



Looking Forward:
The Environmental Bill of Rights

A Discussion Paper summarizing
what the ECO learned during the first part of its
10-Year Review of the *EBR*

November 2004

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Introduction

In February 2004, Ontarians marked the tenth anniversary of the *Environmental Bill of Rights (EBR)*. This milestone provided an opportunity to look back on the first 10 years of implementing the *EBR*. Overall, the *EBR* has been an important legal tool for protecting the environment in Ontario. Ontario residents have been able to use the *EBR* to encourage government action to prevent environmental harm. The tenth anniversary is also a chance to consider ways to improve the *EBR*. To accomplish this, the Environmental Commissioner of Ontario (ECO) is undertaking a 10-Year Review process that has included to date:

- pre-consultation through a questionnaire to seek feedback on the use of the *EBR*.
- a report providing a summary and analysis of the results of the questionnaire.
- a discussion paper on the potential for *EBR* law reform.
- a law reform workshop hosted by the ECO.

As a result of these initiatives, the ECO has collected a large number of wide-ranging views as to how the *EBR* has worked so far, and what could be done to make it more effective. Most of those who participated in the pre-consultation questionnaire and the workshop emphasized many positive aspects of the *EBR*, noting in particular:

- the important information available through searching the Environmental Registry.
- the information and analysis on a broad range of topics in the clear, concise and readable ECO annual reports.
- the reporting, education and special powers of the office of the Environmental Commissioner.

Many respondents were in agreement that the *EBR* had achieved in part what it was created to do. The Environmental Registry and Environmental Commissioner's office were described as the "obvious successes of the *EBR*."

The purpose of this paper is to synthesize many of the comments and suggestions received through the 10-Year Review, and to offer the ECO's suggestions on ways forward.

Through the 10-Year Review process, the ECO generated and received many other valuable suggestions and comments beyond those highlighted in this paper. These are contained in the following documents and included as appendices to this paper:

- *ECO 10 Year Review of the EBR: Results of the Pre-Consultation Questionnaire* ("Pre-Consultation Report")
- *The Environmental Bill of Rights at 10: The Potential for Reforming the Law* ("Law Reform Paper")

- *EBR Law Reform Workshop, June 16, 2004 – Meeting Report* (“Workshop Meeting Report”)

The comments and recommendations in this report must be viewed together with these other documents for context and background. The ECO hopes to offer, for the government’s consideration, the best advice received through the review process.

1. Updating the Principles underlying the *EBR*

Widely held principles about environmental protection have continued to evolve over the past decade. Recent Supreme Court of Canada jurisprudence has recognized new environmental values in principles such as the precautionary principle, the polluter-pays principle and the principle of intergenerational equity. At present, these new principles are not reflected in the *EBR*.

One way to promote these principles through the *EBR* would be to require each ministry to explain in its Statements of Environmental Values (SEVs) how these principles are considered and applied in decision-making within the ministry. This could be accomplished by incorporating these principles within the purposes of the Act listed in s. 2. To give further force and power to these new legal principles, the government might wish to review all of the processes in the *EBR* to ensure these principles are followed.

2. Making Statements of Environmental Values Meaningful

Currently, SEVs are vague and outdated, and have little impact on decision-making in the ministries. It would be desirable to strengthen SEVs and ensure that they are integrated into ministry decision-making so that they become effective and meaningful. This might require legislative amendments to the *EBR* to set out more detailed requirements and expectations for SEVs. SEVs could be given higher status and more prominence within the ministries. They also could be changed to include clear goals and measurable targets so that they truly guide ministry decision-making, and so that progress may be measured against SEVs and reported on by the ministries. (See Pre-Consultation Report, pp. 13-14)

Many private corporations use corporate guidance documents to ensure that the environment is considered in planning and managing their businesses. Within the corporations, these guidance documents are given a great deal of prominence by senior officials. In the same way, SEVs could be promoted internally within the ministries; their importance would be highlighted for staff if the minister and deputy minister were to sign off on the ministry SEV each time it is renewed in order to signal their commitment to the principles in the SEV.

