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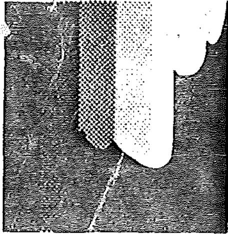

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ENVIRONMENTAL BILL OF RIGHTS: AN OVERVIEW

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ENVIRONMENTAL BILL OF RIGHTS: AN OVERVIEW

By

Richard D. Lindgren[1]

> "The proposed Environmental Bill of Rights is a unique piece of legislation that gives people unprecedented new powers to protect the environment. We are bringing Ontario closer to a true environmental democracy."
>
> **The Hon. Ruth Grier, (July 8, 1992)**

> "The Environmental Bill of Rights is built on the principle that everyone has the right to participate in the decisions which affect their environment. Ontario's Bill will give people unprecedented rights to act on their commitment to protect the environment."
>
> **The Hon. Bud Wildman (May 31, 1993)**

PART I - INTRODUCTION

On May 31, 1993, the Honourable Bud Wildman, Ontario's Minister of Environment and Energy, introduced Bill 26, An Act respecting Environmental Rights in Ontario, for First Reading in the Legislature.[2] More commonly known as the Environmental Bill of Rights (EBR),[3] Bill 26 is the most significant environmental statute to be introduced in Ontario since the passage of the

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[1] Counsel, Canadian Environmental Law Association, and member of the Minister's Task Force on the Environmental Bill of Rights.

[2] Hansard, (May 31, 1993), p.1000 and p.1016. Second reading of Bill 26 commenced on August 3, 1993 and will continue when the Legislature returns for the fall 1993 session: Hansard, (August 3, 1993), pp.3018-22.

[3] The short title of the Act is the Environmental Bill of Rights, 1993: see Bill 26, s.126.

Environmental Assessment Act[4] in 1975.

When proclaimed in force in 1994,[5] the EBR will significantly enhance and protect the public right to an healthful environment by providing for:

- means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;
- increased accountability of the Government of Ontario for its environmental decision-making;
- increased access to the courts by residents of Ontario for the protection of the environment; and
- enhanced protection for employees who take action in respect of environmental harm.[6]

The purpose of this article is to briefly examine the rationale for the EBR and to describe the key components of the EBR.

PART II - RATIONALE FOR REFORM

Despite the number and complexity of environmental laws and regulations in Ontario, there has been a long-standing recognition

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[4] Environmental Assessment Act, R.S.O. 1990, c.E.18.

[5] It is expected that Bill 26 will receive Third Reading and Royal Assent by the end of 1993: see Hansard, (August 3, 1993), p.3022.

[6] Bill 26, s.2(3).

that there are some fundamental gaps in this regulatory regime.[7] For example, there is no legal recognition of the right to a healthful environment. Similarly, there are no legal requirements for public notice and comment when the provincial government sets policy, regulations, or standards respecting the amount or concentration of contaminants that may be emitted into the environment. Moreover, there are no mandatory public notice and comment opportunities when companies apply for Certificates of Approval to permit the discharge of contaminants into a community's airshed. In addition, unlike these companies, members of the public have no legal ability to appeal certificates (or conditions thereof) to the Environmental Appeal Board under the Environmental Protection Act.[8] Finally, members of the public are frequently barred by common law rules (eg. the law of standing and public nuisance) from going to court to protect the environment. Taken together, these and other deficiencies in Ontario's environmental protection regime provide strong justification for statutory reform.

The first calls for an Ontario EBR arose in the 1970s when the Canadian Environmental Law Association and other groups pressed for

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[7] The need to address the deficiencies in the current environmental protection regime are more fully discussed in Chapter 2 of the Report of the Task Force on the Ontario Environmental Bill of Rights (MOE, 1992).

[8] Environmental Protection Act, R.S.O. 1990, c.E.19.

the passage of an EBR.[9] This paralleled developments in other jurisdictions, notably Michigan[10], which had enacted various provisions giving the public greater access to the courts and to environmental decision-making by government. In the late 1970's and throughout the 1980's, the provincial Liberal Party and New Democratic Party introduced a number of private members' bills which would have established an EBR in Ontario; however, these bills were never enacted.

When the New Democratic Party formed a majority government in late 1990, Environment Minister Ruth Grier, a long-time advocate of the EBR, immediately established a large multi-stakeholder advisory committee to assist in the development of the EBR. This committee met frequently until March 1991, and produced some consensus on the essential principles of the EBR. In October 1991, Environment Minister Grier established a smaller multi-stakeholder Task Force[11] to draft an EBR for Ontario. The Task Force members met frequently and liaised with their respective constituencies to

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[9] See P. Muldoon and J. Swaigen, "Environmental Bill of Rights", in Estrin and Swaigen (eds.), Environment on Trial (3rd edition) (Edmond-Montgomery/CIELAP, 1993), chapter 25, pp.795-97.

[10] Michigan Environmental Protection Act, Mich. Comp. Laws Ann.691.1201-1207.

[11] The EBR Task Force was co-chaired by the Deputy Minister of Environment and a lawyer from the Attorney General's office. The Task Force included a lawyer in private practice, a lawyer from the Ministry of Environment, and representatives from the Canadian Manufacturers' Association, Business Council on National Issues, Ontario Chamber of Commerce, Pollution Probe and Canadian Environmental Law Association.

discuss the Task Force's recommendations on the content of the EBR.

On July 8, 1992, the Task Force report (which included a draft EBR) was tabled in the Legislature by Environment Minister Grier.[12] A three month consultation program was then undertaken by the province to receive public input on the draft EBR. In December 1992, the Task Force reconvened to consider the public comments received on the EBR, and the Task Force produced a supplementary report containing 59 additional recommendations to amend and improve the draft bill.[13] Five months later, Bill 26 was introduced for First Reading by Environment Minister Wildman.

