A POLITICAL AND LEGAL ANALYSIS OF ONTARIO'S ENVIRONMENTAL BILL OF RIGHTS

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The concept of an environmental bill of rights has been central to the environmental law reform agenda in Ontario for the past two decades. In this context, the enactment of Bill 26, *An Act Respecting Environmental Rights in Ontario*[1] by the Ontario Legislature in December 1993, represents a major achievement for Ontario's environmental movement. The Environmental Bill of Rights (EBR) has been described "as the most important piece of environmental legislation enacted in Ontario since the *Environmental Assessment Act* of 1975."[2]

This article provides an overview of the evolution of the EBR concept in Ontario, and of the development of Bill 26. It summarizes the major elements of the Ontario EBR, and provides a brief assessment of its impact on the formulation of environmental law and policy in Ontario over the past four years. The article concludes with a discussion of the implications of the Ontario bill for the future of environmental law reform elsewhere in Canada.

I Origins of the Environmental Bill of Rights Concept

1. Common Law Environmental "Rights"

Prior to the enactment of provincial environmental protection statutes in the 1950s, 60s and 70s, the common law provided a number of grounds on which someone affected by environmental damage might obtain redress, in the form of either injunctions or awards of compensatory damages. These common law causes of action might be described as a kind of environmental "rights." Among the most important of the common law causes of action were *nuisance*, which was based on the unreasonable or unnecessary interference with the enjoyment of property, *riparian rights*, which protected downstream owners of property bordering on water bodies from interference with the flow or quality of water by upstream users, *trespass*, which was founded on the unauthorized entry into or damage to property, and *strict liability*, which made

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[1] *An Act Respecting Environmental Rights in Ontario*, S.O. 1993, c. 28 (hereinafter the *EBR*).

[2] The Hon. R. Rae, Premier of Ontario. Address (Speech to Canadian Institute for Environmental Law and Policy/Ontario Ministry of Environment and Energy Environmental Bill of Rights Course, 30 March 1994) [unpublished].

individuals responsible for the damage done by the escape of dangerous materials from their property.[3]

However, these common law "rights" suffer from a number of limitations. Each of the causes of action arises from the common law right of property owners to the enjoyment of their property. This means that an individual's own property must be affected in order to have "standing" to seek relief through the courts. Secondly, litigation is potentially expensive, and losing plaintiffs in Canada can be faced with paying not only their own legal costs, but those of the defendants as well.[4]

Notwithstanding these limitations, prior to the Second World War, Canadian courts, unlike their U.S. counterparts, generally were prepared to uphold common law rules and rights, even in the face of growing demands of industry to use the environment as a sink for its wastes.[5] However, as the pace of industrialization intensified in the post-war period, the strong defence of common law environmental property rights by the courts began to be perceived as a potentially significant barrier to industrial development. This was especially true in light of a number of successful actions by riparian landholders in Ontario against new industrial and municipal facilities in the late 1940s and early 1950s.[6]

In response to these developments in 1956 and 1957, the *Ontario Water Resources Commission Acts*[7] were enacted by the government of Premier Leslie Frost to establish the Ontario Water Resources Commission, and granted it authority over the use of water resources in the province and the maintenance of their quality.[8] The approval of the Commission was required before a work, which removed water from a water body or discharged materials into it, could be constructed or operated.[9] Such approval established "statutory authorization" for the discharge of pollutants from the facilities

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[3]For a detailed description of these causes of action see J. Swaigen & D. Estrin, eds., *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3d ed. (Toronto: Canadian Institute for Environmental Law and Policy and Emond-Montgomery Publishers, 1993) c. 6.

[4]T. Schrecker, "Of Invisible Beasts and the Public Interest: Environmental Cases and the Judicial System" in R. Boardman, ed., *Canadian Environmental Policy: Process* (Toronto: Oxford University Press, 1992) 87.

[5]J. Nedelski, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880-1930" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) at 295.

[6]See in particular, *McKie* v. *K.V.P. Ltd.* (1949) S.C.R. 698, *Stephens* v. *Richmond Hill* (1954) 4 D.L.R. 572, and *Burgess* v. *Woodstock*, (1955) 4 D.L.R. 615.

[7]The *Ontario Water Resources Commission Act*, S.O. 1956, and the *Ontario Water Resources Commission Act*, S.O. 1957.

[8]*Ontario Water Resources Commission Act*, 1957, s.16.

[9]*Ibid*, s.31(1).

in question, and thereby provided a defense against common law actions related to any damage which the pollutants might cause.[10]

2. *Environmental Regulation and Environmental Rights*

The *Water Resources Commission Act*'s approach of limiting the potential for private common law actions to curb pollution, and replacing them with a statutory regime for approval and regulation, provided the basic model for the development of environmental regulatory systems by provincial governments throughout Canada in the 1960s and 70s. The structure appeared to create a means of facilitating further industrial development, while permitting a degree of public control over environmental pollution. In Ontario, the process of establishing regulatory control over the activities of industry culminated with the passage, in 1971, of a comprehensive environmental protection statute, the *Environmental Protection Act*.[11] It encompassed discharges to land, air and water.

In fulfilling its regulatory functions in relation to pollution control, the Ontario Water Resources Commission's successor, the Ministry of the Environment,[12] continued the close working relationships originally established by its predecessor with the waste-generating industries it was to regulate. Participation in standard-setting processes was limited to representatives of the Ministry and the affected industries. Negotiations between officials and industry representatives were central in the determination of global emission and effluent standards and of specific abatement requirements for individual plants. In addition, negotiation was adopted as the Ministry's primary means of securing compliance with the terms and conditions of environmental approvals. Prosecution was seen as a measure of last resort and regarded as a potentially hostile action that would discourage subsequent cooperation on the part of the industry concerned, and harden adversarial attitudes.[13]

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[10]The defense of "statutory authorization" posits that those whose activities are closely circumscribed by statute should not be civilly liable for the inevitable consequences of those activities, provided that the operator is not negligent. See D.P. Emond, "Environmental Law and Policy: A Retrospective Examination of the Canadian Experience" in I. Bernier & A. Lajoie, *Consumer Protection, Environmental Law and Corporate Power* (Toronto: University of Toronto Press, 1985) 116. The extent of the protection from civil liability provided through "statutory authorization" has been limited by the Supreme Court of Canada's decision in *Tock* v. *St. John's Metropolitan Board* (1989) 2 S.C.R. 1181.

[11]S.O., 1971.

[12]Established in 1971 through the consolidation of the Ontario Water Resources Commission and elements of the Departments of Energy and Resources Management and of Health.

[13]M.S. Winfield, "The Ultimate Horizontal Issue: The Environmental Policy Experiences of Ontario and Alberta 1971-1993" (1994) XXVII:1 Canadian Journal of Political Science 132.

The quality of environmental protection that emerged from this "accommodative"[14] and "bipartite bargaining"[15] policy style on the part of the Ontario government was widely regarded as unsatisfactory. The new environmental non-governmental organizations that had begun to emerge in Ontario in the late 1960s and early 1970s were particularly vocal in this regard. However, organizations such as Pollution Probe, founded in 1967, and the Canadian Environmental Law Association (CELA) and Canadian Environmental Law Research Foundation (CELRF), both established in 1970, found themselves virtually excluded from the environmental policy and decision-making process. In this context, an environmental bill of rights appeared to offer environmental advocates a potential means of ensuring access to environmental decision making to non-industrial interests, through the establishment of a legally guaranteed right of participation in the making of regulations, granting of approvals and enforcement of environmental laws.

3. *The U.S. Experience: Administrative Procedure, Action Forcing Statutes and "Citizen Suits"*

In formulating its responses to the environment ministry's approach to the implementation of its regulatory statutes, Ontario's environmental community was strongly influenced by the recent successes of American environmental groups in using the courts to obtain access to environmental decision making processes within the United States government. The U.S. *Administrative Procedure Act*[16], originally enacted in 1946, was particularly important in this regard.[17] The Act required formal public notice and comment periods for "rulemaking," adjudication procedures and provided that "a person suffering legal wrong because of agency action within the meaning of a relevant statute is entitled to judicial review thereof."[18]

In addition, many of the U.S. federal environmental statutes enacted in the late 1960s and early 1970s, including the *National Environmental Policy Act*, the *Clean Water Act*, the *Clean Air Act* and *Endangered Species Act*, contained public

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[14]On "accommodative" regulation see R. Brickman, *et al.*, *Controlling Chemicals: The Politics of Regulation in Europe and the United States* (Ithaca: Cornell University Press, 1985).

[15]See G. Hoberg, "Environmental Policy: Alternative Styles" in M. Atkinson, ed., *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Jovanovich Canada Inc., 1993) 314.

[16]*Administrative Procedure Act*, 5 U.S.C. 702.

[17]See generally T.T. Smith, "Public Participation in Environmental Law-making and Decision-making in the U.S" in *First North American Conference on Environmental Law: Phase II Proceeding* (Washington, Mexico City, Toronto: Environmental Law Institute, Fundacion Mexicana para la Educacion Ambiental, Canadian Institute for Environmental Law and Policy, 1994) 92.

[18]*Supra* note 16, s.10(a).

participation requirements of their own.[19] Furthermore, in stark contrast to the structure of Canadian environmental statutes that provided broad authority to the environment ministers and cabinets to take action to protect the environment, the U.S. legislation included "action-forcing" provisions requiring the executive branch to undertake particular actions within set time frames. In addition, in the U.S. statutes, citizens were authorized to pursue civil actions, or "citizen-suits," to obtain court orders that would bring government agencies and private firms into compliance with regulatory requirements.[20] In many cases, these provisions were enacted by the U.S. Congress for the deliberate purpose of requiring regulatory agencies to include a wider range of stakeholders in their decision making processes than they had in the past.[21]

The significance of these provisions was enhanced by the general willingness of U.S. courts to set aside administrative decisions not only on issues of jurisdiction and natural justice, but also where a decision was not based on sufficient "substantive evidence." This approach was in sharp contrast to the Canadian experience, where judges did not attempt to review cases on the basis of the facts, but rather focused exclusively on issues or errors of law.[22]

4. *Substantive Environmental Rights*

In addition to the establishment of procedural rights of participation in environmental decision-making, Canadian environmental groups and environmental law reform advocates also envisioned legislation that would establish a substantive right to environmental quality. Such a right would create judicially enforceable remedies for environmental damage caused by government agencies or private actors in cases where courts found that the right had been infringed.[23] A substantive right was regarded as necessary to counterbalance the property and economic development rights of industrial

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[19]*National Environmental Policy Act* 42 U.S.C. 4321-4370D; *Clean Water Act* 33 U.S.C. 1251-1287; *Clean Air Act* 42 U.S.C. 7401-7671q; and *Endangered Species Act* 16 U.S.C. 1531-1544.

[20]On "citizen suits" see generally, G. Block, "Public Participation in Environmental Enforcement" in *First North American Conference on Environmental Law: Phase II Proceeding* (Washington, Mexico City, Toronto: Environmental Law Institute, Fundacion Mexicana para la Educacion Ambiental, Canadian Institute for Environmental Law and Policy, 1994) 143.

[21]See generally G. Hoberg, *Pluralism by Design: Environmental Policy and the American Regulatory State* (New York: Praeger, 1992). See also M.W. McCann & H. Silverstein, "Social Movements and the American State: Legal Mobilization as a Strategy for Democratization," in G. Albo, *et al.*, *A Different Kind of State? Popular Power and Democratic Administration* (Toronto: Oxford University Press, 1993) 131.