In corporate guidance documents, specific and measurable targets are set, and corporations report on their progress to shareholders in annual environmental reports. This provides for accountability through measurement and reporting against set

benchmarks. Such corporate guidance documents provide a useful model for SEVs. (See Meeting Report, pp. 12-13)

Responsible private companies use environmental management systems to ensure they have good management practices that protect the environment. These include setting objectives and goals, developing procedures to achieve the objectives and goals, and identifying and training staff who are responsible for meeting and maintaining environmental standards. Companies use different terminology to describe these environmental management systems. For example, Dow Canada has developed Sustainable Development Guiding Principles, and has set Environmental, Health and Safety goals that are tracked in annual and quarterly reports. Another company, Alcan Inc., produces a Sustainability Report each year on its Sustainability Framework.

SEVs could be similar to these corporate guidance documents in providing specific and measurable commitments as to how the purposes of the *EBR* will be applied and integrated with other considerations when the ministries make environmentally significant decisions. Ministries should be able to regularly measure and report on their performance on these commitments.

To ensure that SEVs reflect current government environmental priorities and policies, it would be desirable for each ministry to periodically review, republish and recommit to its SEV. One option would be to amend ss. 10(1) of the *EBR*, which provides that a minister may amend a ministry's SEV "from time to time." For example, this subsection could be amended to require a set periodic review of each ministry's SEV, possibly every five years. (See Law Reform Paper, p. 19)

The *EBR* could also be amended to add an explicit requirement that ministries must consider the ministry SEV when making any environmentally significant decision, whether on a policy, Act, regulation or instrument. Currently, MOE operates under a policy of not considering its SEV when making decisions on instruments, even those prescribed for the purposes of the *EBR*. (See Meeting Report, p. 33; Law Reform Paper, pp. 19-20)

3. Improving the Effectiveness of the Registry

In some cases, the public is frustrated by minimum comment periods for important or complex environmental decisions. The public consultation function of the Environmental Registry could be improved if members of the public were provided consistently with longer comment periods on significant proposals. This could be achieved in most cases without adding delay to the process of approving an instrument, policy, Act or regulation by posting the proposals earlier in the process, concurrent with other aspects of the approval process. (See Pre-Consultation Report, p. 8)

Better access to background documents, through links in the proposal notices to electronic copies of draft instruments or policy documents, would facilitate comments on

Registry proposals. While many documents are already made available in this way, the *EBR* could be amended to ensure that the most pertinent background documents be made available as electronic attachments to Registry notices. (See Meeting Report, pp. 13-14, Pre-Consultation Report, p. 8)

In order for members of the public to provide informed comment on Registry instrument proposals within a short time period, it would be helpful if notices provided better descriptions of the instruments. Proponents are required to submit information describing proposals to be published on the Registry. Ministries could ensure that these descriptions provide a clear and comprehensive description of a proposal, are written in plain language, and include an explanation of the actual environmental consequences of a proposal. It would be helpful for ministries to exercise quality control over the descriptions provided by proponents. This may require the ministries to modify their guidance documents for proponents, and may require training of ministry staff.

It would also be beneficial if ministries made more use of the enhanced public participation provisions in the *EBR*. The Act currently provides for the use of public meetings, and for bump-ups from Class I to Class II instruments that may extend comment periods. Thus far, there has been minimal use of these provisions; more extensive use of the provisions by the ministries might result in fewer applications for leave to appeal.

4. Providing Clarification through Exception Notices

The ECO receives many inquiries as to why certain instruments have not been posted on the Registry. This problem could be addressed by ensuring that all prescribed instruments receive some form of notice on the Registry, whether as regular notices or exception notices. Although there are several different kinds of exceptions to the notice requirements under the *EBR*, only emergency exceptions under s. 29 and exceptions due to equivalent public participation under s. 30 require an exception notice on the Registry. There is currently no requirement that the public receive notice of other types of excepted decisions such as those covered under the *Environmental Assessment Act (EAA)*. This leads to a great deal of confusion and uncertainty about the status of certain decisions. More exceptions should be subject to Registry notices to ensure that all environmental decisions are traceable.