PART III - COMPONENTS OF THE EBR

When Bill 26 is compared with previous versions of the EBR in Ontario, it is clear that several components found in the earlier private members' bills are absent from Bill 26. For example, early versions of the EBR contained provisions relating to access to information, class actions and intervenor funding. However, these matters have since been dealt with by way of recent legislative reforms which took place outside of the context of the EBR.[14]

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[12] Report of the Task Force on the Ontario Environmental Bill of Rights (MOE, 1992). See Hansard (July 8, 1992), pp.1905-06.

[13] Report of the Task Force on the Environmental Bill of Rights: Supplementary Recommendations (MOE, 1992).

[14] See, for example, the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.F.31; Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.M.56;

Accordingly, these matters are not explicitly or extensively dealt with under Bill 26.

1. Preamble of the EBR

Unlike most provincial statutes, Bill 26 contains a preamble which will serve as an interpretive aid for courts construing the intent and meaning of the Bill's provisions. Significantly, the preamble contains strong statements about the public need for effective environmental protection:

> The people of Ontario recognize the inherent value of the natural environment.
>
> The people of Ontario have a right to a healthful environment.
>
> The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.
>
> While the government has the primary responsibility for achieving this goal, the people should have the means to ensure that it is achieved in an effective, timely, open and fair manner.

2. Scope of the EBR

Bill 26 is intended to protect, conserve and restore the natural environment of Ontario. The term "environment" is defined under the bill as follows:

"environment" means the air, land, water, plant life, animal

Class Proceedings Act, S.O. 1992, c.6; and Intervenor Funding Project Act, R.S.O. 1990, C.I.13.

life and ecological systems of Ontario.[15]

This definition of environment is narrower than that found in the Environmental Assessment Act[16], but is somewhat broader than that found in the Environmental Protection Act.[17] In effect, the Bill 26 definition precludes Ontario residents from using the Bill to address problems which predominantly relate to the socio-economic or cultural environment of Ontario.

3. Purpose of the EBR

Bill 26 contains an important statement of the purposes of the legislation:

2.(1) The purposes of this Act are,

(a) to protect, conserve and, where reasonable, restore the integrity by the means provided in this Act;

(b) to provide sustainability of the environment by the means provided in this Act; and

(c) to protect the right to a healthful environment by the means provided in this Act.

Bill 26 goes on to provide more detailed guidance as to what these purposes include:

2.(2) The purposes set out in subsection (1) include the

[15] Bill 26, s.1(1).

[16] Supra, note 4, s.1(c).

[17] Supra, note 8, s.1, which defines "natural environment" as "the air, land and water, or any combination or part thereof, of the Province of Ontario".

following:

1. The prevention, reduction, and elimination of the use, generation, and release of pollutants that are an unreasonable threat to the integrity of the environment.

2. The protection and conservation of biological, ecological and genetic diversity;

3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.

4. The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.

5. The identification, protection and conservation of ecologically sensitive areas or processes.

This statement of purpose is important because it codifies key environmental protection imperatives (eg. conservation of biological diversity, virtual elimination of toxic contaminants, etc.) which have assumed provincial, national and global significance. In addition, as described below, provincial ministries caught by Bill 26 must develop "Statements of Environmental Values" which will give effect to these purposes and provide substantive guidance for environmentally decision-making within government.

4. Public Participation under the EBR

Part II of Bill 26 is arguably the most important component of the EBR because it guarantees public access to significant environmental decision-making by government. In particular, Part

II contains a number of different mechanisms which should collectively enhance public participation and improve governmental decision-making, which, in turn, should minimize the need to go to court to protect the environment. These mechanisms include: the Environmental Registry; Statements of Environmental Values; notice and comment respecting policies, Acts and regulations; notice and comment respecting instruments; and public appeal rights.

(a) Environmental Registry

The EBR Task Force recommended that a "uniform, predictable, and certain system" be established to provide public notice of pending or proposed governmental decisions which may significantly affect the environment.[18] Thus, Part II obliges the provincial government to establish an Environmental Registry[19], which will serve as an electronic databank and bulletin board under the EBR. While the implementation details have not yet been finalized, it is expected that the Environmental Registry will be accessible by computer modem or local government offices.

The Environmental Registry will be used to provide notice of pending or proposed governmental decisions (eg. policies, regulations or instruments) which may significantly affect the environment. It should be noted that where appropriate, additional

[18] Supra, note 12, p.28.

[19] Bill 26, ss.5-6.

means of providing notice (eg. mailings, media advertisements or personal service) will be used by governmental decision-makers, as described below.

(b) Statements of Environmental Values

Bill 26 provides that each Ministry caught by the EBR must publicly develop a Statement of Environmental Values (SEV) within a prescribed period of time.[20] In effect, the SEV will provide Ministry-specific direction on how the purposes of the EBR will be applied when environmentally significant decisions are being made by Ministry officials.[21] Once the SEV has been finalized, the Minister "shall take every reasonable step" to ensure that the SEV is considered during the decision-making process. Together with the supervisory oversight provided by the Environmental Commissioner's office (see below), the SEV should result in greater consistency in, and enhanced accountability for, governmental decision-making respecting the environment.

A draft regulation under the EBR provides that the following fourteen ministries must develop a SEV:

- Ministry of Agriculture and Food;
- Ministry of Consumer and Commercial Relations;
- Ministry of Culture, Tourism & Recreation;

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[20] Bill 26, ss.7-11. See also note 12, supra, pp.23-25.

[21] Bill 26, s.7.

- Ministry of Economic Development and Trade;
- Ministry of Environment and Energy;
- Ministry of Finance;
- Ministry of Health;
- Ministry of Housing;
- Ministry of Labour;
- Management Board of Cabinet;
- Ministry of Municipal Affairs;
- Ministry of Natural Resources;
- Ministry of Northern Development and Mines; and
- Ministry of Transportation.