[22]M. Howlett, "The Judicialization of Canadian Environmental Policy 1989-1990: A Test of the Canada-U.S. Convergence Thesis" (1994) XXVII Canadian Journal of Political Science 120.

[23]P. Muldoon, "The Fight for an Environmental Bill of Rights" (1988) 15 Alternatives 35.

interests.[24] Proponents of the right argued that effective protection of the environment required the legal recognition of "public rights" which, like private property rights, could not be left safely "to some bureaucrat to vindicate when, and if, he determines them to be consistent with the public interest."[25]

A substantive environmental right of this nature would go beyond a revival of the traditional common law environmental causes of action. In particular, the common law requirement of demonstrating individual damage would be eliminated, and a substantive right to environmental quality would belong to every citizen. The effect would be to introduce a "public trust doctrine" into environmental protection, under which the interests of every citizen are recognized in law.[26] This would counterbalance the "structural" power enjoyed by business interests in the policy-making process by virtue of their control over economic investment.[27]

The Evolution of the EBR Concept in Ontario

In addition to the provisions of U.S. federal statutes providing citizen access to the courts, a number of states, beginning with Michigan in 1970,[28] enacted environmental bills of rights, either as parts of specialized environmental legislation or, in the case of Pennsylvania, as amendments to their state constitutions.[29] The essential elements of an environmental bill of rights for Ontario were first formally articulated in the 1974 by the Canadian Environmental Law Association (CELA) and the Canadian Environmental Law Research Foundation (CELRF) in their publication *Environment on Trial*.[30] The proposal included provisions for environmental impact studies, access to government information, relaxed standing rules to permit citizens to defend the environment in courts and tribunals, limits on cost awards in cases of unsuccessful citizen actions, and expanded access to judicial review of administrative actions.

The CELA/CELRF proposal was further refined in the 1978 second edition of *Environment on Trial* to include requirements for public participation in the setting of environmental standards, the establishment of an office of an environmental

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[24]B. Heidenreich & M. Winfield, "Sustainable Development, Public Policy and the Law" in Swaigen, *supra* note 3 at xxxvi.

[25]J. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Random House, 1970) 58-60.

[26]Schrecker, *supra* note 4 at 98-99.

[27]Hoberg, *supra* note 15 at 315-316.

[28]See the *Michigan Environmental Protection Act*, Mich Comp Laws Ann 961.1201-1207.

[29]*Pennsylvania State Constitution*, Art. 1, s. 27.

[30]D. Estrin & J. Swaigen, eds., *Environment on Trial: A Citizen's Guide to Ontario Environmental Law* (Toronto: Canadian Environmental Law Association, Canadian Environmental Law Research Foundation and the New Press, 1974) c. 16.

ombudsman, provisions for class actions, limits on agency discretion, and provisions placing the burden of proof on the polluter.[31] The concept of an environmental bill of rights was adopted by both the Liberal and New Democratic Party opposition during the extended period of Progressive Conservative minority government between 1975 and 1981.[32] The Liberal leader, Dr. Stuart Smith, first introduced a bill as a private members' measure in December 1979,[33] and the New Democratic Party Environment Critic, Marion Brydon, followed with an *Environmental Magna Carta Act* in 1980.[34] Despite the minority government situation, the passage of both of these bills was "blocked" by government members through procedural means.[35]

Environmental bills of rights were introduced as private members' bills on a number of occasions by Liberal and New Democratic members in the aftermath of the Progressive Conservatives' re-election as a majority government in 1981.[36] None of these bills was enacted. The 1985 election resulted in a Liberal minority government, supported by the New Democrats. The New Democratic Party Environment Critic Ruth Grier introduced private members' bills on two occasions during this period.[37] Again, neither bill was enacted. A further bill from Ms. Grier was introduced following the 1987 election, which had resulted in a Liberal majority government. This bill received second reading in December 1987,[38] but was not returned to the House following referral to committee. Ms. Grier introduced a final, unsuccessful, private members' bill in 1989.[39] A private members' bill regarding standing in environmental cases was also introduced by Margaret Marland, the Progressive Conservative Environment Critic, in 1990.[40]

Although it failed to enact a complete environmental bill of rights during its minority and majority periods between 1985 and 1990, the Liberal government of David Peterson did move forward on a number of the other aspects of the bill first proposed by CELA and CELRF in the 1970s. The passage of the *Freedom of*

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[31]D. Estrin & J. Swaigen, *Environment on Trial: A Handbook of Ontario Environmental Law* (Toronto: Canadian Environmental Law Research Foundation, 1978) c. 21.

[32]For a detailed discussion of environmental politics in Ontario during this period see M. Winfield, *The Ultimate Horizontal Issue: Environmental Politics and Policy in Ontario and Alberta 1971-1992* (Department of Political Science, University of Toronto, 1992) c. 3 [unpublished].

[33]Bill 186, *Ontario Environmental Bill of Rights Act*, 3d Sess., 31st Legislature, 1979.

[34]Bill 91, 4th Sess., 31st Legislature, 1980.

[35]Winfield, *supra* note 32 at 58, note 46.

[36]Bill 134, 2nd Sess., 32nd Legislature, 1981 (Dr. Smith); Bill 96, 2nd Sess., 32nd Legislature 1982 (Mr. Elston).

[37]Bill 192, 1st Sess., 33rd Legislature, 1986; Bill 9, 2nd Sess., 33rd. Legislature, 1987.

[38]Bill 13, 1st Sess., 34th Legislature, 1987.

[39]Bill 12, 2nd Sess., 34th Legislature, 1989.

[40]Bill 231, 2nd Sess., 34th Legislature, 1990.

Information and Protection of Privacy Act in 1987,[41] the *Intervenor Funding Project Act* in 1988,[42] the *Municipal Freedom of Information and Protection of Privacy Act* in 1989,[43] and the increased application of the 1975 *Environmental Assessment Act*, were particularly significant in this regard.

The Liberal government also adopted a much more aggressive approach to the enforcement of environmental laws than its predecessor. This was especially evident in the enactment of the *Environmental Enforcement Statute Law Amendment Act, 1986,*[44] which increased the enforcement powers and penalties available under the *Environmental Protection Act*, *Ontario Water Resources Act*, and the *Pesticides Act*, and in the creation of an Investigation and Enforcement Branch within the Ministry of the Environment.[45]

In addition to these developments in Ontario, a series of judicial decisions beginning in the mid-1970s, began to relax the traditional barriers to "standing" for environmental interests. The Supreme Court of Canada's decisions of *Thorson* v. *A.G. Canada*,[46] in 1974, and *Finlay* v. *Canada (Minister of Finance)*,[47] in 1986, were particularly important in establishing "public interest standing" for individuals or groups that had not suffered some "special" (usually economic) damage as a result of the alleged activities. Both the celebrated *Oldman Dam*[48] and *Rafferty-Alameda Dam*[49] environmental assessment cases were argued in the courts on the basis of the post-*Finlay* standing rules.[50]

The Development of Bill 26, The Environmental Bill of Rights

The enactment of an environmental bill of rights was a central component of the New Democratic Party's environmental policy platform during the September 1990 election campaign.[51] Ms. Grier was appointed Minister of the Environment following the

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[41]R.S.O. 1990, c. F. 31.

[42]R.S.O. 1990, c. I. 13.

[43]R.S.O. 1990, c. M. 56.

[44]S.O. 1986, c. 68.

[45]For a general discussion of environmental policy and politics in Ontario during this period see Winfield, *supra* note 32 c. 4.

[46][1975] 1 S.C.R. 138.

[47][1986] 2 S.C.R. 607.

[48]*Friends of the Oldman River Society* v. *Canada (Minister of Transport)* (1992) 7 C.E.L.R. (N.S.) 1.

[49]*Canadian Wildlife Federation Inc.* v. *Canada (Minister of Environment)* (1989) 3 C.E.L.R. (N.S.) 287.

[50]For a detailed discussion of the evolution of this issue see Howlett, *supra* note 22 at 114-118.

[51]*Agenda for the People* (Toronto: Ontario New Democratic Party, 1990).

Party's unexpected election victory. The formation of a 25-member Advisory Committee on the Environmental Bill of Rights to assist the new Minister in developing a bill was announced in December 1990. The committee included representatives of the provincial government, municipalities, and business, labour and environmental organizations.

The advisory committee met on a number of occasions in the spring of 1991, and reached consensus on a number of principles for an Environmental Bill of Rights. However, there was no agreement on how these principles should be implemented.[52] Subsequently, in October 1991, a smaller, multi-stakeholder, Task Force on the Environmental Bill of Rights was appointed to draft a bill. The Task Force included individuals representing the Ontario Chamber of Commerce, Business Council on National Issues, Canadian Manufacturer's Association, Pollution Probe, Canadian Environmental Law Association, the Ministry of the Environment's Legal Services Branch, and a lawyer in private practice. The Task Force was co-chaired by the Deputy Minister of the Environment and a lawyer from the Attorney-General's Office.

1. Political vs. Judicial Accountability

The key policy debate in the development of the Ontario Environmental Bill of Rights related to the appropriate roles of political and judicial forms of accountability in environmental policy and decision-making. Strong supporters of the concept of a legally-entrenched right to environmental quality argued that such a right was necessary to protect the environment from trade-offs between long-term environmental quality and short-term economic or political gains.[53] At the same time, an accompanying emphasis on formalized decision making processes stressed the role of the courts in ensuring that all interests were adequately taken into account in the formulation and implementation of public policy.[54]

In response, opponents of the concept of an environmental bill of rights argued that the judicially enforceable procedural requirements, and action-forcing and citizen suit provisions that have provided the model for much of the content of proposed Canadian environmental bills of rights, all were developed in the institutional context of the U.S. separation of powers system of government. Within this structure, when members of Congress do not trust the executive branch to implement their policies, they enact

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[52]P. Muldoon, "Environmental Bill of Rights" in J. Swaigen & D. Estrin, eds., *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3d ed. (Toronto: Canadian Institute for Environmental Law and Policy and Emond-Montgomery Publishers, 1993) 801.

[53]Muldoon, *supra* note 23 at 35.

[54]Hoberg, *supra* note 15 at 331.

explicit statutes to force executive agencies to comply with their legislative intent.[55] The U.S. environmental statutes of the late 1960s and early 1970s provide particularly strong examples of Congress enlisting the support of the courts to ensure that the implementation of its legislation was conducted by the executive. They were drafted by Democratic, reformist Congresses during the conservative Republican Nixon administration.

In parliamentary systems such as Canada's, the merging of the legislative and executive branches through the cabinet means that, except in minority government situations, the cabinet belongs to the same party as the majority coalition in the legislature. Consequently, the problem of ensuring that executive actions reflect the preferences of the majority of the legislature is not seen as a major issue.[56] Rather, "action-forcing" statutes and other "legalistic"[57] elements of U.S. environmental law are considered alien to the institutional structure of Canadian governments, and viewed as unnecessarily fettering executive discretion in the pursuit of the government's policy goals.[58]

Even stronger objections have been raised to the notion of a legally-enforceable right to environmental quality. In rejecting the concept of legally-entrenched environmental rights during the development of the *Canadian Environmental Protection Act* in 1987, the then federal Minister of the Environment, Thomas McMillan, argued that such rights would be subject to interpretation and:

> inevitably, the interpretation is going to come from the courts, not from politicians who are accountable to the people. We would, in effect, abdicate to the courts decisions affecting the environment, and the courts are not accountable.[59]

The Minister concluded that:

> I am not sure it is in the public interest, and I am sure it is not in the environment's interest, to have law unduly made by judges as opposed to politicians who can be held accountable at the ballot box and in other democratic ways ... .

