of extensions, when it accepts an application for review

#### S. 70, 78 – Extension of Ministry Deadlines

S. 70 requires a minister to give notice of his or her decision whether or not to conduct a review within 60 days of receiving the application for review. Under s. 78, if a minister decides that an investigation is not required, the minister must give notice of that decision within 60 days of receiving the application.

These provisions do not give ministers any flexibility around extending the 60-day deadline, even in unavoidable circumstances that would delay such a decision, such as a public service strike. This lack of flexibility has caused problems during the first decade of the *EBR* with respect to the ECO’s reporting of ministry delays.

S. 70 and 78 could be amended to provide for circumstances where a ministry might be permitted an extension of the deadline for giving notice of a decision.

## **Appendix C – Litigation Rights and Judicial Review Provisions**

### **S. 82 – Definition of “Public Resource”**

S. 82 defines a “public resource” to mean the following: air; water, although not water in a body of water the bed of which is privately owned and on which there is no public right of navigation; unimproved public land; any parcel of public land that is larger than five hectares and used for recreation, conservation, resource extraction, resource management, or some purpose similar to one of these; and any plant life, animal life or ecological system associated with any air, water or public land described in this definition.

At the ECO’s May 2000 Litigation Rights workshop, participants expressed the opinion that the definition of “public resource” was too narrow and should be expanded beyond public lands.<sup>49</sup> Limiting the action to public lands means that members of the public are prevented from pursuing actions to protect the environment in relation to alleged contraventions of laws and regulations that take place on private lands, or public lands not caught in the “public resource” definition. Applications for investigation, which are expected to form the basis for eventual actions in harm to a public resource, are not limited to contraventions occurring on public lands.

S. 82 could be amended to broaden the definition of “public resource.”

### **S. 84 – Fund for Actions for Harm to a Public Resource**

As noted above, s. 84 provides a legal right to bring a civil action in harm to a public resource under the *EBR*.

Ontario residents have exercised this legal right only twice during the first ten years of the Act’s existence. It is likely that the prohibitive costs of conducting civil litigation have contributed to the reluctance to launch s. 84 actions. Plaintiffs in s. 84 actions cannot be awarded damages and will likely not recover all of their costs, even if an action is successful. The government could eliminate some of these financial barriers to litigation by establishing a fund similar to the class proceedings fund administered by the Law Society of Upper Canada that was created to support class actions. The Law Foundation initially endowed the fund with \$500,000.<sup>50</sup> Under s. 59.1(2) of the *Law Society Act*, this fund is used to advance funds toward disbursements in an action, and to indemnify a plaintiff ordered to pay a defendant’s costs.

S. 84 could be amended to establish a fund similar to the class proceedings fund to support actions for harm to a public resource.

### **Ss. 84(8) – Burden of Proof of Contravention**

Ss. 84(8) states the onus is on the plaintiff in an action for harm to a public resource to prove the contravention or imminent contravention on a balance of probabilities.

In proving something on a balance of probabilities, a plaintiff must satisfy the court that it is more likely to have happened than not. At the ECO's May 2000 Litigation Rights workshop, participants suggested that the burden of proof was too high, and that plaintiffs should only have to demonstrate a *prima facie* case. A *prima facie* case would require only the minimum amount of evidence necessary to allow the action to continue in the judicial process, significantly lessening the burden of proof for the plaintiffs. The workshop participants recommended that the onus would then shift to the defendants to show that their action was reasonable and that there was no other course of action.<sup>51</sup>

Ss. 84(8) could be amended to lower the burden of proof of the contravention from a balance of probabilities to a *prima facie* case.

#### Ss. 85(3) – Reasonable Interpretation Defence

The *EBR* sets out three defences to an action for harm to a public resource. The court will find that an Act, regulation or instrument has not been contravened if a defendant successfully establishes one of the following defences: that it exercised due diligence in complying with the Act, regulation or instrument (ss. 85(1)); that the alleged contravention is authorized by federal or provincial Act, regulation or instrument (ss. 85(2)); or that the defendant complied with an interpretation of the instrument that the court considers reasonable (s. 85(3)).