It should be noted that each of these Ministries will be required to place a draft SEV on the Environmental Registry and provide public notice that the SEV is being developed.[22]

(c) Notice and Comment Respecting Policies, Acts and Regulations

Bill 26 provides that if a Ministry caught by the Act is proposing to make, pass, amend, revoke or repeal an environmentally significant policy or Act, and if the Minister considers that the public should be consulted on the proposal before implementation, then the Minister "shall do everything in his or power to give notice of the proposal to the public at least thirty days before

[22] Bill 26, s.8.

the proposal is implemented".[23] Notice of the proposal shall be placed on the Environmental Registry and by other means that the Minister considers appropriate.[24]

Bill 26 defines "policy" in the following manner:

> "policy" means a program, plan or objective and includes guidelines or criteria to be used in making decisions about the issuance, amendment or revocation of instruments but does not include an Act, regulation or instrument.

However, policies which are predominantly financial or administrative in nature are expressly excluded from this notice requirement.[25]

Once a Minister has provided notice of a proposed policy or Act, he or she "shall take every reasonable step" to ensure that the resulting public input is considered when decisions are being made about the proposal.[26] When a decision on the proposal has been made, the Ministry shall provide public notice of the decision, and shall provide a brief description of the effect, if any, of the public input on the decision.[27]

Bill 26 establishes a similar notice-and-comment regime for

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[23] Bill 26, s.15. See also note 12, _supra_, p.40.

[24] Bill 26, s.27.

[25] Bill 26, s.15(2).

[26] Bill 26, s.35.

[27] Bill 26, s.36.

regulations which are proposed under Acts prescribed under the EBR.[28] Predominantly financial or administrative regulations are excluded from this requirement,[29] and notice shall be placed in the Environmental Registry and by other means considered appropriate by the Minister.[30] However, a "Regulatory Impact Statement" (RIS) may also be placed in the registry if the Minister considers that an RIS is necessary "to permit more informed public consultation on the proposal".[31] The RIS shall include:

- a brief statement of the objectives of the proposal;
- a preliminary assessment of the environmental, social and economic consequences of implementing the proposal; and
- an explanation of why the environmental objectives of the proposal would be appropriately achieved by making, amending or revoking a regulation.[32]

Once notice of a proposed regulation has been provided, the Minister shall ensure that the resulting public input is considered when decisions respecting the proposal are being made.[33] Notice of the implementation of the proposed regulation shall be provided by the Minister together with a brief description of the effect, if

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[28] Bill 26, s.16(1). See also note 12, supra, pp.40-41.

[29] Bill 26, s.16(2).

[30] Bill 26, s.27.

[31] Bill 26, s.27(4).

[32] Bill 26, s.27(5).

[33] Bill 26, s.35.

any, of public input on the proposal.[34]

It should be noted that a Minister's failure to comply with the above-noted requirements does not affect the validity of a policy, Act or regulation, and the Minister's actions or decisions cannot be challenged or reviewed in the courts.[35] However, it is expected that the Environmental Commissioner will serve as an important safeguard against improper uses of the government's discretionary powers respecting policies, Acts and regulations.[36]

The notice-and-comment provisions respecting policies, Acts and regulations will be phased in over time to permit Ministries to undertake the necessary preparations respecting the Part II of the EBR. For example, the draft EBR regulation provides that s.15 of the Act (notice-and-comment on policies and Acts) will apply to the Ministry of Environment in mid-1994 and will apply to the other prescribed Ministries in early 1995.

Similarly, the draft EBR regulation provides that s.16 (notice-and-comment on regulations) will begin to apply to a specified list of environmental statutes over a two-year period commencing in 1994. Significantly, the draft regulation lists twenty statutes that will eventually be subject to s.16:

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[34] Bill 26, s.36.

[35] Bill 26, s.37 and s.118.

[36] _Supra_, note 9, p.807.

- Aggregate Resources Act;
- Conservation Authorities Act;
- Crown Timber Act;
- Endangered Species Act;
- Energy Efficiency Act;
- Environmental Assessment Act;
- Environmental Protection Act;
- Game and Fish Act;
- Gasoline Handling Act;
- Lakes and Rivers Improvement Act;
- Mining Act;
- Niagara Escarpment Planning and Development Act;
- Ontario Waste Management Corporation Act;
- Ontario Water Resources Act;
- Pesticides Act;
- Petroleum Resources Act;
- Planning Act;
- Provincial Parks Act;
- Public Lands Act; and
- Waste Management Act, 1992.

Most of the above-noted statutes are administered by the Ministry of Environment and Energy and the Ministry of Natural Resources. Accordingly, when these (and other) Ministries are proposing enact, amend or revoke regulations under these statutes, the EBR requires that public notice-and-comment opportunities be provided in

accordance with the Act.

(d) Notice and Comment Respecting Instruments

Bill 26 establishes a notice-and-comment regime with respect to the proposed issuance, amendment or revocation of instruments caught by the EBR. "Instrument" is defined in the following manner:

> "instrument"... means any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act, but does not include a regulation.[37]

Bill 26 requires prescribed Ministries to develop EBR regulations which classify their instruments into three categories (eg. Class I, II, or III), depending on the instruments' environmental significance.[38] In general, Class II instruments are proposals which the Minister(s) regard as requiring public participation because of the level of risk and extent of potential harm to the environment associated with the instruments.[39] Class II also includes instruments for which there is statutory discretion to hold a public hearing before the instruments are implemented.[40] Class III covers instruments for which there are mandatory hearings

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[37] Bill 26, s.1(1).

[38] Bill 26, ss.19-20.

[39] Bill 26, s.20(2), para.7.

[40] Ibid., para.8.

before the instruments are implemented.[41] Class I instruments are environmentally significant proposals which do not otherwise fall into Class II or III.[42] It is noteworthy that the Ministries' proposed classification regulations will themselves be subject to the notice-and-comment regime for regulations under s.16 of Bill 26.[43]

In addition, Bill 26 provides that Ministers may treat a Class I instrument as a Class II instrument if it is advisable to do so to protect the environment.[44] Similarly, if a Minister decides that a hearing should be held in respect of a Class II instrument, that instrument is considered to be a Class III instrument for the purposes of the EBR.[45] Conversely, if a hearing is not held in respect of a Class III instrument, that instrument is considered to be a Class II instrument for the purposes of the EBR.[46] This ability to "bump up" and "bump down" particular instruments into different categories gives the Ministers sufficient flexibility to ensure that appropriate notice-and-comment opportunities are provided to the public, as described below.

