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The Right to a Review and the Right to an Investigation
Under the Environmental Bill of Rights:
A Preliminary Analysis

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For

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Practical Implications
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The Right to a Review and the Right to an Investigation
Under the Environmental Bill of Rights:
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Prepared by
Paul Muldoon¹

I. Introduction

The Environmental Bill of Rights, 1993² [hereinafter referred to as EBR] is a statute that was proclaimed in force on February 15, 1994. One of the main purposes of the EBR are to ensure that the public has an effective and fair opportunity to have input into environmentally significant decisions and to promote greater accountability within government for its environmental activities. The EBR provides the Ontario public with a set of tools or a variety of procedures to achieve these purposes.

Its history, at least the principles behind the new law, date back at least 20 years.³ It is not surprising, therefore, that the notion of developing an environmental bill of rights has

¹ Counsel, Canadian Environmental Law Association and represented Pollution Probe on the Task Force on the Ontario Environmental Bill of Rights.

² Environmental Bill of Rights Act, 1993 S.O. 1993, c. 28 [hereinafter referred to the "EBR"]

³ For a more detailed review of its history, see: Paul Muldoon and John Swaigen, "Environmental Bill of Rights" in D. Estrin and J. Swaigen (eds.) Environment on Trial: A Guide to Ontario Environmental Law and Policy (3rd ed.) (Toronto: Emond-Montgomery Press, 1993) 793, at 795-7.

invoked a fairly intense discussion and debate.⁴ This debate has ranged from whether the bill is needed at all to whether certain provisions will be effective in protecting the environment.

There is little doubt that a comprehensive evaluation of the new law will not be possible until the law is fully implemented and there is some experience with it. What is possible at this time, however, is a more detailed analysis of the EBR and how it is intended to function.

The purpose of this paper is to provide a review of two components or tools provided in the Act. These two components are: the right to request a review by government of certain government decisions found in Part IV of the EBR; and the right to request an investigation found in Part V of the law. It should be made clear that these two rights are not neatly related and, in fact, are quite independent of each other. The common thread between the two, however, is that they do provide good examples of the potential and limits of the array of new rights provided in the EBR.

Before the right to a review and to an investigation are outlined, it may first be worthwhile to review the various other components of the EBR. These are as follows:

⁴ Some of these discussions and the various arguments are found in the reports of the task force that assisted in developing the bill. See: Ministry of the Environment, Report of the Task Force on the Ontario Environmental Bill of Rights (July, 1992). Report of the Task Force on the Ontario Environmental Bill of Rights: Supplementary Recommendations, December, 1992.

PART I - Definitions and Purposes: This part sets out the overall purposes of the Act. The purposes are important for a number of reasons as described below.

PART II - Public Participation Regime and Statement of Environmental Values: This part contains two cornerstones of the Act. The public participation regime can be summarized as a "notice and comment" process for proposals for new policies, regulations and instruments. The Statement of Environmental Values is a document produced by each ministry subject to the statute which demonstrates how the purposes of the statute are consistent with the ministry's policy framework.

Part III - The Office of Environmental Commissioner: This office was created to oversee the working of the EBR and report directly to the legislature at least once a year. This office was established as a means to political accountability, a mechanism was used rather than solely relying on judicial review.

Part IV - Application for Review: This part provides a procedure to review existing statutes, policies, regulations or instruments (as opposed to new proposals in Part II).

Part V - Application for an Investigation: This part provides a mechanism to request an investigation by government for an alleged illegal activity that may cause harm to the environment.

Part VI - Right to Sue for Harm to Public Resource: This part creates a right to sue by citizens concerning the violation of existing laws causing harm to a public resource. This Part also dismantles the public nuisance rule.

Part VII - Enhanced Work Protection: This part extends existing whistle blower protection for employees.

Part VIII - General Matters: This part deals with transition and other such matters.

One of the primary triggers for the EBR is a government proposal or decision. Proposals and decisions are narrowed to only include Acts, regulations, policies and instruments. The

terms, in turn, are defined in the Act.⁵

II. The Right to Request a Review

1. Overview of the Right to a Review

1.1 Purpose of the Right/ Interrelationship with Other Rights

The right to request a review is found in Part IV, sections 61 through to 73, of the EBR. This Part IV right is closely connected to, and probably could have been incorporated to be part of, Part II of the Act.