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[55]Brickman, *supra* note 14 c. 3.

[56]Hoberg, *supra* note 15 at 337.

[57]*Ibid.* at 324. Hoberg defines legalism in terms of three key elements: formal administrative procedures, with widespread access to information and rights to participation for all affected interests; access to the courts for pro-regulatory interest groups; and non-discretionary governmental duties, enforceable in court.

[58]*Ibid.* at 337.

[59]The Hon. T. McMillan, House of Commons, *Minutes of Proceedings and Evidence,* on Bill C-74, 2d Sess., 33rd Parl., 24-25 November 1987 at 25.

> [T]he committee should reflect long and hard before it embraces with undue haste the principle of an environmental bill of rights that simply takes a whole area of public policy, puts it in the laps of the courts, and tells the judiciary to sort it out.[60]

McMillan's comments reflected the view widely held within government that providing judges with the type of explicit policy role that substantive environmental rights would create, would conflict fundamentally with the principles of parliamentary, responsible government. In the classical model of the cabinet-parliamentary system, the executive is granted wide discretion by parliament and held to account for the consequences of its actions through political means, particularly the actions and criticisms of the legislative opposition parties, interest groups and the media, rather than through the courts.[61]

However, institutional arguments of this nature now appear to carry far less weight with public opinion than may have been the case in the past. This is especially true in the context of the adoption of the *Canadian Charter of Rights and Freedoms* in 1982 and the increasing tendency of Canadians to define their citizenship in terms of the judicially enforceable rights that the *Charter* provides.[62] The degree to which the existing institutional structure has permitted Canadian governments to implement policies on such issues as free trade and the goods and services tax, in the absence of public consensus, has undermined further public confidence in the effectiveness of traditional mechanisms of political accountability.[63]

The potential consequences of increasing the role of the courts in formulating the substantive content of environmental policy through a substantive right to environmental quality, do raise a number of other serious issues. Concerns often have been expressed that judicial intervention in the policy process is anti-democratic, or at least non-democratic. When non-elected judges second-guess the policy decisions of elected legislatures affecting the distribution of risks, costs and benefits within society, such criticism has substantial validity. Alternatively, judicial interventions to ensure that the essential democratic values of fair procedure and equality are respected can be seen as supportive of, and even essential to, democratic government.[64]

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[60] *Ibid.*, 3 February 1988 at 14-16.

[61] For a classical articulation of this view see, for example, S. L. Sutherland, "The Public Service and Policy Development" in M. Atkinson, ed., *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Jovanovich Canada Inc., 1993) 81.

[62] A. Cairns, "The Past and Future of the Canadian Administrative State" (1990) 40 U. T. L. J. 319.

[63] H. Bakvis & D. Macdonald, "The Canadian Cabinet: Organization, Decision-Rules, and Policy Impact" in M. Atkinson, ed., *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Jovanovich Canada Inc., 1993) 76.

[64] I. Green, "The Courts and Public Policy," in M. Atkinson, ed., *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt Brace Jovanovich Canada Inc., 1993) 203.

On a less theoretical level, critics on the left and right of the political spectrum argue with increasing frequency that the enhanced policy-making role of the courts, resulting from the adoption of the *Charter*, may in fact be strengthening the influence of major economic interests on public policy.[65] This is as a result of the greater economic resources available to such interests to pursue legal actions relative to those typically available to individuals and non-governmental organizations.[66] In addition, as the courts become less reticent to challenge executive discretion, business interests may find it easier to question pro-environmental decisions.[67] Rigorous procedural requirements, such as those contained in the U.S. *Administrative Procedure Act*,[68] may provide additional opportunities for economic interests to block or delay the implementation of policies or regulations that they regard unfavourably.[69]

2. *The Enactment of the Ontario Environmental Bill of Rights*

The Environmental Bill of Rights Task Force's efforts to achieve consensus on these issues were reflected in its July 1992 report.[70] In its report, the Task Force chose to propose a structure that strongly emphasized political, as opposed to judicial, accountability mechanisms. This was particularly evident in the absence of a substantive right to environmental quality from the Task Force's recommendations, and in its proposal for the creation of an Office of the Commissioner of the Environment. In turn, the office of the Commissioner would report directly to the Legislature, to ensure that the bill's procedural requirements for public participation in environmental decision making are met.[71]

A supplementary report by the Task Force, in response to public comments received on its initial report, was delivered in December 1992.[72] Subsequently, Bill 26, *An Act Respecting Environmental Rights in Ontario*, was introduced by Ms. Grier's

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[65]See, for example, M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson Inc., 1989) and R. Knopf & T.L. Morton, *Charter Politics* (Toronto: Nelson Canada, 1992).

[66]P. McCormack, "Party Capability Theory and Appellate Success in the Supreme Court of Canada" (1993) XXVI:3 Can. J. of Political Science 523.

[67]Hoberg, *supra* note 15 at 333.

[68]Mandel, *supra* note 65.

[69]D. Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Ithaca: Cornell University Press, 1986) at 191-192.

[70]Task Force on the Ontario Environmental Bill of Rights, *Report* (Toronto: Ontario Minister of the Environment, 1992).

[71]For a detailed discussion of the debates within the Task Force see Muldoon, *supra* note 50 at 802-805.

[72]Task Force on the Environmental Bill of Rights, *Supplementary Recommendations* (Toronto: Ministry of Environment and Energy, 1992).

successor as Minister of the Environment and Energy, the Hon. C.J.(Bud) Wildman on 31 May 1993.[73] The bill closely followed the Task Force's recommendations in structure and approach. Bill 26 was, under somewhat acrimonious circumstances, the subject of public hearings by the Legislature's Standing Committee on General Government in October 1993.[74] It received Third Reading and Royal Assent on December 14 of that year and was proclaimed in force 15 February 1994.

The Ontario *Environmental Bill of Rights* is a complex and challenging piece of legislation, consisting of eight parts. Part I deals with the bill's definitions and purposes. Part II establishes a registry of environmental decisions, requires ministries to develop "statements of environmental values" and establishes a regime for public participation in government decision making. Part III of the Bill creates the Office of the Environmental Commissioner to oversee the Bill's implementation. Parts IV and V permit citizens to request reviews of laws, regulations, and policies, and to request investigations of suspected violations of environmental laws respectively. Part VI establishes a right to sue to prevent, halt or seek the re-mediation of environmental harm to a public resource and removes some limitations on standing in cases of public nuisance causing environmental harm. Part VII protects employees who report environmental wrongdoing from employer reprisals. Part VIII of the bill contains a number of general provisions and, perhaps most importantly, a "privative" clause,[75] insulating all of the bill, except for certain aspects of Part II, from judicial review.

On the surface, these provisions seem to provide extensive public rights to environmental protection. Although, upon closer examination, many of these "rights" are subject to very significant limitations and qualifications, the Bill has had a significant impact on the formulation and implementation of environmental law and policy in the province over the past four years.

Goals, Purposes and Application of the *EBR*

1. Goals and Purposes

The preamble to the *EBR* states that the people of Ontario have "a right to a healthful environment." However, this is the only reference to such a substantive right in the Bill. As it appears in the preamble rather than the *EBR* itself, it constitutes merely an aid to the legal interpretation of the *EBR* and is not legally enforceable.

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[73]Bill 26, 3rd Sess., 35th Legislature, 1993.

[74]Standing Committee on General Government, *Official Report of Debates*, No. G-463-475 (21 October 1993).

[75]*EBR*, *supra* note 11, s. 118.

The purposes of the *EBR*, set out in section 2 to the Bill, include the protection, conservation and, where reasonable, restoration of the environment, the provision of environmental sustainability, and protection of the right to a healthful environment. In addition, specific reference is made to the prevention, reduction and elimination of pollution, the protection of biodiversity, the protection and conservation of natural resources, the encouragement of the wise management of natural resources, and the protection of ecologically sensitive areas or processes.[76] The Bill is to achieve these purposes through the provision of means of public participation in environmental decision making by the Ontario government, increasing the accountability of the government for environmental decisions, increasing access to the courts for the protection of the environment, and enhancing the protection of employees who take action with respect to environmental harm.[77]

2. *Applicability of the EBR*

The *EBR* may apply to government decisions in the categories of acts, policies, regulations and instruments.[78] However, for the Bill to apply to a decision, the Ministry (for the purposes of policies) or statute (for the purpose of regulations or instruments) must be prescribed as being subject to the Bill through regulations made under the Bill. The Bill's implementation is to be phased-in over a five year period, and is scheduled to ultimately apply to a total of thirteen ministries of the government of Ontario, beginning with the Ministry of Environment and Energy.[79]

I. Political Accountability and the Environmental Bill of Rights: Statements of Environmental Values and the Office of the Environmental Commissioner

The Ontario *Environmental Bill of Rights* is an unusual piece of legislation in that, notwithstanding its title, the *EBR* contains no substantive environmental "rights," and even the procedural rights it establishes are of limited legal enforceability. This is very much a product of the *EBR* Task Force's decision to emphasize mechanisms of political, as opposed to judicial, accountability in the Bill which it developed.

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[76] *Ibid.*, s. 2(2).

[77] *Ibid.*, s. 2(3).

[78] These are defined in s.1 of the *EBR*.

[79] The Bill was originally intended to apply to fourteen Ministries (Agriculture and Food; Consumer and Commercial Relations; Culture, Tourism and Recreation; Economic Development and Trade; Environment and Energy; Finance; Health; Housing; Labour; Management Board of Cabinet; Municipal Affairs; Natural Resources; Northern Development and Mines; and Transportation). The Ministry of Finance was permanently exempted from the requirements of the *EBR* on 29 November 1995. See O. Reg. 482/95.

The two most important manifestations of this approach taken by the Task Force were the requirement that ministries, prescribed as being subject to the Bill's provisions, develop "Statements of Environmental Values" indicating how each agency intended to implement the Bill's provisions, and the creation of an Office of the Environmental Commissioner. The Commissioner's Office, in particular, was explicitly conceived of by the Task Force as a replacement for a judicial accountability structure for the environmental decisions made by the government.[80]

Statements of Environmental Values

Section 7 of the *EBR* provides that the minister of each prescribed ministry shall, within three months of the date on which Part II of the *EBR* applies to the ministry, prepare a draft Ministry Statement of Environmental Values (SEV). The statements must explain how:

a) the purposes of the *EBR* are to be applied when the ministry makes decisions that "might significantly affect the environment", and

b) consideration of the purpose of the *EBR* "should be integrated with other considerations, including social, economic and scientific considerations" as part of the ministry's decision making.[81]

The SEVs were intended to instill an 'environmental ethic' into the decision making process of each of the ministries covered by the *EBR*.[82] They were intended as the Bill's primary instrument for affecting the substantive content of decision making, as opposed to the decision making process itself.