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[41] Ibid., para.9.

[42] Ibid., para.10.

[43] Ibid., para.11.

[44] Bill 26, s.26(1).

[45] Bill 26, s.26(2).

[46] Bill 26, s.26(3).

The draft EBR regulation provides that over a four-year period, the following Ministries must classify their instruments into the three above-noted categories and comply with the applicable notice-and-comment regime for each category:

- Ministry of Consumer and Commercial Relations;
- Ministry of Environment and Energy;
- Ministry of Municipal Affairs;
- Ministry of Natural Resources; and
- Ministry of Northern Development and Mines.

To date, only the Ministry of Environment and Energy has circulated a proposed regulation which classifies its statutory instruments into the three categories. Twenty-nine types of approvals have been classified into the three categories. Class I instruments include all approvals for the use of former waste disposal sites and Director's Instructions for establishing new PCB storage sites. Class II instruments include various Director's Orders under the Environmental Protection Act, Ontario Water Resources Act, and the Pesticides Act. Class III instruments include certificates of approval for the establishment of municipal sewage works in or into another municipality. The full draft list of Ministry of Environment and Energy instruments has been appended to this paper.

Bill 26 provides that where a Minister is considering a proposal for a Class I, II or III instrument, he or she "shall do everything

in his or her power to give notice to the public".[47] In general, these notices will be placed on the Environmental Registry for at least a thirty day comment period prior to the government's decision on the proposed instrument.[48] However, for Class II instruments, the Minister is obliged to provide "additional public notice" by other appropriate means (eg. mailings, media advertisements, flyers, news releases, and actual notice to interested parties.).[49] In addition, for Class II instruments, the Minister shall also consider "enhancing" public participation opportunities by: organizing public meetings; allowing oral representations to the Minister or his or her designate; undertaking mediation; or employing any other process "that would facilitate more informed public participation in decision-making on the proposal."[50]

Instruments which are immediately required to respond to emergencies are not subject to the above-noted public participation regime.[51] Where a Minister decides to rely upon this emergency exception, notice must be placed in the Environmental Registry and provided to the Environmental Commissioner as soon as reasonably

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[47] Bill 26, s.22.

[48] Bill 26, s.22(1) and s.27.

[49] Bill 26, s.25 and s.28.

[50] Bill 26, s.24.

[51] Bill 26, s.29. This is also true of policies, Acts and regulations which are necessary to respond to emergencies.

possible.[52]

The notice-and-comment regime for instruments also does not apply where the Minister considers that the environmental aspects of the instrument has been or will be considered in a public participation process which is "substantially equivalent" to the requirements of Part II of the EBR.[53] Again, the Minister must provide public notice of his or her intention to rely upon this exemption.[54] Budget proposals to be presented to the Legislature are also exempt from the notice-and-comment regime.[55]

Similarly, the notice-and-comment regime for instruments does not apply to instruments which, in the Minister's opinion, would be a step towards implementing an undertaking or project already approved:

- by a tribunal under an Act after affording an opportunity for public participation; or
- by a decision under the Environmental Assessment Act; or
- by an exemption under the Environmental Assessment Act.[56]

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[52] Bill 26, s.26(2) to (3) and s.31.

[53] Bill 26, s.30(1). This is also true of policies, Acts and regulations which have been or will be considered in substantially equivalent processes.

[54] Bill 26, s.31(2) to (3).

[55] Bill 26, s.33. The draft EBR regulation also provides that official plans under the Planning Act are exempted from the requirements of Part II of the EBR until 1998.

[56] Bill 26, s.32(1) and (2).

However, it should be noted that the draft EBR regulation provides that future proposals to exempt undertakings under the Environmental Assessment Act are deemed to be regulations, which will be subject to the notice-and-comment regime for regulations under s.16 of Bill 26.

Once notice has been given in respect of an instrument, the Minister may appoint a mediator to assist in the resolution of issues related to the instrument.[57] The Minister is also obliged to take "every reasonable step" to ensure that the public comment on the proposed instrument is considered before a decision is made respecting the proposal.[58] Once a decision has been made respecting the proposal, the Minister shall provide public notice of the decision.[59]

As described below, Ontario residents may seek leave to appeal decisions respecting Class I and II instruments; Class III instruments generally have their own prescribed appeal procedures. In addition, Ontario residents may bring judicial review applications under the Judicial Review Procedure Act[60] on the grounds that a Minister or his or her delegate "failed in a fundamental way to comply with the requirements of Part II

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[57] Bill 26, s.34.

[58] Bill 26, s.35.

[59] Bill 26, s.36.

[60] Judicial Review Procedure Act, R.S.O. 1990, c.J.1.

respecting a proposal for an instrument".[61] Such applications must be commenced within twenty-one days of the date that the Minister gave public notice of the decision.[62]

(e) Public Appeal Rights

Bill 26 provides that Ontario residents may seek leave to appeal decisions respecting Class I or II instruments for which notice is required under the EBR.[63] There are two prerequisites to seeking leave to appeal: first, the person seeking leave must have an interest in the decision; and second, a right of appeal must exist for the person who applies for, or who is subject to, the instrument.[64] An application for leave must generally be filed within fifteen days of the impugned decision.[65]

The leave application is to heard by the appellate body having jurisdiction over the matter (eg. the Environmental Appeal Board for instruments under the Environmental Protection Act).[66] Bill 26 prescribes the test for obtaining leave,[67] and if leave is

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[61] Bill 26, s.118(2).

[62] Bill 26, s.118(3).