In the ECO's May 2000 paper on litigation rights issues, the authors discussed the defences available to a defendant in a Harm to a Public Resource action, noting that

. . . [a] potential plaintiff would need a great deal of information about the defendant, information that may require expert advice in order to interpret, to know whether or not any of these defences would be applicable. The plaintiff would not be able to obtain the information necessary to evaluate the strength of the defendant's defence until the discovery stage of the lawsuit, making the lawsuit a risky prospect.<sup>52</sup>

At the Litigation Rights workshop, participants identified the "reasonable interpretation" defence in particular as a barrier to the Harm to a Public Resource action, suggesting that this defence was too broad.<sup>53</sup> A court might be persuaded that a defendant's interpretation of an instrument was "reasonable" even where the defendant did not follow its specific terms and conditions, depending on the defendant's priorities and situation.

Ss. 85(3) could be amended to require that a defendant show it has complied with a strict interpretation of the instrument in question.

#### Ss. 90(1) – Power to Issue Stay

Ss. 90(1) permits the court to stay or dismiss an action in harm to a public resource if the court considers it to be in the public interest to do so. In deciding this, ss. 90(2) provides

that the court may look at environmental, economic and social concerns, and may consider: whether the issues raised would be better resolved by another process; whether there is an adequate government plan to address the public interest issues raised; and any other relevant matter.

Another recommendation from the ECO's May 2000 Litigation Rights workshop was to narrow the court's power to issue a stay under s. 90. Participants suggested that the power to issue a stay "in the public interest" was too broad.<sup>54</sup> Instead, the *EBR* could set out more specific circumstances in which the court would be permitted to issue a stay.

Ss. 90(1) could be amended to narrow the court's power to issue a stay.

#### S. 92 – Common Law Test for Interlocutory Injunction

S. 92 provides the court with power to consider special circumstances, including whether an action is a test case or raises a novel point of law, when exercising its discretion under the rules of court as to whether to dispense with an undertaking by the plaintiff to pay damages caused by an interlocutory injunction or mandatory order.

However, the *EBR* does not change the requirements of the common law test for granting an injunction. To obtain an interlocutory injunction, the plaintiff must satisfy a three-pronged test, showing that: there is a serious issue to be tried; the plaintiff will suffer irreparable harm if an interlocutory injunction is not granted; and the plaintiff will suffer greater harm than the defendant if the injunction is not granted. Participants at the May 2000 Litigation Rights workshop raised as a concern the fact that this test has generally not resulted in injunctions' being granted in environmental cases in Canada.

S. 92 could be amended to modify the common law test to lower the threshold for granting an interlocutory injunction in a Harm to a Public Resource action.

#### S. 103 – Public Nuisance and Class Actions

S. 103 provides for an action in public nuisance causing environmental harm, where a plaintiff experiences direct economic or personal loss, without the requirement that the plaintiff obtain the consent of the Attorney General, as is the case with common law public nuisance actions.

The Task Force intended that s. 103 would work with the *Class Proceedings Act*, which was also introduced in 1992, to facilitate public nuisance claims.<sup>55</sup> The Task Force and the government recognized that class proceedings reform was an integral part of environmental reform, given the expense and complexity of environmental claims. Because the expense of an individual claim was such an impediment, a class proceeding would often be the only effective way to proceed.<sup>56</sup> Although the ECO intervened before the Supreme Court of Canada in *Hollick v. Toronto(City)*,<sup>57</sup> the Court did not comment specifically on the *EBR*'s Public Nuisance action in relation to class proceedings.

S. 103 could be amended to clarify the relationship of Public Nuisance actions to class actions.

#### S. 103 – Fund for Public Nuisance Actions

As noted above, s. 103 provides for actions for public nuisance.

As with s. 84 actions, it is likely that the prohibitive costs of conducting civil litigation have contributed to deterring s. 103 actions. The government could eliminate financial barriers to public nuisance actions by establishing a fund similar to the class proceedings fund administered by the Law Society of Upper Canada that was created to support class actions. The Law Foundation initially endowed the fund with \$500,000.<sup>58</sup> Under s. 59.1(2) of the *Law Society Act*, this fund is used to advance funds toward disbursements in an action, and to indemnify a plaintiff ordered to pay a defendant's costs.

S. 103 could be amended to establish a fund similar to the class proceedings fund to support actions in public nuisance under the *EBR*.