During the Standing Committee of General Government's hearings on the Bill, a number of witnesses suggested that the SEV provisions of the Bill be structured to define their purposes and content more effectively. The Conservation Council of Ontario, for example, proposed that the SEV provisions of the Bill be replaced by requirements that agencies develop environmental strategic plans, which would include explicit commitments to specific actions within set time-frames.[83] However, these proposals were not adopted by the Committee.

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[80]M.G. Cochrane, former chair, Task Force on the Ontario Environmental Bill of Rights, "Consensus, History and Overview of the Environmental Bill of Rights: Environmental Decision making-Joint Responsibility, Public Participation and Political Accountability" (Presentation to CIELAP/MOEE Environmental Bill of Rights Course, 29 March 1994) [unpublished].

[81]*EBR*, ss. 7(a) and (b).

[82]*EBR* Task Force, *supra* note 70 at 23-24.

[83]D. Macdonald & C. Winter, *Presentation to the Standing Committee on General Government Regarding Bill 26: The Environmental Bill of Rights* (Toronto: Conservation Council of Ontario, 1993).

The lack of clarity in the provisions of the Bill relating to the SEVs was reflected in the draft statements released by the fourteen ministries prescribed for the purposes of the *EBR* in May 1994.[84] Notwithstanding considerable efforts within the affected agencies to develop their statements, the draft statements were regarded widely as a major disappointment. The draft SEVs were often vague, and in some cases, appeared to commit agencies to "business as usual." Environmental groups and various environmental professional organizations, in particular, declared themselves "underwhelmed" by the draft statements.[85]

Environmental organizations appear to have expected the Statements to provide specific commitments from the affected ministries regarding how they would make operational the *EBR*'s purposes of promoting pollution prevention, biodiversity protection, natural resources conservation, wise management of natural resources and the protection of ecologically sensitive areas or processes in their operations and activities. On the other hand, the officials charged with drafting the statements understood their task in terms of providing generalized statements of commitment to the *EBR*'s purposes,[86] and many stressed the importance of the Bill's reference to the "integration" of these environmental purposes with economic, social and scientific considerations.

Final versions of the ministry SEVs were released in November 1994, as required by the *EBR*. The final statements included some minor revisions to the May 1994 drafts. In response, the Environmental Commissioner stated that:

> While the current SEVs provide a good foundation for environmental decision making that complies with the *EBR*, some elements need further attention.[87]

As a result, each of the ministries agreed to participate in a one-year review of the SEVs, ending on November 15, 1995. During this period the ministries were to work with the Environmental Commissioner's Office and the public to refine each SEV. In

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[84]*Draft Statements of Environmental Values For 14 Government Ministries* (Toronto: Ministries of: Agriculture, Food and Rural Affairs; Consumer and Commercial Relations; Culture, Tourism and Recreation; Economic Development and Trade; Environment and Energy; Finance; Health; Housing; Labour; Municipal Affairs; Natural Resources; Northern Development and Mines; Transportation, and the Management Board Secretariat, 1994).

[85]See for example, *Submission on the Statements of Environmental Values Under the Environmental Bill of Rights* (Toronto: Canadian Environmental Law Association, Canadian Institute for Environmental Law and Policy, CLEAN, Northwatch, Pollution Probe and the Wetlands Preservation Group of West Carleton, 1994), and C. Winter, *A Review of the 14 Draft Statements of Environmental Values* (Toronto: Conservation Council of Ontario, 1994)

[86]Personal communication, Bob Shaw, Environmental Bill of Rights Office, Ontario Ministry of Environment and Energy, 14 September 1994.

[87]E. Ligeti, Environmental Commissioner of Ontario, "An open letter to the Public from the Environmental Commissioner's Office" November 1994.

her first Annual Report, released in June 1996, the Environmental Commissioner noted that little progress was actually made in this area.[88] In practice, the statements appear to be having little or no impact on Ministry behaviour or policies. This point was highlighted by the Commissioner in her Second Annual Report to the Legislature.[89]

The Office of the Environmental Commissioner

The Office of the Environmental Commissioner is the *EBR*'s institutional centerpiece. It is the principal manifestation of the Task Force's goal of employing political as opposed to judicial accountability mechanisms as the primary means of ensuring that governments adhere to the requirements of the *EBR*.[90] The establishment of an independent body to review and assess government policies and programs with respect to their effects on the environment is not unprecedented in Canada. Institutions of this nature are seen as an effective means of enhancing political accountability for decision making in complex policy fields, such as environmental protection.[91]

The Environment Conservation Authority of Alberta (1970-1977) provided a highly successful model for such an agency,[92] and the federal government has recently created the position of Commissioner for the Environment Sustainable Development within the Office of the Auditor-General.[93] In addition, the Ontario Round Table on the Environment and Economy presented a proposal for the creation of an Office of the Commissioner of Sustainability in its September 1992 report *Restructuring for Sustainability*. What is unusual about the Ontario Commissioner's Office is that its function is primarily to oversee, and to a certain degree, administer, the implementation of the *procedural* aspects of the *EBR*, as opposed to the traditional role of such agencies of providing independent *substantive* policy and program reviews and advice.

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[88]Environmental Commissioner for Ontario, *Annual Report 1994-1995: Opening the Doors to Better Environmental Decision Making* (Toronto: Legislative Assembly of Ontario, 1996) at 11-25.

[89]Environmental Commissioner for Ontario, *Annual Report 1996: Keep the Doors open to Better Environmental Decision Making* (Toronto: ECO, 1997).

[90]*EBR* Task Force, *supra* note 70 at 65-70.

[91]P.S. Elder, "The Participatory Environment in Alberta" (1974) 12 Alta. L. R. 411.

[92]On the Alberta Environment Conservation Authority, see Elder, "The Participatory Environment in Alberta" and C.D. Hunt, "Environmental Protection and the Public" (1978) 8:1 Alternatives.

[93]See *An Act Respecting The Office of the Auditor General of Canada and Sustainable Development and Monitoring*, S.C. 1995, c. 43. The first Sustainable Development Commissioner was appointed in June 1996, and made his first report to Parliament in March 1997. See *Commissioner of Environment and Sustainable Development to the House of Commons* (Ottawa: Office of the Auditor General, 1997).

1. *Mandate and Institutional Structure*

The Environmental Commissioner is to be appointed by the Legislative Assembly as an Officer of the Assembly for a five-year term, with the possibility of reappointment for a further term or terms.[94] Eva Ligeti, a Professor of Legal Administration at Seneca College of Applied Arts and Technology, was appointed as Ontario's first Environmental Commissioner in May 1994.

The functions of the Environmental Commissioner include reviewing the implementation of the *EBR* and the compliance of ministries with its requirements, providing educational programs to the public about the *EBR*, and providing advice and assistance to members of the public who wish to participate in decision making about a proposal as provided by the Bill.[95] The Environmental Commissioner must submit annual reports to the Legislative Assembly.[96] The Commissioner may also submit special reports to the Legislature at any time he or she feels it is necessary to do so.[97]

In addition to these reporting functions, the Commissioner is assigned a number of administrative duties by the *EBR*. The most significant of these is the receipt and forwarding to the appropriate ministries of requests for reviews of statutes, regulations, and policies made by members of the public under Part IV of the Bill, and requests for investigations made under Part V. The Commissioner's Office also has some limited investigative powers. In particular, the Commissioner has the authority to examine any person on oath, and may require the production of documents or other things from these persons.[98]

2. *Impact and Effectiveness*

The Office of the Environmental Commissioner was intended to be an instrument of enhanced political accountability and its mandate can be interpreted widely or narrowly in this context. On the surface, the capacity of the Commissioner's Office to address substantive policy issues appears to be limited. The Office has no clear mandate to review specific environmental decisions or investigate complaints, and seems to be restricted to reporting on the degree to which the procedural requirements of the *EBR* were followed in such situations.

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[94] *EBR*, *supra* note 11, s. 49(3).

[95] *Ibid.*, s. 57.

[96] *Ibid.*, s. 38.

[97] *Ibid.*, s. 58(4).

[98] *Ibid.*, s. 60.

Similarly, the Office's mandate to review the effects of the statutes, regulations, policies and programs of prescribed ministries on the environment, appeared limited to assessing the degree to which decision making involving such instruments and activities considers the Ministry's SEV. Furthermore, although the SEVs are the cornerstone of the *EBR*'s political accountability structures, the Commissioner has no direct mandate to comment publicly on the adequacy of Ministry SEVs once they have been finalized, or to recommend changes in the statements from time to time. In many ways, the Office appears to be intended to carry out reactive, auditing functions, as opposed to more pro-active activities.

On the other hand, the Commissioner's mandate to review ministers' exercises of "discretion" under the *EBR* could be subject to a very broad interpretation regarding the content of ministerial decisions. The review of the implementation of ministry SEVs could also be read as opening the door to comment on the substance of ministry policies and activities affecting the environment. Nor is the Office explicitly prohibited from commenting publicly on the content of environmental policy.

A wider interpretation of the Commission's mandate would be more consistent with the role envisioned for the Office by many stakeholders involved in the *EBR* drafting process. During the development of the *EBR*, a number of environmental non-governmental organizations argued for a more direct and pro-active substantive policy review mandate for the Environmental Commissioner's Office.[99] This would follow the highly successful models of the Alberta Environment Conservation Authority,[100] the New Zealand Environmental Commissioner's Office,[101] and the approach taken by the House of Commons Standing Committee on the Environment and Sustainable Development in its May 1994 report on the concept of a federal Environmental Commissioner or Auditor-General's Office.[102]

In her first Annual Report,[103] the Commissioner commented extensively on procedural matters under the *EBR*, and in many cases was critical of the government's behaviour. The Commissioner also commented indirectly on a number of substantive environmental policy matters. In addition, the Commissioner has made two special

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[99]See for example, M. Winfield, *Submission to the Standing Committee on General Government Regarding Bill 26: An Act Respecting Environmental Rights in Ontario* (Toronto: Canadian Institute for Environmental Law and Policy, 1993).

[100]See the *Environment Conservation Act*, S.A. 1970, c. 125, s. 7.

[101]On the New Zealand Commissioner see M.B. Sanson, "Assisting in the Resolution of Environmental Issues - the Role of New Zealand's Parliamentary Commissioner for the Environment" (1993) 4:2 J. Environmental Law & Practice 222.

[102]Standing Committee on Environment and Sustainable Development, *The Commissioner of the Environment and Sustainable Development to the House of Commons* (Ottawa: Office of the Auditor General, 1997).

[103]Environmental Commissioner, *supra* note 88.

reports to the Legislature, the first in January 1996,[104] and the second in October 1996.[105] Both were highly critical of the government's implementation of the *EBR*.