[63] Bill 26, s.38.

[64] Ibid.

[65] Bill 26, s.40.

[66] Bill 26, s.39.

[67] Bill 26, s.41.

granted, the decision respecting the instrument is automatically stayed unless the appellate body orders otherwise.[68]

Significantly, the EBR also provides that if an appeal is filed by a person who applies for, or who is subject to, a Class I or II instrument, then notice of the appeal shall be placed in the Environmental Registry.[69] This requirement will give other interested members of the public an opportunity to know about, and participate in, the appeal.

5. Environmental Commissioner under the EBR

Part III of Bill 26 establishes a new officer of the Assembly known as the Environmental Commissioner.[70] To help ensure his or her independence, the Environmental Commissioner will be appointed to five-year terms and will be removable only for cause.[71]

The Environmental Commissioner will undoubtedly play an important role in implementing the EBR and ensuring governmental accountability under the EBR. In particular, the Environmental Commissioner has a number of critical duties under the legislation,

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[68] Bill 26, s.42.

[69] Bill 26, s.47.

[70] Bill 26, s.49. See also note 12, supra, pp.64-68; and note 13, supra, pp.22-26.

[71] Bill 26, s.49.

including:

- reviewing the implementation of the EBR and compliance of Ministries with the requirements of the EBR;
- providing guidance on the development and application of the SEV;
- reviewing the use of the Environmental Registry;
- reviewing the exercise of discretion by Ministers under the EBR; and
- reviewing the use of various EBR components (eg. application for review of Acts, policies, regulations or instruments; application for investigation of environmental offences; civil cause of action to protect public resources, as described below).[72]

Bill 26 requires the Environmental Commissioner to report directly to the Legislature on an annual basis, and he or she will be reporting on a wide variety of activities under the EBR.[73] However, the Environmental Commissioner may also file "special reports" with the Legislature at any time and on any matter which should not await the annual report.[74] Similarly, the Environmental Commissioner is obliged to report "as soon as reasonably possible" if he or she considers that a Minister has failed to comply with EBR requirements respecting the SEV.[75]

To carry out his or her duties, the Environmental Commissioner is

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[72] Bill 26, s.57.

[73] Bill 26, s.58.

[74] Bill 26, s.58(4).

[75] Bill 26, s.58(5). See note 12, supra, pp.76-82.

empowered to examine any person under oath and to require the production of documents, and he or she generally has the powers conferred upon a commission under Part II of the Public Inquiries Act.[76]

6. Applications for Review under the EBR

Part IV of Bill 26 provides that any two residents may apply to the Environmental Commissioner to initiate a governmental review of the adequacy of an existing Act, policy, regulation or instrument to protect the environment.[77] Similarly, any two residents may also apply for a governmental review of the need for a new Act, policy, regulation or instrument to protect the environment.[78] Thus, where existing regulatory standards are obsolete, inadequate or non-existent, Ontario residents may use the EBR to cause a review of the need for new or more effective regulatory standards.

Within ten days of receiving the application for review, the Environmental Commissioner shall refer the application to the appropriate Minister(s).[79] Within twenty days of receipt of the application, the Minister(s) shall acknowledge receipt to the applicants, and shall provide notice of the requested review to

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[76] Bill 26, s.60.

[77] Bill 26, s.61(1).

[78] Bill 26, s.61(2).

[79] Bill 26, s.62.

other parties with a direct interest in the matters raised in the application.[80] Within sixty days of receipt of the application, the Minister(s) shall inform the applicants, the Environmental Commissioner, and other interested parties whether a review is to be undertaken.[81]

In determining whether a review is necessary in the public interest, the Minister(s) shall consider a number of factors, including:

- the applicable SEV;
- the potential for environmental harm if the review is not undertaken;
- whether the matter is otherwise subject to periodic review;
- any relevant social, economic, scientific or other evidence;
- submissions received by interested parties;
- the resources required to conduct a review; and
- whether there were public participation in the making of the Act, policy, regulation or instrument in question.[82]

Accordingly, there is considerable discretion as to whether a review of Acts, policies, regulations or instruments will be undertaken by the government. It is noteworthy that the EBR specifies that recent governmental decisions (eg. decisions made within the past five years) will not be subject to review if the

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[80] Bill 26, ss.65-66.

[81] Bill 26, s.70.

[82] Bill 26, s.67.

decisions were made in a manner consistent with the notice-and-comment regime prescribed in Part II of the EBR.[83] However, this provision does not apply where there is new evidence that failure to review the decision could result in significant environmental harm.[84]

If the Minister(s) decide to undertake a review, then any new Acts, policies, regulations or instruments resulting from the review will be subject to the notice-and-comment regime established by Part II of the EBR.[85]

The draft EBR regulation provides that the following Ministries will be subject to Part IV (request for review):

- Ministry of Agriculture and Food;
- Ministry of Consumer and Commercial Relations;
- Ministry of Environment and Energy;
- Ministry of Municipal Affairs;
- Ministry of Natural Resources; and
- Ministry of Northern Development and Mines.

This means that Ontario residents can apply for a review of the policies of these Ministries if there is reason to believe that

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[83] Bill 26, s.68(1).

[84] Bill 26, s.68(2).

[85] Bill 26, s.73.

they are ineffective in protecting the environment.

The draft EBR regulation also provides that the twenty statutes subject to s.16 (notice-and-comment) are also subject to Part IV, except for the Game and Fish Act. Class I, II and III instruments and regulations under these statutes are also caught by Part IV, with the exception of certain approvals and regulations under the Environmental Assessment Act. Thus, the EBR enables Ontario residents to apply for a governmental review of the adequacy of these Acts, regulations and instruments to protect the environment.

