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ENSURING ACCESS TO ENVIRONMENTAL JUSTICE: HOW TO STRENGTHEN ONTARIO'S *ENVIRONMENTAL BILL OF RIGHTS*

Submissions of the Canadian Environmental Law Association
To the Ministry of the Environment and Climate Change
(Environmental Registry No. 012-8002)

Prepared by:

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***Abstract**: Enacted in 1993, Ontario's Environmental Bill of Rights contains various tools that Ontario residents can use to ensure environmental protection, enhance governmental accountability, and participate in environmental decision-making. However, the legislation has remained largely unchanged since its enactment, and the past two decades of experience under the Environmental Bill of Rights have demonstrated the need for various statutory, regulatory, policy and administrative reforms. Accordingly, the focus of Ontario's current public review of the Environmental Bill of Rights should be on implementing procedural and substantive changes which are required to better achieve the public interest purposes of the legislation.*

PART I – INTRODUCTION

The Canadian Environmental Law Association ("CELA") welcomes this opportunity to provide submissions to the Ministry of the Environment and Climate Change ("MOECC") on how to improve and strengthen Ontario's *Environmental Bill of Rights* ("EBR").

CELA is a public interest law group founded in 1970 for the purposes of using and enhancing environmental laws to protect the environment and safeguard human health. Funded as a specialty legal aid clinic, CELA lawyers represent low-income and vulnerable communities in the courts and before tribunals on a wide variety of environmental issues.

Since our inception, CELA's casework, law reform and public outreach activities have focused on the entrenchment and enforcement of environmental rights. In addition, CELA frequently uses the tools available under the EBR of behalf of our clients, and we provide public legal education and summary advice to numerous Ontarians about how to use the EBR in an effective manner. Accordingly, CELA views the 1993 enactment of the EBR as an important milestone in the evolution of Ontario's environmental legislation.

(a) Background: The Context for EBR Review

As noted by a leading commentator:

> Enacting specific environmental rights legislation allows for the most comprehensive articulation of the substantive and procedural elements of the right to a healthy environment, including mechanisms and processes for ensuring access to information,

participation in environmental governance, and access to justice (through both judicial and non-judicial avenues).[1]

In Ontario, the origin and intent of the EBR can be traced back to the public and parliamentary debates that accompanied various private members' bills that had been proposed in the late 1970s and 1980s to establish an EBR regime in the province.[2]

In 1990, the Ontario government established a multi-stakeholder advisory committee, which reached a consensus that an EBR was needed in Ontario. In 1991, the Ontario government established a Task Force on the EBR (which included a CELA representative). In 1992, the Task Force released its final report, which contained a proposed EBR. This report was subject to another round of public consultation, and the Task Force released a supplementary report in late 1992.

In 1993, the Ontario government introduced the EBR in the form of Bill 26, which was subject to public hearings by a legislative committee. After the completion of the committee hearings (in which no substantive amendments were made), the EBR received Third Reading and Royal Assent in December 1993.

In early 1994, the EBR was proclaimed in force, and various components of the EBR were phased in over time. However, the EBR has essentially remained unchanged over the past 23 years.

(b) Rationale for Reforming the EBR

Since the EBR came into force, there have been a number of success stories which illustrate how the EBR can be used effectively to inform and empower the public to protect the environment and conserve resources, particularly at the local level.[3]

However, it must be recognized that the EBR was very much a product of its age, and that societal values, ecological challenges and environmental priorities have continued to evolve since the early 1990s. In addition, it must be noted that several key items currently present in the EBR (e.g. the section 41 leave test for third-party appeals) were not contained in the draft EBR originally proposed by the Task Force, and should therefore be reconsidered during the current review, as described below.