The pattern of offering substantial criticism of government actions with respect to the implementation of the *EBR* continued in the Commissioner's Second Annual Report, tabled in April 1997. The second report also highlighted the government's failure to consider the environmental implications of a wide range of decisions to amend environmental laws, eliminate environmental advisory bodies, boards and commissions, and to reduce dramatically the budgets of environmental agencies.[106]

The Commissioner's annual and special reports have had a significant impact in the media and with the public. The Office has emerged as a critical institutional mechanism for holding the provincial government to account to the Legislature and the public for its environmental policies and actions. This function has become particularly important in light of the current government of Ontario's elimination of most of the province's independent advisory bodies on environmental matters over the past two years.[107]

II. The *EBR* System for Public Participation in Environmental Decision Making

Requirements for Public Notice and Comment Periods

The most basic, and possibly most important, responsibility the *EBR* places upon government decision-makers considering proposals for new environmental statutes, regulations, policies and instruments is the provision of notice to the public. The Bill provides for the establishment of an electronic "Environmental Registry" for this purpose.[108]

Following the placement of a notice of a pending decision on the environmental registry, as a general rule the *EBR* requires that there be a minimum thirty-day comment period during which members of the public may comment on the proposed decision.[109] Decisions may be exempted from these requirements if they are deemed by the

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[104]Environmental Commissioner for Ontario, *Ontario Regulation 482/95 and the Environmental Bill of Rights: A Special Report to the Legislative Assembly of Ontario* (Toronto: ECO, 1996).

[105]Environmental Commissioner for Ontario, *Keep the Door to Environmental Protection Open: A Special Report to the Legislative Assembly of Ontario* (Toronto: ECO, 1996).

[106]Environmental Commissioner, *supra* note 89.

[107]On these measures see M. Winfield & G. Jenish, *Ontario's Environment and the Common Sense Revolution: A First Year Report* (Toronto: Canadian Institute for Environmental Law and Policy, 1996) and M. Winfield & G. Jenish, *Ontario's Environment and the Common Sense Revolution: A Second Year Report* (Toronto: CIELAP, 1997).

[108]*EBR*, *supra* note 11, s. 27(1).

[109]*Ibid.*, ss. 15(1); 16(1); and 22(1).

responsible minister not to be "environmentally significant," or of a "predominantly financial or administrative nature."[110] In addition, exemptions may be granted in the case of emergencies,[111] or if the decision in question is subject to a public participation process "substantially equivalent" to the *EBR* process.[112]

At the conclusion of the public comment period, the *EBR* requires that the minister responsible for the decision in question ensure that relevant comments received from the public are considered in the ministry's decision making. As well, the minister must provide notice of the decision to the public as soon as reasonably possible, and include in the notice of the decision a brief of the effect, if any, of public participation in the making of the decision.[113]

Failure to comply with the public notice and comment requirements of the *EBR* does not invalidate the act, policy, regulation or instrument except that such failure may be judicially reviewed.[114] This provision is the one exemption provided to the "privative" clause contained in s.118 of the *EBR* which otherwise exempts decision making related to the *EBR* from judicial review.

1. Impact and Effectiveness

Notwithstanding these limitations, the public participation regime established by the *EBR* is proving to be one of its significant elements. The basic notice and comment requirements, in combination with the environmental registry, have provided members of the public with a comprehensive window on environmental decision making in the province, unlike any which existed before.

The importance of the *EBR*'s public notice and comment requirements have been particularly highlighted in the context of the wide range of initiatives taken by the current government since its election in June 1995.[115] In many cases it is unlikely that members of the public would have been informed of major initiatives in the absence of the requirements of the *EBR*. Also, public comment periods have provided opportunities for those concerned about the environmental implications of the government's proposals to organize effective responses.

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[110]*Ibid.*, ss. 15(2) and 16(2).

[111]*Ibid.*, s. 29.

[112]*Ibid.*, s. 30(1).

[113]*Ibid.*, s. 36.

[114]*Ibid.*, s. 37.

[115]Winfield, *supra* note 107.

However, the implementation of the *EBR*'s public notice and comment provisions has been resisted by many of the Ministries subject to the Bill's requirements. The failures of the Ministries of Natural Resources and of Consumer and Commercial Relations to meet the implementation schedule for the Bill's provisions, for example, were highlighted in the Environmental Commissioner's October 1996 Special Report to the Legislature.[116]

In addition, in November 1995, the Ministry of Finance was permanently exempted from the requirements of the *EBR*, and the application of the *EBR*'s requirements to other agencies with respect to activities related to "financial restructuring" was suspended for 10 months.[117] This action also prompted a Special Report to the Legislature by the Commissioner.[118]

Public Hearings

The *EBR*'s elements related to the provision of formal public hearings in relation to environmental decision making are remarkably complex. Surprisingly, the Bill does not permit ministers to provide formal hearings in situations where there currently are no provisions for such hearings, such as the granting of approvals for air emissions under the *Environmental Protection Act.* At the same time, *EBR* permits ministers to exempt from public hearings decisions for which such hearings, usually before the Environmental Assessment Board, are currently statutory requirements. This would include the granting of approvals for undertakings related to the handling, treatment and disposal of hazardous or liquid industrial wastes, large municipal solid waste management disposal sites, and certain types of sewage treatment systems regulated under the *Ontario Water Resources Act.*[119]

Third Party Appeals of Environmental Decisions

The *EBR* also provides for the possibility of appeals of environmental decisions by members of the public in situations where a right of appeal exists for the proponent.[120] However, the Bill establishes an extremely stringent leave test for the granting of third

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[116]Environmental Commissioner, *supra* note 105.

[117]O. Reg. 482/95.

[118]Environmental Commissioner, *supra* note 105.

[119]For a detailed discussion of these provisions see P. Muldoon, "Which Government Decisions are Covered by the Act?" in P. Muldoon *et al.*, eds., *Environmental Bill of Rights Workshop "Putting the New Regime into Practice"* (Toronto: Canadian Environmental Defence Fund, 1994).

[120]*EBR*, s. 38(1).

party appeals. Leave is only to be granted by the appellate body where there is "good reason to believe that no reasonable person ... could have made the decision."[121]

At the time of the *EBR*'s passage, a number of commentators noted the test established a "virtually insurmountable" barrier to third party appeals of environmental decisions.[122] However, by the end of 1996, two leaves to appeal had been granted by the Environmental Appeal Board, regarding approvals granted under the *Environmental Protection Act*.[123]

III. Requests for Reviews of Laws, Regulations and Policies Through the *EBR*

A formalized procedure for requesting reviews of existing laws, regulations, and policies has been a long-standing component of proposals for environmental bills of rights in Canada.[124] A procedure for this purpose is set out in Part IV of the *EBR*. All decisions of ministries prescribed for the purposes of the *EBR* establishing Acts, policies, regulations and instruments are potentially subject to a request for a review,[125] except for decisions made in the last five years and in a manner consistent with the intent and purpose of Part II of the *EBR*.[126] There is also a process for requesting reviews of the need for new statutes, policies and regulations.[127] The request for review process became applicable to decisions made by the Ministry of Environment and Energy on January 1, 1995, with additional ministries becoming subject to the process in later years.[128]

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[121] *Ibid.*, s. 41.

[122] J. Swaigen, Chair, Ontario Environmental Appeal Board, "The Role of Appellate Bodies under the *EBR*" in *Environmental Bill of Rights Course: Proceedings* (Toronto: Canadian Institute for Environmental Law and Policy, 1994).

[123] *Re Barker* (1996) 20 C.E.L.R. (N.S.) 72 and *Residents Against Company Pollution Inc.* v. *Ontario (Director, Ministry of Environment and Energy)* (14 June 1996) [unreported].

[124] See, for example, D. Estrin & J. Swaigen, *Environment on Trial: Handbook of Ontario Environmental Law* (2nd ed.) (Toronto: Canadian Environmental Law Research Foundation, 1978) c. 21.

[125] *EBR.*, *supra* note 11, s. 61(1).

[126] *Ibid.*, s. 68(1).

[127] *Ibid.*, s. 61(2).

[128] For example, the Ministry of Agriculture and Food, the Ministry of Consumer and Commercial Relations, the Ministry of Natural Resources and the Ministry of Northern Development and Mines are scheduled to become subject to the right of review in April 1996; and the Ministry of Municipal Affairs will become subject in April 1998.

The *EBR* Request for Review Process

Two persons that reside in Ontario must make the application for review to the Environmental Commissioner.[129] The request is then referred to the appropriate minister(s).[130] The minister then must acknowledge receipt of the application within twenty days.[131] Within sixty days of receiving the application for review, the minister must decide whether to undertake the review and provide a brief statement of his/her reasons to the applicants, the Environmental Commissioner, and any other person who might be directly affected by the decision.[132]

Section 68 of the *EBR* requires the minister not to review a decision made within the last five years that was consistent with the *EBR*'s public participation process,[133] unless there is social, economic, scientific or other evidence to suggest that a failure to undertake the review could result in significant harm to the environment.[134]

If the minister decides to undertake a review, then the review must be conducted in a manner consistent with the *EBR* Part II system for public participation in decision making.[135] The review must be completed "within a reasonable time".[136] Finally, upon completion of the review, the minister must give notice of the outcome of the review to those persons who received notice of the decision to undertake the review.[137] The notice must state what action has been, or is to be, taken as a result of the review.[138]

Impact of the Request for Review Provisions

The requests for review provisions of the *EBR* are complex. Their primary advantage over the pre-*EBR* approach of requesting policy reviews through correspondence with the minister in question is the requirement for a response within sixty days. However, even this standard is not legally enforceable. Rather, the applicant would have to complain to the Commissioner of the Environment in the hope that he or she might

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[129] *EBR.*, *supra* note 11, s. 61(1).

[130] *Ibid.*, s. 62(1)1.

[131] *Ibid.*, s. 65.

[132] *Ibid.*, s. 70.

[133] *Ibid.*, s. 68(1).

[134] *Ibid.*, s. 68(2).

[135] *Ibid.*, s. 73.

[136] *Ibid.*, s. 69(1).

[137] *Ibid.*, s. 71(1).

[138] *Ibid.*, s. 71(2).

admonish the minister responsible for their failure to reply within the time-frame established by the *EBR*.

Questions were also raised about the likely effectiveness of the request for review process given that the Bill permits ministers to determine whether their own ministry's statutes, regulations, policies and instruments warrant review. Similarly, if a review is established, the ministry in question will, in effect, conduct a review of itself.

During the development of the *EBR*, a number of environmental non-governmental organizations noted the potential conflict of interest inherent in the *EBR*'s request for review structure, and proposed alternative models to both the *EBR* Task Force and the Legislature's Standing Committee on General Government. These would have permitted the Commissioner of the Environment to conduct independent reviews of statutes, regulations, instruments, policies and programs in response to requests from members of the public. Such a structure would have provided for more complete and objective reviews, and strengthened the substantive policy role of the Environmental Commissioner's Office.[139] However, these proposals were not incorporated into the final text of the *EBR*.

In practice, members of the public have filed the substantial numbers of requests for reviews under the *EBR*. Three hundred and thirteen requests, dealing with sixteen different topics were presented in the first year of the Bill's operation alone.[140] The request for review process has emerged as a useful means for members of the public highlight failures or weaknesses in government policy.

IV. Requests for Investigations of Legal Compliance

The right to request an investigation is set out in Part V of the *EBR*. This element of the *EBR* permits two Ontario residents to apply for an investigation of another person's compliance with a prescribed Act, regulation or instrument.[141] The *EBR*'s provisions in this regard are similar to those of the federal *Canadian Environmental Protection Act* (CEPA) enacted in 1988, allowing any two residents of Canada, eighteen years of age or older who are of the opinion that an offense has been committed under CEPA, to apply to the Minister of the Environment for an investigation of the alleged offence.[142]

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[139]Winfield, *supra* note 99.

[140]Environmental Commissioner, *supra* note 88 at 45.

[141]*EBR*, *supra* note 11, s. 74.