7. Applications for Investigations under the EBR

The EBR Task Force recommended that "when reasonable people have reasonable grounds to believe that an environmental offence or contravention has occurred, they should be able to rely on a government response that acknowledges their allegations and advises them of the outcome".[86] Accordingly, Part V of Bill 26 establishes a mechanism which permits Ontario residents to submit a formal application for the investigation of suspected environmental offences. It should be noted that a similar mechanism already exists at the federal level in ss.108-110 of the Canadian Environmental Protection Act.[87]

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[86] Supra, note 12, pp.69-70.

[87] Canadian Environmental Protection Act, S.C. 1988, c.22, as amended.

Under the EBR, any two residents of Ontario may submit a sworn statement to the Environmental Commissioner requesting an investigation of a contravention of an Act, regulation or instrument prescribed for the purposes of Part V of the EBR.[88] The draft EBR regulation provides that the following statutes will be subject to Part V over a two-year phase-in period:

- Aggregate Resources Act;
- Conservation Authorities Act;
- Crown Timber Act;
- Endangered Species Act;
- Fisheries Act (Canada);
- Energy Efficiency Act;
- Environmental Assessment Act;
- Environmental Protection Act;
- Game and Fish Act;
- Gasoline Handling Act;
- Lakes and Rivers Improvement Act;
- Mining Act;
- Ontario Water Resources Act;
- Pesticides Act;
- Petroleum Resources Act;
- Provincial Parks Act;
- Public Lands Act; and
- Waste Management Act, 1992.

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[88] Bill 26, s.74(1).

Hence, if two Ontario residents have grounds to believe that an offence has occurred under one of the above-noted statutes, they may file an application for investigation with the Environmental Commissioner. The draft EBR regulation similarly provides that contraventions of regulations or instruments under these statutes may serve as the basis of a request for an investigation.

Within ten days of receipt of the application, the Environmental Commissioner shall refer it to the appropriate Minister, who shall acknowledge receipt of the application to the applicants within twenty days.[89]

The Minister shall investigate the alleged contravention unless:

- the application is frivolous and vexatious;
- the matter is not serious enough to warrant an investigation; or
- the alleged contravention is not serious enough to cause environmental harm.[90]

Where the Minister decides not to investigate, he or she shall provide notice, with reasons, of this decision to the applicants, the Environmental Commissioner, and the persons alleged to have

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[89] Bill 26, ss.75-76.

[90] Bill 26, s.77.

been involved in the contravention.[91] This notice shall be provided within sixty days of receipt of the application.[92]

If the Minister decides to investigate, then the investigation must be completed within 120 days of receipt of the application, or the Minister must provide the applicants with a written estimate of the time required to complete the investigation.[93] Within thirty days of the completion of the investigation, the Minister shall give notice of the outcome to the applicants, the Environmental Commissioner, and the persons alleged to have been involved in the contravention.[94] This notice shall state what action, if any, that the Minister has taken or proposes to take as a result of the investigation.[95]

As described below, if the applicants do not receive a response to their request for an investigation within a reasonable time, or if an unreasonable response is received from the investigating Minister, then the applicants may go to court to protect public resources in accordance with Part VI of the EBR.

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[91] Bill 26, s.78(1). It is noteworthy that s.81 prohibits the Minister's notices under s.78 and s.80 from disclosing personal information about the persons who applied for the investigation.

[92] Bill 26, s.78(3).

[93] Bill 26, s.79.

[94] Bill 26, s.80(1).

[95] Bill 26, s.80(2).

8. Access to the Courts under the EBR

Traditional civil causes of action (eg. nuisance, negligence, trespass, riparian rights, and strict liability) permit persons to sue in respect of environmental where they have suffered personal harm, property damage or pecuniary loss.[96] However, it has been exceptionally difficult for public interest litigants to use these causes of action to protect the environment. For example, the law of standing and the public nuisance rule have presented formidable barriers to public interest environmental litigation. Accordingly, the EBR Task Force made two recommendations about access to the courts; first, that a new cause of action be created to protect public resources from significant harm; and second, that the public nuisance rule be reformed to enhance access to environmental justice.[97]

(a) New Cause of Action

Part VI of Bill 26 creates a new civil cause of action which permits Ontario residents to sue persons who cause significant harm to public resources as a result of contravening an Act, regulation or instrument prescribed under Part V (request for

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96 _Supra_, note 9, p.810.

97 _Supra_, note 12, pp.83-110.

investigation).[98] In particular, s.84 provides that where a person has contravened or is about to contravene a prescribed Act, regulation or instrument, and where that contravention has caused or will cause significant harm to a public resource of Ontario, then any resident may bring an action in the Ontario Court (General Division) in respect of the harm.[99] The normal civil burden of proof applies to such actions: the plaintiff must prove his or her case on a balance of probabilities.

Significantly, "public resource" is defined broadly as follows:

> "public resource" means,
>
> (a) air,[100]
>
> (b) water, not including water in a body of water the bed of which is privately owned and which there is no public right of navigation,
>
> (c) unimproved public land,[101]
>
> (d) any parcel of public land that is larger than five hectares and is used for,
>
> (i) recreation,

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[98] For a fuller discussion of the new cause of action, see R.D. Lindgren, "Ontario's Environmental Bill of Rights: Enhancing Access to Environmental Justice", in The Environmental Bill of Rights: Preparing for Fundamental Change (Canadian Institute, 1992), chapter IV.

[99] Bill 26, s.84(1).

[100] The definition of "air" excludes indoor air: see Bill 26, s.1(1).

[101] "Public land" is further defined as land which belongs to: the Crown in right of Ontario; municipalities; and conservation authorities, but does not include leased public land used for agricultural purposes: see Bill 26, s.82.

(ii) conservation,

(iii) resource extraction,

(iv) resource management, or

(v) a purpose similar to one mentioned in subclauses (i) to (iv), and

(e) any plant life, animal life or ecological system associated with any air, water or land described in clauses (a) to (d).[102]

Before an action can be commenced to protect public resources, the plaintiff must file a request for an investigation under Part V of the EBR. If the government's response is unreasonable or is not received within a reasonable time, then the plaintiff may proceed with the action.[103] If the claim involves odour, noise or dust arising from agricultural activities, the plaintiff must follow the procedures established under the Farm Practices Protection Act[104] However, these preliminary steps do not have to be undertaken by the plaintiff where the delay in taking these steps "would result in significant harm or serious risk of significant harm to a public resource".[105]

Bill 26 recognizes three specific defences to the new cause of

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[102] Bill 26, s.82.