Moreover, the Task Force itself recommended that certain EBR provisions (e.g. the reform of the public nuisance rule, the new civil cause of action to protect public resources, etc.) should be actively monitored over time and revisited if warranted.[4] In short, the Task Force recognized

[1] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 213.
[2] Generally, see Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond-Montgomery, 1995), pages 7 to 11.
[3] See, for example, ECO, *Celebrating the 10th Anniversary of the EBR and the ECO* (2004). See also ECO, *The EBR: Your Environment, Your Rights* (rev. January 2015); and ECO, Annual Report 2015-16, Chapters 2.3 and 3.1.1.
[4] *Report of the Task Force on the Ontario EBR* (July 1992), pages 107 to 108 [EBR Task Force Report].

that its EBR proposals were not cast in stone, and that the operational experience under the EBR should be reviewed and, where necessary, addressed through appropriate EBR amendments.

Nevertheless, despite repeated calls for EBR reform by the Environmental Commissioner of Ontario ("ECO") and other commentators over the years, no meaningful steps were undertaken by the Ontario government to amend the EBR or its implementing regulations in order to address serious difficulties which had arisen under the EBR.

To address the compelling need for EBR reform, CELA filed an Application for Review under Part IV of the EBR in late 2010 to request that the EBR itself should be reviewed and revised. In early 2011, this Application for Review was granted by the MOECC, which agreed with CELA that a review of the EBR was warranted.

At the time, the ECO commended the MOECC for its decision to review the EBR since this exercise would enable Ontarians to participate in the updating and renewal of the EBR.[5] Unfortunately, the actual commencement of the public EBR review was inexplicably delayed by the MOECC for years, prompting CELA and other environmental groups to write repeatedly to the Minister to express concern over this dilatory approach to an increasingly urgent situation.[6]

In July 2016, however, the MOECC posted an information notice on the Environmental Registry to announce the formal start of the EBR Review, and to solicit public input on potential changes to the EBR and its accompanying regulations. It is anticipated that after the current public comment period closes, the MOECC will develop, and conduct further public consultation, on its proposed amendments to the current EBR regime.

In our view, this initial stage of the EBR Review offers the MOECC, stakeholders, and all Ontarians an important and timely opportunity to:

- assess the efficacy of current EBR tools;

- consider possible improvements to the EBR tools; and

- evaluate the soundness of some of the original assumptions and trade-offs that influenced the content of the EBR when first enacted in 1993.

CELA's specific conclusions and advice regarding key EBR issues are outlined below in Part II of these submissions.

PART II – KEY ISSUES REQUIRING EBR REFORM

In the information notice posted on the Environmental Registry regarding the EBR Review, the MOECC has provided a brief questionnaire soliciting public comment on various matters regarding legislative, regulatory and administrative issues which have arisen under the EBR.

[5] ECO, Annual Report 2010-11, pages 116-19.
[6] These letters are posted at: http://www.cela.ca/collections/justice/ontarios-environmental-bill-rights-ebr

The specific questions posed by the MOECC consultation document are reproduced below, followed by CELA's findings and recommendations regarding the issues under consideration.

Question 1: Should the EBR purposes and principles be expanded or modified? If so, how?

CELA submits that this question should be answered in the affirmative.

The overall purposes of the EBR are currently set out in subsection 2(1), and may be summarized as follows:

- protect, conserve and, where reasonable, restore the integrity of the environment;

- provide sustainability of the environment; and

- protect the right to a healthful environment.

All of the above-noted purposes are qualified by the phrase "by the means provided in this Act." The fundamental problem with this legislative drafting is that the "means" currently provided in the EBR fall short of actually achieving these purposes. This is particularly true in relation to the subsection 2(1) reference to the "right to a healthful environment" because the EBR confers no enforceable or stand-alone public right to a "healthful environment" (which, like "integrity" or "sustainability," is not even defined under the Act).[7] As described below, CELA submits that the EBR should be amended to define and entrench a substantive right to a healthy and ecologically balanced environment, as well as other new legal accountability mechanisms (e.g. public trust doctrine).