The central core of Part II is a notice and comment regime. Under this regime, a process is established to ensure that the public is notified of, and given the opportunity to comment on, environmentally significant proposals. These proposals include proposals for new statutes, regulations, policies and instruments. For statutes, regulations and policies, the minister responsible for the proposal has the discretion as to whether or not to subject the proposal to public participation. For instruments, there is a classification process where instruments deemed to be environmentally significant are

⁵ In section 1 of the EBR, "Policy" is defined as: "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."

"Regulation" "...has the same meaning as in the Regulations Act."

"Instrument" "means any document of a 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."

classified into classes I to III.⁶ There is a procedure to "bump-up" instruments from one class to another on a case-by-case basis.⁷

The regime in Part II pertains, first of all, to new proposals for statutes, regulations, policies and instruments. The Part IV right to review pertains asking for a review of existing statutes, regulations, policies and instruments or a review where there is no statute, regulation or policies. As such, the primary purpose of Part IV is to provide a procedure to selectively go back and review the appropriateness or effectiveness of past government decisions, or to fill the gaps in existing environmental law and policy in the province. The procedure is activated by the submission of an application for a review by two persons resident in Ontario. If a request for review is granted, the statute, regulation, policy or instrument sought to be reviewed is then treated as a proposal and follows the procedure laid out in Part II. Part IV then provides a procedure that "feeds" into Part II.

⁶ See: EBR, ss. 19-21. Class I are instruments which require the minimum public involvement, such as notice through the environmental registry and the opportunity to comment. Class III, on the other hand, is restricted to instruments that require a hearing. Class II includes instruments with enhanced notice and comment requirements. There is a draft regulation on this matter. See: MOEE's Classification of Instruments, "2nd Draft Regulation under the Environmental Bill of Rights."

⁷ EBR, s. 26.

1.2 The Two Rights of Review: Right to Request Review Existing Decisions and Right to Request New Initiatives

As noted above, the "right to review" actually incorporates two rights as defined in section 61. These two rights can be described as follows:

- (a) Section 61(1) pertains to where there is a request to review an existing policy, Act, regulation or instrument in order to protect the environment; and
- (b) Section 61(2) pertains to where there is a request to make or pass a new policy, Act or regulation in order to protect the environment.

There are a number of important differences between the types of review. First, the right to request a review to make a new policy, Act or regulation does not apply to instruments. This difference may not be that important since the debate is usually whether the approval is adequate or appropriate; not whether an approval is needed in the first place. Hence, it will be interesting to assess to what extent this is a limitation.

Second, there is some discussion about the interrelationship between the two rights of review. For example, if one was denied in their application to have an existing policy reviewed, could not one creatively fashion a request to establish a new policy that overlaps, duplicates or overlays the existing policy where a review was originally denied?

Hence, while one may analyze the two rights to review, in reality the distinction should not be exaggerated. Moreover, for

all intents and purposes, the procedure and steps in using these requests are virtually identical, although some differences do exist that will be noted below.

2. Applying for the Reviews

It should be made clear that the EBR does not apply to all government decisions or matters dealt with by government. Hence, the first issue is to determine whether the EBR is applicable at all.

2.1 Decisions that Are Reviewable

The EBR does not apply to all government proposals and decisions.⁸ It applies only to "prescribed ministries" and "prescribed statutes." In other words, the ministry or the statute must be "caught" by the EBR before it applies. Hence, any analysis must start with the question as to what proposals are subject to the EBR.

Part IV also only applies to certain prescribed ministries and prescribed statutes.⁹ Moreover, each ministry and statute has a different phase-in date. As outlined below, which ministries and statutes are prescribed, and when, are defined by regulation. For the EBR generally, there is a five year phase-in period, although the phase-in for Part IV is actually only two years. Table I and Table II summaries the prescribed ministries and statutes, together with phase-in dates for Part IV.