[103] Bill 26, s.84(2).

[104] Bill 26, s.84(4). The Farm Practices Protection Act, R.S.O. 1990, c.F.6, establishes the Farm Practices Protection Board, which hears complaints about agricultural activities which have caused nuisance impacts from odour, noise or dust.

[105] Bill 26, s.84(6).

action: first, that the defendant exercised due diligence; second, that the defendant's conduct was statutorily authorized; and third, that the defendant complied with a reasonable interpretation of its instrument.[106] Other defences available at law are also preserved by the EBR.[107]

The government may be named as a defendant or co-defendant in the action. However, if the government is not a defendant, then the government must be given notice of the action through service of the statement of claim upon the Attorney General.[108] The plaintiff must also provide public notice of the action by placing a notice on the Environmental Registry, and by other means ordered by the court; however, the court is empowered to order parties other than the plaintiff to give or fund notice of the action.[109] Similarly, the court is empowered to order any party to give further notice at any stage of the action to ensure "fair and adequate representation of private and public interests, including governmental interests, involved in the action".[110]

Given the public interest nature of the new cause of action, the EBR gives the courts broad powers to permit non-parties to

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[106] Bill 26, s.85(1) to (3).

[107] Bill 26, s.85(4).

[108] Bill 26, s.86.

[109] Bill 26, s.87.

[110] Bill 26, s.88.

participate in the action on such terms as may be imposed by the courts.[111] This provision will permit other persons to intervene in the action where appropriate, but the court can control the scope and nature of the intervention.

The court has been empowered to stay or dismiss the action if it is in the public interest to do so.[112] In determining this matter, the court may have regard for the environmental, economic and social concerns arising out of the action, and may consider whether the issues would be better resolved by another process, and whether there is an adequate governmental plan to address the public interest issues.[113] The EBR Task Force contemplated that in appropriate circumstances, the Attorney General may intervene and move for a stay or dismissal of the action on public interest grounds; however, the Attorney General's position is not binding on the court, which must consider the submissions of all parties before making a decision on the proposed stay or dismissal.

If a plaintiff has requested an interlocutory injunction or mandatory order, the defendant may ask the court to require the plaintiff to provide an undertaking to pay damages if the pre-trial relief is granted but the action is dismissed at trial. However, the EBR codifies the court's discretion to dispense with this

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[111] Bill 26, s.89.

[112] Bill 26, s.90.

[113] Bill 26, s.90.

undertaking if special circumstances exist, including whether the action is a test case or raises a novel point of law.[114]

If the court finds that the plaintiff is entitled to judgment, the court is empowered to order various remedies, including:

- granting an injunction against the contravention;
- ordering the parties to negotiate a restoration plan;
- granting declaratory relief; and
- making any other orders, including cost orders, that the court considers appropriate.[115]

However, the court cannot award damages to the plaintiff, nor can the court make an order which is inconsistent with the Farm Practices Protection Act.[116]

The EBR gives the court broad powers respecting the negotiation and content of restoration plans. Where a restoration plan is necessary, the parties may be ordered to negotiate a "reasonable, practical and ecologically sound" plan which provides for:

- the prevention, diminution or elimination of the harm;
- the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource affected by the contravention; and

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[114] Bill 26, s.92.

[115] Bill 26, s.93(1).

[116] Bill 26, s.93(2) and (3).

- the restoration of all uses, including enjoyment, of the public resource affected by the contravention.[117]

The restoration plan may also include provisions requiring:

- research into and development of technologies to prevent, decrease or eliminate harm to the environment;

- community, education or health programs;

- the transfer of property by the defendant so that the property becomes a public resource;[118] or

- the payment of money from the defendant to the Minister of Finance to be used for environmental protection or restoration purposes.[119]

Where the court orders the parties to negotiate a restoration plan, the court may make a number of interim and ancillary orders respecting the negotiation process or the restoration of the resource.[120] If the parties successfully negotiate a restoration plan, then the plan must be submitted to the court for an order approving the plan and requiring the defendant to comply with the plan.[121] If the parties cannot agree upon a restoration plan, then the court shall develop its own restoration

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[117] Bill 26, s.95(2).

[118] Bill 26, s.95(3). However, such provisions may only be included in the restoration plan with the consent of the defendant: Bill 26, s.95(4) and (5).

[119] Bill 26, s.95(8). Again, the consent of both the defendant and the Attorney General is necessary for the transfer of funds.

[120] Bill 26, s.96.

[121] Bill 26, s.97.

plan with the assistance of court-appointed experts.[122]

The judgment of the court is binding on all residents of Ontario by reason of the doctrines of res judicata and issue estoppel.[123] Thus, where the court has dismissed a court on its merits, then another resident cannot bring a subsequent but identical action against the same defendant arising out of the same harm to the public resource.

While the normal cost rules apply to the new cause of action (eg. costs follow the event), the EBR codifies the court's discretion not to order costs against an unsuccessful plaintiff where there are special circumstances, including whether the action is a test case or raised a novel point of law.[124] It should be noted that a similar provision exists in Ontario's recent Class Proceedings Act.[125]

Bill 26 provides that the filing of an appeal against an order made under the EBR does not operate as a stay of the order. However, a motion may be brought before an appellate judge to seek a stay of the order.[126]

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[122] Bill 26, s.98.

[123] Bill 26, s.99.

[124] Bill 26, s.100.

[125] Class Proceedings Act, S.O. 1992, c.6, s.31.

[126] Bill 26, s.101.