[142]*Canadian Environmental Protection Act*, S.C. 1988, c. 22, s. 108. The request for investigation provisions of CEPA appear to have been rarely used, and no prosecutions are known to have occurred as a result of a requested investigation. See K. Clark & B. Rutherford, "CEPA and Environmental Law Enforcement" in M. Winfield, ed., *Reforming the Canadian Environmental Protection Act: A Submission to the Standing Committee on Environment and Sustainable Development* (Toronto: Canadian Institute for Environmental

Among other things, the existence of the *EBR* provisions will permit the Ontario government to enter into "equivalency" agreements with the federal government regarding the operation of federal regulations made under CEPA in Ontario.[143]

Circumstances under which a Request for Investigations can be Made

Investigations may be requested into the compliance of private sector actors and federal, provincial and municipal government agencies with the provisions of the statutes prescribed for the purposes of the *EBR* and with any regulations made, or instruments issued, under those statutes. The implementation schedule for the right to request an investigation runs ahead of that for the right to review. The right to request an investigation became applicable to the Ministry of Environment and Energy in 1994, with additional ministries being made subject to the right to request an investigation in later years.

The *EBR* Request for Investigation Procedure

Two persons resident in Ontario must make the application for investigation to the Environmental Commissioner.[144] Within ten days of receiving the application for an investigation, the Environmental Commissioner must refer the application to the appropriate minister(s) of the prescribed ministries.[145] The minister must acknowledge receipt of the application within twenty days.[146]

Following the receipt of the request, the minister responsible for the Act in question must determine whether to conduct an investigation in response to the request. Within sixty days of receiving the application for investigation, the minister must either give notice that the investigation is not required or commence the investigation,[147] except where there is an ongoing investigation concerning the same matter.[148]

Law and Policy, 1994).

[143]On equivalency agreements and CEPA see B. Rutherford & K. Clark, "The Constitution, Harmonization and CEPA" in M. Winfield, ed., *Reforming the Canadian Environmental Protection Act: A Submission to the Standing Committee on Environment and Sustainable Development* (Toronto: Canadian Institute for Environmental Law and Policy, 1994).

[144]*EBR.*, *supra* note 11, s. 74(1).

[145]*Ibid.*, s. 75.

[146]*Ibid.*, s. 76.

[147]*Ibid.*, s. 78(3).

[148]*Ibid.*, s. 78(2).

If the minister decides to undertake an investigation, then the minister must complete the investigation within one hundred and twenty days of receiving the application, or notify the applicants in writing of the additional time required to complete the investigation.[149] Upon completion of the investigation, the minister must give notice of the outcome of the investigation to those persons who received notice of the decision to undertake the investigation.[150] The notice must state what action has been or, is to be, taken as a result of the investigation.[151]

When the minister refuses to investigate, s/he must give notice of this decision, including a brief statement of the reasons for refusal, to the applicants, each person alleged in the application to have been involved in the contravention for whom an address is given in the application, and the Environmental Commissioner.[152]

Impact of the Request for Investigation Provisions

As with the Request for Review provisions of the *EBR*, concerns were raised regarding the likely effectiveness of these provisions, as they could lead to situations in which ministers are asked to investigate the activities of their own ministries or crown agencies within their portfolios. The Minister of Environment and Energy, for example, might be asked to investigate discharges from a sewage treatment plant operated by the Clean Water Corporation under the *Ontario Water Resources Act*, or from an Ontario Hydro facility.

During the development of the *EBR*, a number of environmental non-governmental organizations suggested that the Commissioner's Office might have been given the capacity to conduct investigations of alleged violations of environmental statutes and regulations itself under such circumstances.[153] However, these proposals were not incorporated into the Bill.

As with the Request for Review provisions, the Request for Investigation provisions have emerged as an important means through which members of the public can highlight violations of environmental laws, and the failure of the provincial government

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[149] *Ibid.*, s. 79(1).

[150] *Ibid.*, s. 80(1).

[151] *Ibid.*, s. 80(2).

[152] *Ibid.*, s. 78(1).

[153] See, for example, M. Winfield, *A Submission to the Ontario Environmental Bill of Rights Task Force* (Toronto: Canadian Institute for Environmental Law and Policy, 1992).

to take action in relation to such violations. Thirteen requests for investigation were filed in the first year of the Bill's operation,[154] and seventeen in the second.[155]

V. The Right to Sue to Protect a Public Environmental Resource

Part VI of the *EBR*, which contains the rights to sue provisions, was the most controversial component of the Act. This part of the *EBR* increases public access to the courts to protect the environment in two key ways:

1) the public is given a new right of action to enforce environmental laws; and
2) the standing barrier in public nuisance actions is removed.

However, as will be discussed below, a number of constraints are placed on access to the courts. This reflects the Task Force's decision to restrict access to the courts to "the control option of last resort."[156]

The Role of Citizen Suits in Environmental Law Enforcement

1. Origins of the Citizen Suit Concept

The public generally has two means of directly enforcing environmental laws where the government fails to do so. Under such circumstances, a citizen has the option of pursuing a private prosecution, or an action through a statutorily-created "citizen suit." A private prosecution is a "*quasi*-criminal" proceeding in which a citizen may prosecute the party alleged to have caused harm to the environment. A number of Canadian environmental statutes include provisions explicitly permitting private prosecutions, including the Ontario *Environmental Protection Act*, the Yukon *Environment Act*,[157] the North West Territories *Environmental Rights Act*,[158] and the federal *Fisheries Act*.[159]

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[154]Environmental Commissioner, *supra* note 88 at 45.

[155]Environmental Commissioner, *supra* note 89 at 46.

[156]Ministry of the Environment, News Release, "Environment Minister Ruth Grier releases draft Environmental Bill of Rights" (8 July 1992).

[157]S.Y. 1991, c. 5.

[158]R.S.N.W.T. 1988, c. 83 (Supp.).

[159]R.S.C. 1985, c. F-14.

Private prosecutions have met with some success in Canada, particularly under the federal *Fisheries Act*,[160] and the mere threat of a private prosecution has on occasion, prompted governments to act to enforce their environmental laws.[161] However, private prosecutions also suffer from a number of limitations as a means of ensuring environmental law enforcement. As in any criminal proceeding, the burden of proof on a party bringing a private prosecution is "beyond a reasonable doubt." In addition, in some jurisdictions, such as British Columbia, the provincial Attorney-General must approve and conduct all prosecutions.[162] Even where this is not the case, the Attorney-General may exercise his or her right to take over the conduct of the prosecution, and then fail to pursue the matter further.[163]

A "citizen suit," on the other hand, is a *civil* action in which a private party has a statutory cause of action to seek relief in the civil courts to enforce the provisions of a statute. As such, a citizen suit may have some advantages over a private prosecution. In a civil suit, the emphasis is on compensation rather than deterrence, and in some instances this may be a more appropriate approach. Furthermore, the consent of the Attorney-General generally is not required to pursue a citizen suit. Perhaps even more importantly, the burden of proof in a citizen suit is the civil one of "on a balance of probabilities," which is a lesser onus than the criminal burden of "beyond a reasonable doubt." However, both private prosecutions and civil suits are costly to bring, although the costs rules of civil actions, under which an award of costs can be made against an unsuccessful plaintiff, do not apply in criminal or *quasi*-criminal proceedings, such as private prosecutions.[164]

As with many new developments in Canadian law, precedents for citizen suit provisions in environmental statutes may be found in American legislation. In the 1970s, the United States Congress enacted a number of statutes permitting citizen suits, beginning with Section 3304 of the 1970 *Clean Air Act*.[165] Such provisions now are

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[160]See, for example, L. Nowlan, "Public Participation in Enforcement of Environmental Standards in British Columbia" in *First North American Conference on Environmental Law: Phase II Proceedings* (Toronto, Washington D.C., Mexico City: Canadian Institute for Environmental Law and Policy, Environmental Law Institute and Fundacion Mexicana para la Educacion Ambiental, 1994) 114.

[161]See, for example, R. Gibson, *Control Orders and Industrial Pollution in Ontario* (Toronto: Canadian Environmental Law Research Foundation, 1983) 71. See also Estrin & Swaigen, *supra* note 124.

[162]The *Crown Counsel Act*, S.B.C. 1991, c. 10, s. 2(a) requires that the Criminal Justice Branch of the Ministry of the Attorney-General must approve and conduct all prosecutions.

[163]For a detailed discussion of private prosecutions, see J. Swaigen, "Private Prosecutions" in J. Swaigen & D. Estrin, eds., *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3d ed. (Toronto: Canadian Institute for Environmental Law and Policy and Emond-Montgomery Publishers, 1993) 827-831.

[164]The general rule in civil suits is that "costs follow the cause," meaning that the loser pays the costs of the winner. However, such an award is only for "party and party," as opposed to "solicitor and client" costs. The former are set by tariff and typically amount to one-half to two-thirds of the actual legal fees incurred.

[165]42 U.S.C. 7604.

contained in most U.S. federal environmental statutes.[166] They generally allow citizens, upon giving notice to the government, to act as "private Attorney-Generals," taking court action against environmental offenders and obtaining civil penalties such as injunctions and fines.

Those in favour of citizen suit provisions argue that they enable citizens to enforce legislation where the government fails to do so. As such, they are a powerful tool in environmental protection. At the same time, citizen suits have been criticized as being expensive and invasive of the executive branch of government, having the potential to upset the balance of power between the regulators and the regulated, and to lead to uneven statutory enforcement.[167]

In addition, some commentators have argued that one of the key reasons for the statutory creation of such actions in U.S. legislation is that the American political structure is based on the separation of powers between the executive and the legislative branches of government. Within this structure, legislatures cannot guarantee that the executive branch will carry out their legislative intent. In other words, the executive cannot be trusted to implement legislature's laws and therefore safeguards such as citizen suit provisions must be built into legislation.[168]

In contrast to the American model, the Canadian political system is based on a tradition of "responsible government," in which the executive and legislative branches of government are fused. Consequently, Canadian legislatures do not have the same institutional mistrust of the executive as their American counterparts. Accordingly, they generally have not enacted legislation creating citizen suits, despite arguments in favour of doing so from the Canadian environmental community.[169] As a result, actions relating to statutory regulations and violations in Canada must be supported by elected officials.[170]

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[166]Citizen suit provisions are contained in the *Clean Water Act*, *Endangered Species Act*, *Surface Mining Control and Reclamation Act*, *Marine Protection Research and Sanctuaries (Ocean Dumping) Act*, *Deepwater Port Act*, *Safe Drinking Water Act*, *Noise Control Act*, *Energy Policy and Conservation Act*, *Outer Continental Shelf Lands Act*, and the *Superfund Amendment and Reauthorization Act of 1986*. The most notable exception in this regard is the *Federal Insecticide, Fungicide and Rodenticide Act*. On citizen suits in the U.S. see generally J.G. Miller and the Environmental Law Institute, *Citizen Suits: Private Enforcement of Federal Pollution Control Laws* (Washington, D.C.: Environmental Law Institute, 1987) and Hoberg, *supra* note 15 at 341.

[167]G. Block, "Public Participation in Environmental Enforcement" in *First North American Conference on Environmental Law Phase II, Proceedings* (Washington, Mexico City and Toronto: Environmental Law Institute, Fundacion Mexicana para la Educacion Ambiental, Canadian Institute for Environmental law and Policy 1994) 143.