Accordingly, CELA finds that the EBR's current statement of purpose is unduly constrained and highly problematic. In our opinion, the EBR purposes need to be fundamentally recast and expanded to provide greater clarity on what the EBR is specifically aiming to deliver to Ontarians. In this regard, CELA recommends the development of new provisions which stipulate that the purpose of the EBR is to:

- protect the right of present and future generations of Ontarians to a healthy and ecologically balanced environment;

- establish the Ontario government's duty to comply with this Act, and to protect the environment in accordance with the public trust;

- ensure that all Ontarians have timely access to:

  (a) adequate environmental information;

  (b) environmental justice in the courts and before administrative decision-makers;

[7] The term "healthful environment" also appears in the EBR preamble, which, as matter of statutory interpretation, does not create a legally binding or enforceable right.

(c) fair and effective mechanisms for participating in environmental decision-making; and

- protect the rights of employees against reprisals for taking or facilitating actions to safeguard the environment.[8]

Subsection 2(2) of the current EBR goes on to entrench several important environmental principles (e.g. "pollution prevention", "biodiversity conservation", "ecosystem protection", etc.) that are intended to direct or guide governmental decision-making in Ontario. In CELA's view, these original principles should be retained within the EBR, but consideration should be given to amending the EBR to provide appropriate definitions of these words and phrases.[9]

More importantly, after subsection 2(2) was drafted in the early 1990s, a number of other important environmental principles have emerged at the national and international level, and have been adopted by legislators, tribunals and the judiciary across Canada. This new environmental ethos includes well-known concepts such as the "zero discharge", "polluter pays" principle, "precautionary principle", and the "principle of intergenerational equity."[10]

CELA submits that to remain current and credible, subsection 2(2) of the EBR should be amended to expressly include these additional purposes and principles, together with appropriate statutory definitions. We would further recommend that the EBR should contain an environmental equity principle (also known as environmental justice) to ensure that low-income or vulnerable communities are not disproportionately burdened or put at risk when government decisions are made in relation to standard-setting and instrument issuance.[11]

Similarly, consideration should also be given to including other environmental principles in the EBR which reflect public policy objectives recently espoused by the Ontario government, such as reducing greenhouse gas emissions and facilitating the transition to a circular economy.

When combined with other recommended EBR reforms, CELA submits that an updated set of "green" purposes and principles within the EBR will help inform the content of updated Statements of Environmental Values (see below), and will provide an important benchmark that can be invoked or relied upon in other EBR tools (e.g. Applications for Review and Investigation). In short, expanding the list of EBR purposes and principles will serve as an important interpretive aid and solid policy foundation for responding to the environmental challenges of the 21st century.

Question 2: Are there additional ministries, instruments or legislation that should be covered under the EBR?

[8] These purposes have been adapted from the recently introduced *Canadian Environmental Bill of Rights* ("Bill C-202"), a private member's bill that was introduced by MP Linda Duncan and received First Reading in the House of Commons in December 2015.
[9] See, for example, Bill C-202, section 2.
[10] ECO Special Report, *Looking Forward: The Environmental Bill of Rights* (March 1, 2005), page 2 ["ECO Special Report"].
[11] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 222.

CELA submits that this question should be answered in the affirmative.

The overall objective in prescribing ministries under the EBR is to ensure that all ministries making environmentally significant decisions are caught by, and subject to, the EBR.

Since 1993, however, some originally prescribed Ministries are no longer subject to the EBR, and the Ontario government has failed or refused to prescribe other key or newer Ministries whose decisions may affect the environment and public resources. In turn, these omissions have prompted many citizens to file Applications for Review to request prescribing Ministries which were outside the scope of the EBR coverage.

The ECO has often described this problem as "keeping the EBR in sync" with newly created or differently named Ministries.[12] In CELA's view, O.Reg.73/94 should be revised as part of the current EBR Review in order to ensure that all relevant Ministries and Crown agencies are prescribed by regulation as being subject to all appropriate sections of the EBR. As a starting point, CELA recommends that the following Ministries should become prescribed under Part IV of the EBR: Ministry of Finance; Ministry of Education; Ministry of Economic Development, Employment and Infrastructure; Ministry of Community Safety and Correctional Services; Ministry of Aboriginal Affairs; and Treasury Board Secretariat.