It would be desirable if exception notices were posted as soon as reasonably possible after a decision is made on instruments that the public might otherwise expect to be classified, but which are exempted by O. Reg. 681/94, the *EBR* instrument classification regulation. (See Law Reform Paper, pp. 2-3)

An exception notice also could be posted where there is an exception for an instrument due to equivalent public participation under s. 32 of the *EBR*. (See Law Reform Paper, pp. 6, 8)

Finally, exception notices could be posted for instruments that implement decisions under the *EAA* or tribunal decisions under s. 32, or implement a budget or economic statement under s. 33. (See Law Reform Paper, p. 23; Meeting Report, p. 32)

5. Refining the Relationship between *EBR* and *EAA* Consultation Processes

The ECO is concerned that *EAA* consultation 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 issue is discussed in depth in the Law Reform Paper, pages 3 to 8. A number of possible solutions to this problem are discussed in that paper, and some are presented here.

Ss. 32(1)(b) of the *EBR* allows an exception to the requirement to give notice on the Registry of proposed instruments that would be a step toward implementing an undertaking approved by a decision made under the *EAA*. However, it would be preferable that instruments implementing an environmental assessment (EA) undertaking not be subject to the ss. 32(1)(b) exception 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). Ss. 32(1) currently lacks the requirement in s. 30 of the *EBR* that an exception be available only where there has been another process of public participation that was "substantially equivalent." Alternatively, ss. 32(1)(b) could be removed from the *EBR* altogether to ensure adequate public notice in all cases, and to allow new technical information to be considered. The existing provision exempts undertakings that may have been approved under the *EAA* many years ago and that deserve fresh public scrutiny. (See Law Reform Paper, pp. 6-8)

Ss. 32(2) provides an exception for instruments that implement undertakings exempted from undergoing an environmental assessment by a regulation under the *EAA*. While the exemption of undertakings by a ministry or public body from the requirements of an individual EA may be reasonable, further excepting the instruments that carry out these undertakings from the notice and appeal provisions of the *EBR* means that many important environmentally significant decisions are made without any formal requirement for public consultation. Ss. 32(2) could be eliminated, allowing these instruments to become subject to the *EBR*. (See Law Reform Paper, pp. 5, 8)

It could also be valuable if ministries were given the explicit discretion to post regular Registry proposal notices for any instrument covered under s. 32 that, in the view of the ministry, deserves public input. (See Law Reform Paper, p. 8)

6. Increasing Access to Applications for Leave to Appeal

S. 40 of the *EBR* requires that an application for leave to appeal be received no later than 15 days after notice of the ministry decision is given on the Environmental Registry. This requirement has been recognized as a tight deadline and a significant barrier to applying for leave to appeal. There would be merit in extending the deadline for seeking leave to appeal from 15 to 20 days. (See Law Reform Paper, pp. 11-12)

Also, tribunals could be given specific discretion to extend the deadline for leave to appeal beyond the minimum in circumstances where a decision notice did not give adequate notice, or where it is otherwise just to do so. (See Law Reform Paper, pp. 11-12)

7. Expanding ECO Powers

While the ECO has the power to employ an examination under oath when necessary, the *EBR* does not provide any other, less cumbersome, powers to assist in carrying out the ECO's mandate and responsibilities. When requesting information from ministries, the ECO must rely on voluntary cooperation unless willing to use the power of examination under oath.

The ECO could be given the power, similar to that of the Ombudsman, to require ministry staff to provide information or produce documents relevant to matters under review by the ECO. This would allow the ECO guaranteed access to ministry information needed to review ministry decisions and ministry compliance with the *EBR*. (See Law Reform Paper, pp. 13-14; Meeting Report, p. 41)

Prior to 1999, the Environmental Commissioner and other officers of the legislature were paid a salary comparable to salaries paid to deputy ministers in the Ontario civil service. This was hastily changed in 1999 so that Cabinet set salaries, although this change was quickly reversed for the Provincial Auditor. 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. There was support at the law reform workshop for returning the Commissioner's salary to a deputy minister level. The ECO believes that this issue requires further study by the legislature. (See Law Reform Paper, p. 25; Meeting Report, p. 41)