⁸ As noted above, "proposals" and "decisions" are limited to Acts, policies, regulations and instruments.

⁹ EBR s. 63(2)(a).

TABLE I

Prescribed Ministries and Phase-In Dates for Part IV
of the EBR

Ministry of Agriculture and Food	April 1, 1996
Ministry of Consumer and Commercial Relations	April 1, 1996
Ministry of Environment and Energy	February 1, 1995
Ministry of Municipal Affairs	April 1, 1998
Ministry of Natural Resources	April 1, 1996
Ministry of Northern Development and Mines	April 1, 1996

Source: Ontario Regulation 73/94 made under the Environmental Bill of Rights, 1993, February 16, 1994 (O.Reg. 73/94), s. 5.

TABLE II

Prescribed Statutes for Part IV

Aggregate Resources Act	April 1, 1996
Conservation Authorities Act	April 1, 1996
Crown Timber Act	April 1, 1996
Endangered Species Act	April 1, 1996
Energy Efficiency Act	November 15, 1994
Environmental Assessment Act	November 15, 1994
Environmental Bill of Rights, 1993	November 15, 1994
Environmental Protection Act	November 15, 1994
Gasoline Handling Act	April 1, 1996
Lakes and Rivers Improvement Act	April 1, 1996
Mining Act	April 1, 1996
Niagara Escarpment Planning and Development Act	November 15, 1994
Ontario Waste Management Corporation Act	November 15, 1994
Ontario Water Resources Act	November 15, 1994
Pesticides Act	November 15, 1994
Petroleum Resources Act	April 1, 1996
Planning Act	April 1, 1996
Provincial Parks Act	April 1, 1996

Source: Ontario Regulation 73/94 made under the Environmental Bill of Rights, 1993, February 16, 1994 (O.Reg. 73/94), ss. 6 and 3.

2.2 Exceptions

Apart from phase-in issues, there are a number exceptions in the statute or regulations which serve to exclude or exempt the EBR from application. Some of these exceptions include:

- (a) The Game and Fish Act is not prescribed for the purposes of Part IV.¹⁰
- (b) Part IV does not apply to a review of the need for a new exemption under the Environmental Assessment Act.¹¹
- (c) The minister is directed not to grant a review if the decision was made in a manner that the minister considers consistent with the intent and purpose of Part II.¹²

However, the Act also states that this exception may not apply where there is social, economic scientific or other evidence that failure to review the decision could result in significant harm to the environment; and the evidence was not taken into account when the decision sought to be reviewed was made.¹³

3. Procedure/ Steps for the Right

The EBR lays out a fairly specific procedure or series of steps. These steps can be summarized as follows:

¹⁰ Ontario Regulation 73/94 made under the Environmental Bill of Rights, 1993, February 16, 1994 (O.Reg. 73/94), s. 6(2).

¹¹ EBR, s. 63(3).

¹² EBR, s. 68(1).

¹³ EBR, s. 68(2).

The Application for Review: Under s. 61, the right to review can only be used where two persons make an application for review and those two persons are residents of the province. The application can be directed to a review an existing Act, regulation, policy or instrument or the establishment of a new Act, regulation or policy. The purpose of these request must be solely to protect the environment.¹⁴

Contents of the Application: There are a number of technical requirements to the applications, and these include:

(i) the application must be one that is provided by the Environmental Commissioner (unlike other provisions of the EBR where there does not seem to be a prescribed form);¹⁵

(ii) the application must include: names and addresses of the applicants; an explanation of why the applicants believe that the review should be undertaken to protect the environment; and a summary of the evidence supporting the applicants' belief that the review applied for should be undertaken.¹⁶

(iii) the policy, Act, regulation or instrument sought to be review must be clearly identified in the application.¹⁷

Forwarding the Application: Once completed, the application is forwarded to the Environmental Commissioner. The Commissioner has no discretion or power but to forward the

¹⁴ EBR, s. 61(1)(2).

¹⁵ EBR, s. 61(3).

¹⁶ EBR, s. 61(3).