[168]Howlett, *supra* note 22 at 118.

[169]*Ibid.*, at 124.

[170]*Ibid.*, at 116.

Given these considerations, the appropriateness of "citizen suits" in the institutional context of the Canadian system of government has been the subject of considerable debate. On one hand, citizen suits have been described as an extreme example of the "legalist" public philosophy in action – they take the role of law enforcement away from the Attorney-General acting for the state, and give it to private citizens.[171] However, others argue that such suits are an important component of public participation in environmental protection and are necessary to ensure that the enforcement of environmental laws is maintained.[172]

2. *Citizen Suits in Canada*

In addition to Ontario, three other Canadian jurisdictions have enacted environmental statutes containing citizen suit provisions. In November 1990, the Northwest Territories became the first Canadian jurisdiction to enact an environmental bill of rights with the passing into law of the *Environmental Rights Act*.[173] The Yukon Territory followed the Northwest Territories in 1992, with the enactment of the *Environment Act* which includes several environmental rights provisions. In particular, the Act provides every resident the right to a healthful natural environment and "a remedy adequate to protect the natural environment and the public trust."[174]

Finally, the Quebec *Environment Quality Act*[175] creates a right to "a healthy environment and to its protection, and to the protection of living species inhabiting it," to the extent permitted by the Act. The Act provides for the remedy of an injunction prohibiting any act or operation which interferes or might interfere with the exercise of these rights, subject to the existence of a "depollution programme negotiated with the government."[176] Standing is given to residents frequenting a place where a contravention of the Act is alleged or is in its immediate vicinity.[177]

A number of other Canadian jurisdictions permit more limited civil actions in relation to environmental harm. At the federal level, the *Canadian Environmental Protection Act* permits "any person who has suffered loss or damage" as a result of a CEPA infraction, to seek injunctive relief in court or sue for damages.[178] However, no

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[171]Hoberg, *supra* note 15 at 331.

[172]Muldoon, *supra* note 23.

[173]*Environmental Rights Act*, R.S.N.W.T. 1988, c. 83 (suppl.), ss. 5 and 6.

[174]*Environment Act*, S.Y.T. 1991, c. 5, ss. 6 and 7.

[175]R.S.Q. 1977, c. Q-2.

[176]*Ibid.*, ss. 19.1 and 19.2.

[177]*Ibid.*, s. 19.3.

[178]CEPA, ss. 131, 136(1) and (2).

action has ever been taken under these provisions. A number of environmental non-governmental organizations recommended that a full citizen suit provision be added to CEPA during the House of Commons Standing Committee on Environment and Sustainable Development's five year review of the Act in the fall of 1994.[179]

The Alberta *Environmental Protection and Enhancement Act* of 1992 contains a provision similar to the existing CEPA provisions.[180] Citizen suits have also been considered under the proposed Saskatchewan *Charter of Environmental Rights and Responsibilities*, and *British Columbia Environmental Protection Act*, although it seems unlikely that they will be enacted. At the federal level, provisions for civil actions to protect the environment are contained in Bill C-74, the new *Canadian Environmental Protection Act*, and Bill C-65, the proposed *Canadian Endangered Species Protection Act*. However, both Bills died on the Parliamentary Order Paper when a federal election was called June 1997. As of December 1997 neither Bill had been reintroduced into the House of Commons.

The *EBR* "Citizen Suit" Provision: The New Right of Action to Protect a Public Environmental Resource

Subsection 84(1) of the *EBR* creates the following new statutory cause of action:

> [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.

Any person resident in Ontario may bring a court action against the person alleged to be in contravention or imminent contravention in respect of the harm and is entitled to judgment if successful. However, the new cause of action has been very narrowly drafted. It applies only to contravention of prescribed laws that occur after the *EBR* has come into force, and such contravention must involve significant environmental harm to a public resource. The right of action is limited further in that a plaintiff may only bring an action in court after several procedural steps have been taken.

1. Bringing An EBR Lawsuit: The Procedural Steps

The first step to bringing a section 84 lawsuit is that the plaintiff must have made an application, under Part V of the *EBR*, for an investigation of an alleged contravention

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[179]See, for example, "CEPA and Environmental Law Enforcement" and "Public and Workers' Environmental Rights" in B. Mausberg, P. Muldoon, & M. Winfield, eds., *The Canadian Environmental Protection Act: An Agenda for Reform* (Ottawa: Toxics Caucus, Canadian Environment Network, 1994).

[180]*Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13-3, s. 205.

of a prescribed statute, regulation or instrument, and the plaintiff must have not received a response in a reasonable time or have received a response that was not reasonable.[181] However, these procedures need not be undertaken where the delay from compliance, "would result in significant harm or serious risk of significant harm to a public resource".[182]

Once this first step has been completed, the plaintiff may proceed to serve its statement of claim on the defendant(s). Within ten days of serving the statement of claim on the first defendant, the plaintiff also must serve the statement of claim on the Attorney-General of Ontario. Notice of the action must also be given to the public through the Environmental Registry by delivery of the notice to the Environmental Commissioner, and the Commissioner must promptly place the notice on the Registry.[183]

Within thirty days after the close of pleadings, the plaintiff must make a motion to the court for directions relating to such notice, as the plaintiff is required to give notice to the public by any other means ordered by the court.[184] The court also has the power to require a party other than the plaintiff to give notice and to permit any person to participate in the action, as a party or otherwise, so as to protect the private and public interests involved in the action.[185] There is a two-year limitation period commencing on the day of the discovery by the plaintiff of the harm to the public resource.[186]

2. *Defences to an EBR Lawsuit*

The plaintiff's failure to follow any of the required steps or procedures in bringing an *EBR* lawsuit, such as the failure to meet a limitation period, may be a potential defence in an *EBR* action. In addition, there are a number of specific defences available to a defendant in an *EBR* lawsuit.

Once served, the defendant(s) or the Attorney-General can seek a stay or dismissal of the proceedings on the grounds that to continue the action in the courts is not in the public interest.[187] The defendant(s) or the Attorney-General also may take steps to have

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[181] *EBR*, *supra* note 11, s. 84(2).

[182] *Ibid.*, s. 84(6).

[183] *Ibid.*, ss. 87(1) and (2).

[184] *Ibid.*, s. 87(3).

[185] *Ibid.*, ss. 87(5), 88(1) and 89.

[186] *Ibid.*, s. 102.

[187] *Ibid.*, s. 90.

the plaintiff discontinue, abandon or settle the action prior to trial.[188] However, settlements of Section 84 actions are not binding unless approved by the court.[189]

The burden of proof in the action is on the plaintiff to prove the contravention or imminent contravention, on a balance of probabilities.[190] A defendant will have a defence where:

(1) the defendant satisfies the court that it exercised due diligence in complying with the Act, regulation or instrument;

(2) the act or omission alleged to be a contravention is authorized by statute, regulation or instrument; or

(3) the defendant satisfies the court that it complied with an interpretation of the instrument that the court considers reasonable.[191]

In addition, Subsection 85(4) provides that "this section shall not be interpreted to limit any defence otherwise available."

The defences created by these legislative provisions are unusually broad. In particular, the common law defence of due diligence is extended to a defence in which a defendant only need demonstrate that it acted on a reasonable interpretation of an instrument. The effect of such language is to provide a defendant in an *EBR* lawsuit with defences against which it may be very difficult to succeed.

3. *Remedies*

Where the plaintiff is successful, the court may grant an injunction against the contravention, order the parties to negotiate a restoration plan with respect to harm to the public resource resulting from the contravention, and to report to the court on the negotiations within a fixed time, grant declaratory relief, or make any other order, including an order as to costs, that the court considers appropriate.[192] No awards of damages may be made, and the order also must be consistent with the *Farm Practices Protection Act*.[193] The court may not order negotiation of a restoration plan if adequate restoration has already been achieved or ordered by law.[194]

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[188] *Ibid.*, s. 91(1).

[189] *Ibid.*, ss. 91(2) and (3).

[190] *Ibid.*, s. 84(8).

[191] *Ibid.*, s. 85.

[192] *Ibid.*, s. 93(1).

[193] *Ibid.*, ss. 93(2) and (3).

[194] *Ibid.*, s. 94.

The Impact of the *EBR* Citizen Suit Provisions: Opening the Floodgates to Litigation?

Many stakeholders, particularly those representing business interests, expressed concern that the *EBR*'s new right of action provisions would open the "floodgates" to litigation and result in many frivolous lawsuits. In practice, as of December 1997, nearly four years after the enactment of the *EBR*, no actions had been initiated under the Bill's Right of Action provisions. This is despite the enormous reductions in the environmental law enforcement efforts of the Ontario government in the period following the June 1995 provincial election.[195]

This outcome appears to be the result of a combination of factors. Among the most important have been the extremely stringent tests and procedural tests that must be met in order for an action to be launched, and the extraordinary defenses provided to respondents. These considerations make the chances of bringing a successful action extremely low.

In addition, public interest litigants face significant economic barriers in attempting to launch an action under the Bill. *EBR* plaintiffs have no financial incentives to initiate actions, as the court cannot make monetary awards to them.[196] Nor are any forms of intervenor funding available to plaintiffs.[197] The Bill also bars the commencement of Section 84 actions as class proceedings as provided for under the *Class Proceedings Act, 1992*.[198]

Furthermore, following the normal rules of costs for civil litigation, the costs of an action brought under the *EBR* will be awarded in the cause. The court "may consider any special circumstance, including whether the action is a test case or raises a novel point of law,"[199] but it is not required to consider any special circumstances when awarding costs. Earlier proposed environmental bills of rights included provisions to reduce plaintiffs' exposure to costs awards against them.[200] The business community strongly opposed such requirements, arguing that they would dramatically increase the

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[195]See Winfield & Jenish, *supra* note 107.

[196]*EBR*, *supra* note 11, s. 93(2).

[197]The *Intervenor Funding Project Act*, R.S.O. 1990, c. I-13 established a scheme to provide public interest intervenors before certain administrative tribunals with funding to support their interventions. The funding was extended in March 1992 for four years. However, the Act was permitted to expire in April 1996.

[198]*EBR*, *supra* note 11, s. 84(7). A class proceeding allows one or more persons to bring a lawsuit on behalf of many people seeking redress for widespread harm or injury. The *Amendment to Law Society Act*, establishes a fund to which plaintiffs can apply for financial assistance in bringing these lawsuits.

[199]*EBR*, *supra* note 11, s. 100.

[200]Estrin & Swaigen, *supra* note 124.

cost of dealing with environmental issues and that the threat of costs was needed to deter frivolous litigation.[201]

Public Nuisance Causing Environmental Harm

In light of the limitations placed on the new cause of action in the *EBR*, the Bill's removal of certain legal barriers to bringing an action in public nuisance acquires greater significance. A public nuisance is "an inconvenience or interference caused to the public generally, or part of the public, which does not affect the interests of individuals in land".[202] The public nuisance standing rule is that a "private individual cannot seek a remedy for public nuisance without the consent of the Attorney-General unless he can show that he has suffered a harm, or possesses an interest, that distinguishes him from the rest of the public".[203]

The *EBR* removes this limitation by providing that:

> No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action without the consent of the Attorney-General in respect of the loss or injury only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.[204]

Without such a provision, an individual only could sue for losses caused by a public nuisance without the consent of the Attorney-General if the individual had suffered harm or possessed an interest different from, or greater than, the rest of the public.