#### S. 121 – Regulation-Making Powers

This paper deals with potential legislative reforms to the *Environmental Bill of Rights*, rather than changes needed in the regulations under the *EBR*. Generally, it is a simpler and speedier process to make changes to the regulations, and this may occur more frequently.

Having stated that, it is worth mentioning some amendments that have been proposed recently by stakeholders and staff with respect to the regulations.

In relation to O. Reg. 73/94, the General Regulation under the *EBR*, the Ministries of Finance, Education and Public Infrastructure Renewal could be prescribed for the purposes of Part II of the *EBR* under s. 1 of the regulation. Under s. 3, the *Drainage Act*, the *Nutrient Management Act* and the *Ontario Planning and Development Act* could be added, making them subject to applications for review, and to posting regulations on the Registry for public comment. S. 4 could be amended to add the Ministries of Transportation, Health and Education to the list of ministries subject to applications for review. Under s. 9, the *Nutrient Management Act* could be included on the list of Acts subject to applications for investigation. Also, applications for review of official plans could be reinstated, in relation to official plans that were intended to be subject to these provisions prior to approval delegation by the Ministry of Municipal Affairs and Housing.

In relation to O. Reg. 681/94, additional instruments could be classified for the purposes of the *EBR*. For example, approvals for soil conditioning sites could be included as classified instruments.

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<sup>1</sup> This paper was written by Maureen Carter-Whitney, Legal Analyst at the ECO. Lisa Shultz, Policy and Decision Analyst at the ECO, provided research support on the *EAA*-related exceptions in s. 32 of the *EBR*. David McRobert, In-House Counsel and Senior Policy Advisor at the ECO, and Gord Miller, Environmental Commissioner of Ontario, provided input and guidance. A number of other ECO staff provided constructive comments. The paper was slightly revised in October 2004 to correct some minor errors.

<sup>2</sup> *The Ontario Regulation and Policy-Making Process in a Comparative Context: Exploring the Possibilities for Reform, A Report Prepared for the Environmental Commissioner of Ontario*, October 1996, at 9-10.

<sup>3</sup> *Ibid.*, at 10.

<sup>4</sup> *Supplementary Recommendations, Report of the Task Force on the Ontario Environmental Bill of Rights*, December 1992, at 9.

<sup>5</sup> *Keep the Door to Environmental Protection Open – A Special Report to the Legislative Assembly of Ontario*, October 1996, at 1.

<sup>6</sup> *Ibid.*, at 2-7.

<sup>7</sup> Registry # PB7E4001, also see *Thinking Beyond the Near and Now*, ECO 2002/2003 Annual Report, at 184-185.

<sup>8</sup> *Report of the Task Force on the Ontario Environmental Bill of Rights*, July 1992, at 33.

<sup>9</sup> *Developing Sustainability*, ECO 2001/2002 Annual Report, at 35.

<sup>10</sup> *Report of the Task Force on the Ontario Environmental Bill of Rights*, July 1992, at 32-33, 133-134.

<sup>11</sup> *The Role of Public Hearings in Environmental Decision Making*, Paper by Len Gertler to “EA – Back to the Future: A Joint OAIA-OSEM Forum”, May 16, 2003, at 3.

<sup>12</sup> *Notre Development Corporation (Adams Mine Site)*, Decision of the Environmental Assessment Board, EA-97-01, at 4.

<sup>13</sup> *Developing Sustainability*, ECO 2001/2002 Annual Report, at 35.

<sup>14</sup> ECO 1997 Annual Report Supplement, at 21.

<sup>15</sup> *Gary Steacy Dismantling Limited*, Decision of the Environmental Assessment Board, EA-97-03, at 29.

<sup>16</sup> ECO 1997 Annual Report Supplement, at 21.

<sup>17</sup> *Broken Promises: MNR’s Failure to Safeguard Environmental Rights*, ECO Special Report, June 2001.

<sup>18</sup> *Developing Sustainability*, ECO 2001/2002 Annual Report, at 12-13.

<sup>19</sup> *Developing Sustainability*, ECO 2001/2002 Annual Report, at 41.

<sup>20</sup> *Ibid.*, at 33.