8. Clarifying ECO Compellability

The ECO is concerned that attempts to engage the Commissioner and ECO staff as witnesses in legal proceedings may foster a negative perception of the ECO's impartiality. It would be helpful if the *EBR* stated explicitly that the Commissioner and ECO staff cannot be compelled to give evidence in a court or a proceeding of a judicial

nature concerning information related to the Commissioner's role or functions. Similar provisions protect other officers of the legislature. (See Law Reform Paper, pp. 12-13)

9. Reconsidering the Test for a Harm to Public Resource Action

While potential barriers for bringing an action in harm to a public resource under s. 84 of the *EBR* have been raised as a significant issue, there are strongly held opposing views on this question. Environmental lawyers who represent residents and environmental groups are extremely concerned that the tests to be met before bringing a s. 84 action are too onerous, and that this part of the *EBR* is essentially useless because it does not work effectively in its current form. These opinions were expressed repeatedly at the Law Reform Workshop. At the same time, other stakeholders expressed the view that the *EBR* Task Force had envisioned s. 84 as a last resort, so it is not surprising that it has been used infrequently. In the opinion of these stakeholders, s. 84 should not be amended to make access to the courts easier.

Although the government must decide which approach it will take with respect to s. 84, the ECO has developed some options for reform.

The ECO is concerned that the test for bringing an action in harm to a public resource is too strict because the plaintiff is required to show both that the defendant has contravened or will imminently contravene a prescribed Act, regulation or instrument, and also that significant harm to a public resource has been, or will imminently be, caused. The test could be amended so that it presents less of a barrier to potential plaintiffs seeking to bring an action. This might be accomplished by shifting the onus in relation to significant harm. Currently, the onus is on the plaintiff to show that there is or will be significant harm to a public resource. It could be shifted to the defendant, who would have to show that no significant harm has or will be caused. (See Law Reform Paper, pp. 15-16)

The *EBR* currently requires that a plaintiff in an action under s. 84 has applied for an investigation into an alleged contravention under Part V and either has not received a response within a reasonable time, or has received a response that is not reasonable. Potential plaintiffs have seen this requirement as onerous and an additional barrier to launching an action in harm to a public resource. This requirement could be modified so that the plaintiff would need to show that the ministry's response failed to adequately protect the environment. (See Law Reform Paper, pp. 16-17; Meeting Report, p. 36)

Because of the current architecture of the Act, any potential amendment to the action in harm to a public resource in s. 84 will be very complex and necessarily lead to other changes in related sections of the *EBR*. The ECO will continue to study and consult on potential reforms to s. 84.

10. Considering Participant Funding for *EBR* Proceedings

The *EBR* currently does not include provisions for participant funding for groups or individuals. It is often financially prohibitive for individuals to pursue their rights under the *EBR* if that involves court or tribunal proceedings or the employment of expert assistance. In recent years, as financial support and resources have decreased, it has also become increasingly difficult for environmental non-governmental organizations (ENGOS) to engage the processes provided by the *EBR*.

This may be an appropriate moment to consider introducing some form of participant funding under the *EBR*, perhaps as a pilot project. Such funding could assist individuals and ENGOS in participating more effectively in environmental decision-making through the rights in the *EBR*.

Proponents and financiers of projects with potentially negative environmental impacts understand the importance of predictability in approvals processes. There is some suggestion that proponents may be willing to provide participant funding if it increases the predictability that accompanies a thorough airing of all technical issues of concern, and a meaningful public consultation process. Government funding may also be appropriate in some circumstances. (See Meeting Report, p. 27-28)

Conclusion

Many other issues have been raised over the course of the 10-Year Review process. The process showed that the *EBR* has enhanced public participation rights, and has improved the transparency of environmental decision-making. Other important comments and suggestions are contained in the three background documents that accompany this paper. The ECO hopes that this exercise will inspire positive changes to the *EBR* and the procedures used to implement it. More effective use of the *EBR* by the public can only result in better environmental decision-making in Ontario, helping to preserve our environment for generations to come.