Notwithstanding the *EBR* reforms, the pursuit of environmental public nuisance actions remains subject to some limitations. While a plaintiff under the *EBR* no longer must show damage above and beyond the damage suffered by others, the plaintiff is still required to demonstrate a direct economic loss or personal injury. This requirement may continue to prevent many from bringing a public nuisance action.

In addition, as is the case with litigating on the basis of the new cause of action, the costs of bringing an action for public nuisance also may act as a powerful deterrent,[205] although the provisions of the *Class Proceedings Act* do apply to *EBR* public nuisance actions. Farmers continue to be protected against public nuisance actions by provisions

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[201]Muldoon, *supra* note 52 at 812.

[202]*EBR* Task Force, *supra* note 70 at 91.

[203]Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney-General, 1989) at 10.

[204]*EBR*, *supra* note 11, s. 103(1).

[205]Canadian Bar Association - Ontario, *Submission to the Minister of the Environment on the Proposed Environmental Bill of Rights* (Toronto: CBA, 1992) at 32.

contained in the *Farm Practices Protection Act*.[206] As a consequence of these factors, like the *EBR* citizen suit provisions, public nuisance actions are likely to remain an option of last resort for citizens seeking to protect the environment or themselves from harm. The first action using the *EBR*'s expanded standing in public nuisance actions was initiated in February 1997.

VI. The Right to "Blow the Whistle" on Employers

Part VII of the *EBR* is intended to enhance the protection of employees from employer reprisals, if they use the *EBR* to "blow the whistle" on their employers. Specifically, the legislation enables employees to file a complaint with the Ontario Labour Relations Board where an employer has taken reprisals against the employee on a prohibited ground.[207]

These provisions contain a number of improvements over those of section 174 the existing *Environmental Protection Act* (EPA).[208] In particular, they provide broader protection, in that the EPA only shields employees complying with the EPA, the *Environmental Assessment Act*, the federal *Fisheries Act*, the *Ontario Water Resources Act* and the *Pesticides Act* and regulations pursuant to these statutes. In contrast, the *EBR* provisions apply to activities relating to all of the statutes prescribed for the purposes of the Bill. The reversal of the onus in "whistleblowing" situations also represents a significant gain for employees.

The *EBR*'s provisions were originally intended to replace the provisions of section 174 of the EPA. However, it was pointed out in submissions from labour and environmental non-governmental organizations to the Standing Committee on General Government that this would have diminished the employee rights that existed under the EPA provisions. The reason for this was that the EPA provisions might have created an offence with the words "no person shall" with respect to the taking of reprisals against "whistleblowers." The proposed *EBR* provision did not contain such language.[209] Consequently, the Committee amended the Bill so that the *EBR*'s whistleblower protection provisions exist parallel to, rather than in replacement of, those of the EPA.

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[206]*EBR*, *supra* note 11, s. 103(2).

[207]*Ibid.*, s. 105(1).

[208]R.S.O. 1990, c. E. 19.

[209]On this issue see CBA - Ontario, *supra* note 205 at 32-33.

The *EBR* does not grant employees the right to refuse to work, or to refuse to harm the environment, although the *EBR* Task Force recommended further study in this area.[210] However, no action has been taken in this regard to date.

Conclusions

The Ontario *Environmental Bill of Rights* is a peculiar and paradoxical piece of legislation. Notwithstanding its title, the *EBR* grants members of the public no substantive environmental rights, and even the procedural rights that the Act provides are subject to very significant limitations. In many places the *EBR* creates new means for the public to participate in environmental decision making, but then effectively neutralizes these opportunities by placing severe constraints on their use.

The *EBR*, for example, requires that affected ministries develop Statements of Environmental Values, explaining how the *EBR*'s environmental purposes are to be applied in ministry decision making. However, the statute also states that the SEVs must explain how these purposes are to be "integrated" with "social, economic and scientific considerations."[211] Similarly, the *EBR* grants standing for third party appeals of environmental decisions, but creates as well a very stringent leave test for third parties in such appeals.

This pattern is repeated with the *EBR*'s citizen suit provisions, which provide for civil actions to protect public environmental resources from harm, but at the same time, establish a range of procedural barriers to the initiation of such actions, provide defendants with extraordinary defences, and explicitly prohibit the pursuit of *EBR* actions as class proceedings. The *EBR* also includes some net losses, in terms of public participation in environmental decision making. Perhaps the most notable is the possibility that instruments and approvals for which a public hearing is a statutory requirement, can now be "bumped-down" through the *EBR* so that hearings are at the minister's discretion.

In addition to these specific limitations, the *EBR* also suffers from a serious weakness in its overall structure in that it is "phase-shifted" in terms of the appropriate roles for political and judicial accountability mechanisms. The role of the courts and judicial accountability in ensuring procedural fairness in the decision making processes of democratic societies is widely accepted, as is the appropriateness of using political means of oversight and accountability in relation to the substantive content of public policy decisions.[212]

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[210]Ontario MoEE, *The Environmental Bill of Rights: Response to Public Comment* (Toronto: 1993) at 19.

[211]*EBR*, ss. 7(a) and (b).

[212]See generally Green, *supra* note 64.

The *EBR*, however, uses an instrument of *political* accountability – the Office of the Environmental Commissioner – as its principle means of attempting to guarantee procedural fairness, while providing very limited mechanisms for affecting the substance of environmental policy. This is especially evident in the absence of an explicit substantive policy review mandate for the Commissioner's Office and in the presence of a "privative" clause insulating all of the *EBR*, except for certain elements of Part II, from judicial review.

These contradictions are largely the result of the process used by the government of Ontario to develop the *EBR*. This was in itself a paradox, as it employed a multipartite bargaining structure to develop what normally has been characterized as an instrument of a legalist public philosophy. While the multipartite model emphasizes cooperative bargaining between government and all of the relevant stakeholders in a policy area, legalism stresses formalized, adversarial relations among stakeholders, and gives a prominent role to the courts in the supervision of interest group conflict.[213]

The multipartite character and consensus-based mandate of the *EBR* Task Force are reflected in the *EBR*'s contradictory elements. The requirement for consensus effectively granted the business and bureaucratic interests on the Task Force a veto over the Bill's contents. At the same time, the environmental non-governmental organization representatives on the Task Force found themselves in the difficult position of having to choose between working within this framework, or withdrawing from the process altogether. However, the latter option could have resulted in there being no *EBR* at all, as the government might not have acted on the issue in the face of the opposition from business interests and within the provincial bureaucracy. This concern was especially acute in light of the government's reversals on other key election commitments, such as the implementation of public auto insurance in the province.[214]

In practice, despite the fact that the *EBR*'s provisions regarding a new right of action to protect a public resources were the focus of much of the debate during the Bill's development, they have emerged as one of the Bill's least significant elements. As of the end of 1997, nearly four years after the Bill's passage, and after two and a half years of immense reductions in the capacity of Ontario government agencies to enforce environmental laws, no actions had been initiated under the *EBR*'s provisions.

This outcome appears to be the result of a combination of several factors. These include the extremely stringent tests and procedural requirements that must be met in order for an action to be launched under the Bill. Plaintiffs also face significant economic barriers in their efforts to bring an action under the *EBR* provisions, including the risk of an adverse award regarding costs. In contrast, the Bill's provisions

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[213]See generally Hoberg, *supra* note 15.

[214]On the record of the Rae government in general see T. Walkom, *Rae Days: The Rise and Follies of the NDP* (Toronto: Key Porter Books Ltd., 1994).

establishing the environmental registry and public participation regime, and creating of the Office of the Environmental Commissioner, are having a major impact on environmental law and policy making in the province.

The *EBR*'s requirements for public participation in environmental decision making, in particular, have emerged as critically important elements. These provisions establish critical points of access for Ontario citizens. The information provided through the environmental registry has been especially significant in this regard. The registry provides, for the first time, a comprehensive picture of environmentally significant activities and decisions in the province to both the public and the provincial government itself.

In addition, the requirements of public notice and comment periods for significant environmental decisions are resulting in more open and accountable decision making processes than previously existed. This is true especially for agencies, such as the Ministries of Natural Resources, Transportation and of Northern Development and Mines, whose policy development processes historically have been characterized by closed relationships with traditional clientele groups.

The importance of the *EBR*'s public notice and comment requirements have been highlighted in the context of the wide range of initiatives affecting the environment and natural resources management which have been taken by the Progressive Conservative government of Ontario since its election in June 1995.[215] In many cases, it is unlikely that members of the public would have even been informed of major initiatives in the absence of the requirements of the *EBR*. In addition, the public comment period has provided opportunities for those concerned by the implications of proposed government actions to organize effective responses.

For its part, the Office of the Environmental Commissioner has emerged as a effective mechanism for enhancing the accountability of the provincial government to the Legislature and the public for its environmental policies and decisions. This function has become particularly important in the context of the current government of Ontario's decision to eliminate virtually all of the independent environmental advisory bodies that existed prior to 1995.

The Commissioner's Office has not hesitated to criticize the government's implementation of the *EBR*, through both annual and special reports, when it has seen it as necessary to do so. The Office has also taken a broad reading of its mandate, particularly with respect to the substantive content of the government's environmental policies, and has highlighted gaps, weaknesses and failures in these policies in both of its Annual Reports to date.

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[215]See generally Winfield & Jenish, *supra* note 107.

The Bill's provisions related to requests of reviews of government policies, and investigations of alleged violations of environmental laws, have also emerged as useful means through which members of the public can draw attention to weaknesses and failures in government policies and operations.

Despite its significant limitations, the Ontario *EBR* provides some significant directions for future environmental law reform in Canada. Its elements provide a number of potential means of reconciling the roles of political and legal accountability mechanisms in environmental decision making. Political and legal approaches to accountability have traditionally been regarded in Canada as contradictory and almost mutually exclusive options in public policy decision making.

The concepts of a public registry of significant environmental decisions and legally established requirements for public notice and comment periods in relation to such decisions are particularly noteworthy in this context. Such structures seem essential to ensuring that members of the public have the information necessary to hold government decision-makers to account for their choices. The provision of information about the nature and consequences of public policy decisions is a fundamental requirement for the effective functioning of political accountability mechanisms.

Similarly, the concept of an independent body, such as the Environmental Commissioner's Office to substantively review, assess and report on the impact of government policies and programs on the environment, is gaining increasing acceptance. Such agencies have significant potential to enhance political accountability for decision making in complex policy fields such as the environment. This potential is reflected in the federal government's recent establishment of the position of Commissioner for Environment and Sustainable Development within the Office of the Auditor-General.

The citizen suit concept is less well accepted. However, it seems likely to become a necessity if the effective enforcement of environmental laws is to be achieved, particularly as traditional accountability mechanisms in this area have failed to bring significant improvements in enforcement efforts in most Canadian jurisdictions. The need for strengthened opportunities for citizen enforcement actions is further reinforced by the resource constraints presently being imposed on environmental protection agencies throughout Canada.

In the end, each of these elements of minimum public participation requirements for decision making, provisions for the independent evaluation of the effects of public policies on the environment, and mechanisms which enable citizens to ensure the enforcement of environmental laws and regulations will be necessary to provide for an environmentally sustainable future for present and future generations of Canadians.