¹⁷ EBR, s. 61(4).

application to the appropriate minister. Where there is an application to a minister for a ministry not prescribed under Part IV, the Commissioner must give notice to the applicants that the EBR does not apply to the minister responsible for the matter subject of the application.¹⁸

Acknowledgement and Notice: Once a minister receives an application for review from the Environmental Commissioner, the minister is obliged to acknowledge the receipt of the application within 20 days of receiving the application from the Commissioner.¹⁹ The duty to give notice only applies to applications for review with respect to instruments. The minister is also obliged to give notice of the application for review to any person that might have a direct interest in matters raised in the application. There is no definition of "direct interest" in the statute.²⁰ One express consideration the minister can take into account in determining whether there should be a review are submissions from those having a direct interest.²¹ It should be noted that any notice under Part IV cannot disclose the names or addresses of the applicants or any other personal information about them.²²

¹⁸ EBR, s. 62.

¹⁹ EBR, s. 65.

²⁰ EBR, s. 66.

²¹ EBR, s. 67(2)(e).

²² EBR, s. 73.

Ministerial Review Based on the Public Interest: Upon receipt, the minister must consider each application for review in a preliminary way to determine whether the public interest warrants a review of the matters raised in the application.²³ The review of an Act, regulation, policy or instrument should be conducted in the same way as a proposal for the same would have been conducted under the statute.²⁴

Decision to Review and Notice Thereof: Once a minister decides a review is warranted, the review must be undertaken in a reasonable time.²⁵ Further, notice must be given, together with a brief statement of the reasons for the decision, to the applicants, the Environmental Commissioner and any other person who the minister considers ought to get the notice because the person might be directly affected by the decision.²⁶

Notice of Outcome of Review: Once the review is completed, the minister must give notice of the outcome of the review, and what action, if any, will result, to those who received notice of the intention to review.²⁷ As mentioned above, the notice still cannot disclose the names or addresses of

²³ EBR, s. 67(1).

²⁴ EBR, s. 73.

²⁵ EBR, s. 69.

²⁶ EBR, s. 70.

²⁷ EBR, s. 71.

the applicants or any other personal information about them.²⁸

4. Ministerial Discretion and Criteria for that Discretion

Obviously, the most important decision point in Part IV is whether, and on what grounds, the minister decides that the request for a review should be granted. The operative criteria is whether the "public interest" warrants a review. The Act outlines nine criteria to assist the minister in determining whether it is in the public interest to proceed with the review. These criteria are as follows:²⁹

- (i) the ministry statement of environmental values;
- (ii) the potential for harm if the review applied for is not undertaken;
- (iii) the fact that matters sought to be reviewed are otherwise subject to periodic review;
- (iv) any social, economic, scientific or other evidence the ministers considers relevant;
- (v) any submission from a directly affected person with respect to a application to review an instrument;
- (vi) the resources required to conduct the review;
- (vii) the extent to which members of the public has an opportunity to participate in the matter sought to be reviewed;
- (viii) how recently the policy, Act, regulation or instrument was made, passed or issued; and
- (ix) any other matter that minister considers relevant.

Clearly, this is not an exhaustive list. Moreover, there is

²⁸ EBR, s. 73.

²⁹ EBR, s. 67(2)(3).

no mandatory duty for the minister to consider all or any of this list. However, one could argue that there is a legislative intention for the minister to consider the pertinent factors on this list.

5. The Right to Review in Practice

The right to review under Part IV of the EBR is potentially the most procedure for the public under this new law. Unlike other provisions, it has the direct intent to change the way the government presently regulates or challenges the legitimacy of an existing instrument. If one accepts that there are thousands of instruments being relied upon at this time that do not have an expiry date, the right to review may be the most direct mechanism to review those approvals.

On one hand, the appropriate minister could take a very conservative view and virtually negate the intent of Part IV by refusing to grant any application for review. On the other hand, the appropriate minister could grant applications with little predictability. It is submitted that neither approach would serve the best interests of Part IV or the objectives of the EBR. With public input, ministries subject to the EBR should carry on some internal review with a view of establishing criteria as to when and under circumstances applications for review should be granted. This should also be undertaken with a prioritization scheme for regulations, policies and instruments or classes of instruments. This internal review would be helpful to both those applying for reviews and those that may be affected by such

reviews. Moreover, it would also provide a more rational framework for the exercise of ministerial discretion, a subject which the Environmental Commissioner has the ability to comment on every year.