<sup>21</sup> *Ibid.*

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- <sup>22</sup> *Developing Sustainability*, ECO 2001/2002 Annual Report, at 41.
- <sup>23</sup> *Ibid.*
- <sup>24</sup> *Report of the Task Force on the Ontario Environmental Bill of Rights*, July 1992, at 52-3.
- <sup>25</sup> *Ibid.*, at 53.
- <sup>26</sup> *Ibid.*
- <sup>27</sup> *Ibid.*
- <sup>28</sup> *Supplementary Recommendations, Report of the Task Force on the Ontario Environmental Bill of Rights*, December 1992, at 21.
- <sup>29</sup> <http://www.ene.gov.on.ca/envision/env%5Freg/ebr/english/ebr%5Finfo/right%5Fto%5Fcomment.htm>
- <sup>30</sup> *Draft Guideline on the Use of Mediation in Ontario's Environmental Assessment Process*, December 15, 2000.
- <sup>31</sup> *The EBR Litigation Rights: A Survey of Issues and Six-Year Review*, May 2000, at 9-10.
- <sup>32</sup> *EBR Litigation Rights Workshop Meeting Report*, May 2000, at 14.
- <sup>33</sup> *Partnership for Public Lands et al.*, Decision of the Environmental Review Tribunal, 03-100 to 03-105, at 4.
- <sup>34</sup> *The EBR Litigation Rights: A Survey of Issues and Six-Year Review*, May 2000, at 12-13, 18.
- <sup>35</sup> *EBR Litigation Rights Workshop Meeting Report*, May 2000, at 14-15.
- <sup>36</sup> *Report of the Task Force on the Ontario Environmental Bill of Rights*, July 1992, at 95-6.
- <sup>37</sup> *Ibid.*, at 96.
- <sup>38</sup> *EBR Litigation Rights Workshop Meeting Report*, May 2000, at 15.
- <sup>39</sup> *Braeker et al. v. The Queen et al.*, initiated in 1998, is still at the discovery stage, while *Brennan et al. v. the Board of Health for the Simcoe County District Health Unit*, begun in 1999, was dismissed without costs in 2002 because the plaintiffs did not wish to continue it.
- <sup>40</sup> *Report of the Task Force on the Ontario Environmental Bill of Rights*, July 1992, at 96-7.
- <sup>41</sup> *EBR Litigation Rights Workshop Meeting Report*, May 2000, at 15.
- <sup>42</sup> *Having Regard*, ECO 2000/2002 Annual Report, at 38.
- <sup>43</sup> *Developing Sustainability*, ECO 2001/2002 Annual Report, at 8-10.
- <sup>44</sup> *Ibid.*, at 10-11.
- <sup>45</sup> *Implementing the Environmental Bill of Rights: Exceptions – A Guidance Document*, June 1998, at 6.
- <sup>46</sup> *Keep the Door Open to Environmental Protection*, ECO Special Report, October 1996, at 7.

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<sup>47</sup> *Open Doors*, ECO 1998 Annual Report, at 216.

<sup>48</sup> *Supplementary Recommendations, Report of the Task Force on the Ontario Environmental Bill of Rights*, December 1992, at 22-23.

<sup>49</sup> *EBR Litigation Rights Workshop Meeting Report*, May 2000, at 15.

<sup>50</sup> *The EBR Litigation Rights: A Survey of Issues and Six-Year Review*, May 2000, at 14-5.

<sup>51</sup> *EBR Litigation Rights Workshop Meeting Report*, May 2000, at 15.

<sup>52</sup> *The EBR Litigation Rights: A Survey of Issues and Six-Year Review*, May 2000, at 15.

<sup>53</sup> *EBR Litigation Rights Workshop Meeting Report*, May 2000, at 15.

<sup>54</sup> *Ibid.*, at 15.

<sup>55</sup> *Report of the Task Force on the Ontario Environmental Bill of Rights*, July 1992, at 88-90.

<sup>56</sup> *Having Regard*, ECO 2000/2002 Annual Report, at 149.

<sup>57</sup> [2001] 3 S.C.R. 158, 2001 SCC 68.

<sup>58</sup> *The EBR Litigation Rights: A Survey of Issues and Six-Year Review*, May 2000, at 14-5.