Bill 26 establishes a general two-year limitation period on the commencement of actions under s.84 of the EBR.[127]

(b) Reform of the Public Nuisance Rule

Bill 26's creation of a new civil cause of action does not necessarily assist persons who have suffered loss or damage from a public nuisance causing environmental harm. Traditionally, widespread public harm has been actionable only at the instance of the Attorney General, who was presumed to be the guardian of the public interest. Tort law, however, developed a distinction between a "public" and "private" nuisance, and the courts have generally recognized that any person who has suffered "special" or "unique" damages above that suffered by the community at large could seek compensation for his or her private loss caused by the public nuisance.

Nevertheless, the distinction between private and public nuisance has been blurred by many courts.[128] Moreover, a number of actions to recover private loss arising from a public nuisance have been dismissed on the grounds that the plaintiffs lacked standing or lacked "special" damages that set them apart from other members

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[127] Bill 26, s.102.

[128] Beth Bilson, The Canadian Law of Nuisance (Butterworths, 1991), chapter 3.

of the community.[129]

Bill 26 remedies this situation 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 the 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.[130]

In light of this provision, defendants should no longer be able to obtain the dismissal of claims arising out of a public nuisance simply because the plaintiff has suffered loss or injury of the same kind or degree as other persons within the community, and the Attorney General has not consented to the bringing of the action.

9. Whistle-blower Protection under the EBR

Section 174 of the Environmental Protection Act currently provides limited protection for employees who "blow the whistle" on polluting employers. In particular, this section prohibits employers from dismissing, disciplining, penalizing, coercing or intimidating employees who:

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[129] See, for example, Hickey v. Electric Reduction Co. (1970), 21 D.L.R. (3d) 368 (Nfld. S.C.); see also Fillion v. New Brunswick International Paper Co., [1934] 3 D.L.R. 22 (N.B. Ct.).

[130] Bill 26, s.103.

- have complied with environmental laws, regulations or instruments;

- have sought or may seek the enforcement of environmental laws or regulations;

- have given or may give information to the Ministry of Environment or a provincial officer; or

- have been or may be called upon to testify in proceedings under environmental laws or regulations.

If an employer contravenes this provision, the aggrieved employee is entitled to file a written complaint with the Ontario Labour Relations Board, which is empowered to fashion an appropriate remedy.

The EBR Task Force examined these existing provisions and concluded that whistle-blower protection should be entrenched and expanded in the EBR.[131] Accordingly, Part VII of Bill 26 permits employees to complain to the Ontario Labour Relations Board where they have been dismissed, disciplined, penalized, coerced, intimidated, or harassed by employers because the employee:

- participated in the making of a SEV, policy, Act, regulation or instrument as provided in Part II;

- applied for a review under Part IV;

- applied for an investigation under Part V;

- complied with or sought the enforcement of a prescribed Act, regulation or instrument;

- gave information to an appropriate authority for the purposes of an investigation, review or hearing related to a

131 Supra, note 12, pp.111-14.

prescribed policy, Act, regulation or instrument; or

- gave evidence in a proceeding under the EBR or under a prescribed Act.[132]

If the Board agrees that the employer has acted improperly, the Board may: enjoin the impugned conduct; order the hiring or reinstatement of the employee, with or without compensation; or order compensation to the employee in lieu of hiring or reinstatement.[133]

The draft EBR regulation provides that the twenty statutes prescribed for the purposes of s.16 of the EBR (see above) are prescribed for the purposes of Part VII (employee protection). Regulations and instruments under these statutes are also prescribed for the purposes of Part VII.

PART IV - CONCLUSION

Bill 26 is intended to protect, conserve and restore the environment through a variety of means, including: public participation in environmental decision-making (Part II); establishment of the Environmental Commissioner's office (Part III); application for review of governmental policies, Acts, regulations and instruments (Part IV); application for

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[132] Bill 26, s.105.

[133] Bill 26, s.110.

investigation of environmental offences (Part V); commencement of lawsuits to protect the environment (Part VI); and protection of whistle-blowing employees (Part VII).

While these measures are long overdue in Ontario, Bill 26 has been properly described as "evolutionary" rather than "revolutionary":

> Companies which are already making serious and sustained efforts to comply with the law will have little to fear from this Bill. Lawbreakers, on the other hand, will have additional headaches.[134]

[134] Dianne Saxe, "The Environmental Bill of Rights: Evolutionary, not Revolutionary", Hazardous Waste Management (August 1992), p.25.

Section	Instrument
Environmental Protection Act	
section 7	Order for controlling contaminant discharge
section 9	Approval for discharge into the natural environment other than water (i.e. air emissions)
section 10	Approval of a program for preventing, reducing, or controlling discharge
section 17	Order for remedial work
section 18	Order for preventative measures
section 27	Approval for a waste disposal site
section 43	Order for removal of waste and restoration of site
section 44	Order for conformity with Act for waste disposal sites
section 46	Approval for use of former waste disposal site
section 79	Order for private sewage system
section 136	Order for performance of environmental measures
Regulation 362, section 6	Instructions for management of PCB waste
Ontario Water Resources Act	
section 31	Order prohibiting or regulating discharge of sewage into water
section 32	Order for preventative measures for facilities discharging into water
section 34	Permit to take water
subsection 34(7)	Notice for regulating water diversion
subsection 52(3)	Order or direction for unapproved water works
section 52(6)	Direction for maintaining water works
section 53(1)	Approval for sewage works
section 53(3)	Order for unapproved sewage works
section 61	Direction for maintaining sewage works
section 62(2)	Direction on a report respecting sewage works or water works for municipalities
section 74(2)	Order designating public water or sewage service area
section 91	Direction for sewage disposal
section 92	Order to stop or regulate discharge of sewage into sewage works
Regulation 903, subsection 21(5)	Direction to abandon a well
Pesticides Act	
section 28	Order for controlling the handling, storage, use, disposal (etc) of pesticides
Regulation 914	Interim Status Schedules

* The Acts should be referred to for a complete interpretation of each section.