Over the next few years, it will be interesting to examine how many requests for reviews will be formally submitted and then how many granted. No doubt the early experience with this section will provide a very important signal as to the utility and effectiveness of this provision.

III. The Right to Request an Investigation

1. Overview to the Right

The right to notice and comment under Part II and the right to request a review under Part IV are meant to allow the public to effectively participate in environmental decision-making. The right to request an investigation, however, is intended to make sure that there is compliance with those laws. This right is found in Part V, sections 74 to 81 of the EBR.

1.1 Scope of the Rights/ Interrelationship with Other Rights

The right to request an investigation is important for a number of reasons. First, it should be considered simply as another tool outlined in the EBR. It is a tool that most members of the public would have expected to be in the law since, as the preamble states, the government has the "primary responsibility" for the protection of the environment.³⁰

³⁰ The relevant part of the Preamble states:

While the government has the primary responsibility for

Second, the right to request an investigation is important since the procedure for requesting an investigation must be used as a precondition to employing the "right to sue" provisions in the EBR.³¹

1.2 Significance of the Right In Relation to Present Practice

When reviewing the provisions governing the right to request an investigation, a question does arise as to whether the right to request an investigation actually does go further than present practices. In other words, what is the difference between the existing informal request process to an investigation and the formal process contained in Part V of the EBR? It may be argued that provisions in Part V may not provide any greater potential to force the appropriate ministry to undertake an investigation.

The extent to which government discretion is constrained in this context remains a topic for debate. However, the Part V process does provide added benefit over the present inform process. First, there is some benefit from the fact that a formal process does exist. It provides a certain, predictable process

achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

³¹ EBR, s. 84(2). See: Rick Lindgren, "Using the Courts Under The Environmental Bill of Rights: A Public Interest Plaintiff's Perspective" A paper presented at the CBAO-LSUC Joint Program The Environmental Bill of Rights: Practical Implications, June 10, 1994.

with legislated deadlines and clear delineation of responsibilities. Second, the formal process does provide the potential to reduce the bureaucratic maze for the public. Because the application is forwarded to the Environmental Commissioner, who then must determine which is the relevant ministry, the applicants are spared the problem of determining jurisdictional boundaries between various ministries.

1.3 Application of the Right

As with the right to a review, the right to an investigation has to apply to a statute that is prescribed under the EBR. Table III outlines the prescribed statute to which Part V applies, along with the applicable implementation and phase-in dates.

2. Procedure/ Steps for the Right

The EBR provides a fairly clear roadmap as to the process and procedure to use the right to request an investigation. The processes can be summarized as follows:

Application for Request for an Investigation: Under the EBR, any two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate minister.³²

³² EBR, s. 74(1).

TABLE III

Prescribed Statutes for Part V

Aggregate Resources Act	April 1, 1996
Conservation Authorities Act	April 1, 1996
Crown Timber Act	April 1, 1996
Endangered Species Act	April 1, 1996
Energy Efficiency Act	August 15, 1994
Environmental Assessment Act	August 15, 1994
Environmental Protection Act	August 15, 1994
Game and Fish Act	April 1, 1996
Gasoline Handling Act	April 1, 1996
Lakes and Rivers Improvement Act	April 1, 1996
Mining Act	April 1, 1996
Ontario Water Resources Act	August 15, 1994
Pesticides Act	August 15, 1994
Petroleum Resources Act	April 1, 1996
Provincial Parks Act	April 1, 1996
Public Lands Act	April 1, 1996
Waste Management Act	August 15, 1994

Source: Ontario Regulation 73/94 made under the Environmental Bill of Rights, 1993, February 16, 1994 (O.Reg. 73/94), s. 9.

Contents of the Application: There are a number of requirements that must be included in the application for an investigation. These include:

(a) the application must in the form provided for the purpose by the office of the Environmental Commissioner;

(b) the contents shall include: names and addresses of the applicants; a statement of the nature of the alleged contravention; to the extent such information is available, the names and addresses of those involved in the alleged contravention; a summary of the evidence supporting the allegation of the applicants; to the extent such information is available, the names and addresses of each person who may give evidence and a summary of the evidence they may give; a description and copy of any document or other material that should be considered; and details of any previous contacts with the Office of the Environmental Commissioner or any ministry regarding the alleged contravention.³³

(c) an affidavit by each applicant which includes a statement by each applicant or, where an applicant is a corporation, by a director or corporation of the corporation, stating that the applicant believes that the facts alleged in the application are true.³⁴

³³ EBR, s. 74(2).

³⁴ EBR, s. 74(3)(4).

Forwarding the Application and Notice: Within ten days of receiving a copy of the request for an investigation, the Environmental Commissioner must forward the application to the minister who is responsible for the statute under which the contravention is alleged to have been committed.³⁵

Within 20 days of receiving it, the minister must acknowledge receipt of the application to the applicants.³⁶

Duty to Investigate: The minister must investigate all matters to the extent that the minister considers necessary in relation to a contravention alleged in the application.³⁷

Notice of Decision Not to Investigate: Within sixty days of receiving the application, the minister must give notice to the applicants, the Environmental Commissioner and anyone named in the application that is alleged to be involved in the contravention and an address has been given in the application.³⁸

Time Required for the Investigation: If there is an investigation, the investigation must be completed within 120 days of receiving the application or an estimated time needed to complete investigation. Within that time period, the minister must either complete the investigation or give

³⁵ EBR, s. 75.

³⁶ EBR, s. 76.

³⁷ EBR, s. 77.

³⁸ EBR, s. 78.

a revised time estimate.³⁹

Notice of Outcome: Within 30 days of completing an investigation, the minister shall give a notice of the outcome of the investigation, including a description of what action will be taken, if any, to the applicants, the Environmental Commissioner and each person alleged in the application to have been involved in the commission of the contravention.⁴⁰

3. Ministerial Discretion and Criteria for that Discretion

Once a request is before the responsible minister, the minister must decide whether to proceed with the investigation. The EBR does not give clear guidance as to the threshold test and criteria. The test seems to be a subjective one but arguably the minister must have some evidence before him or her in order to grant a request under s. 77. Under section 77(1), the "minister shall investigate all matters *to the extent that the minister considers necessary* in relation to a contravention alleged in an application." [Emphasis Added]

The EBR does not state what criteria must or should be considered. Instead, it lists a few factors that states that the minister is not compelled to conduct an investigation if:

- (i) if the application is frivolous or vexatious;
- (ii) the alleged contravention is not serious enough to

³⁹ EBR s. 79.

⁴⁰ EBR, s. 80.

warrant an investigation;

(iii) the alleged contravention is not likely to cause harm to the environment; and

(iv) the investigation would duplicate an ongoing or completed investigation.⁴¹

Hence, it remains for future practice to determine the extent to which these provisions do constrain discretion. However, it should be recalled that even if there is broad discretion, the Environmental Commissioner does have the express function of reviewing the exercise of discretion under the right to an investigation.⁴² There is no such review of government discretion at the present time.

4. The Right to an Investigation in Practice

At the present time, it is difficult to provide any reliable estimate how often the right to an investigation will be used and in what context. These estimates may be a little complex since some requests will be filed to fulfil the condition precedent to employing the cause of action. Nevertheless, if nothing else, there is a benefit to formalizing the complaint and investigation process. The fact there will be greater certainty of process and governmental duties to keep the complainant cognizant on the status of the investigation is a positive step. The success of this provision may be more dependent on whether the government allocates sufficient resources to the various investigation

⁴¹ EBR s. 77.

⁴² EBR, ss. 57(g)(j).

branches than any design or format of the provisions of the EBR.

IV. Summary and Conclusions

The right to review and the right to an investigation are important provisions in the EBR. It will be some time before there can be a detailed analysis of the practice of these sections. However, this paper has reviewed the intent and procedures with respect to these provisions. The next step is to examine how they were interpreted and applied, issues which will determine their eventual effectiveness.