In addition, CELA and the ECO continue to object to the ongoing exclusion of the Ministry of Finance as a prescribed ministry under the EBR, particularly since this Ministry oversees the administration of the province's Greenhouse Gas Reduction Fund.[13] Indeed, the very first Special Report of the ECO addressed the Ontario government's ill-advised decision in 1996 to suddenly remove the Ministry of Finance as a prescribed Ministry under the EBR.[14] In our view, the Ministry of Finance should again be made fully subject to the EBR.

Similarly, CELA, the ECO and other stakeholders have expressed concern about environmentally significant statutes which have not yet been prescribed under the EBR. For example, the most recent ECO Annual Report lists the following statutes which have not yet been prescribed under the EBR despite their environmental implications or significance: *Building Code Act, 1992; Drainage Act; Electricity Act, 1998; Forest Fires Prevention Act;* and *Weed Control Act.* In CELA's view, O.Reg. 73/94 should be revised to prescribe these statutes.

With respect to non-prescribed instruments, the ECO has identified several environmentally significant permits, approvals and licences which are not yet prescribed under the EBR:[15]

- instruments under the *Food Safety and Quality Act, 2001*;

[12] ECO, 2015-16 Annual Report, Chapter 1.4.
[13] ECO, 2015-16 Annual Report, page 41. See also ECO, 2009-10 Annual Report, page 29. On the general topic of prescribing Ministries and statutes in a timely manner under the EBR, see also ECO, *Supplement to the 2009-2010 Annual Report*, pages 357-72.
[14] ECO, *Ontario Regulation 482/95 and the EBR* (January 17, 1996), pages 4 to 7.
[15] ECO, 2015-16 Annual Report, page 42.

- nutrient management instruments under the *Nutrient Management Act, 2002*;

- water management plans under the *Lakes and Rivers Improvement Act*; and

- instruments under the *Provincial Parks and Conservation Reserves Act, 2006*.

CELA recommends that O.Reg. 681/94 should be amended to include these instruments. CELA further recommends that the following instruments should also be prescribed under this regulation:

- provincial officers' orders under section 157 and 157.1 of the *Environmental Protection Act*;

- registrations in the Environmental Activity and Sector Registry under Part II.2 of the *Environmental Protection Act*; and

- orders that permit activities or development in the absence of a land use under the *Far North Act, 2010*.[16]

Question 3: Is there a need to adjust EBR requirements regarding the content, review, and updating, or application of Statements of Environmental Values? If so, how?

CELA submits that this question should be answered in the affirmative.

The EBR Task Force originally described the development and application of Ministry-specific Statements of Environmental Values (SEV) as "the best method of ensuring that the purposes of the EBR" are influencing government decision-making with respect to the environment.[17] Accordingly, section 11 of the EBR imposes a positive legal duty on prescribed Ministers to "take every reasonable step" to ensure that the Ministries' SEVs are considered whenever environmentally significant decisions are being made by the Ministries.

Over the past 23 years, however, the implementation of this duty – and the substantive content of the SEVs – has been highly controversial. For example, the ECO's Special Report on EBR reform correctly concluded that "SEVs are vague and outdated, and have little impact in the ministries."[18] Even though some SEVs have been revised since the ECO's Special Report in 2005, the SEVs still amount to little more than a verbatim recital of EBR purposes and high-level environmental commitments, with little or no operational direction on how these purposes and principles are to be put into practice during decision-making in relation to Acts, regulations, policies, or instruments.

In the past, the MOECC argued that its SEV is not even applicable to its decisions respecting prescribed instruments, despite findings to the contrary by the Environmental Review Tribunal

[16] ECO, 2014-15 Annual Report, pages 24-25.
[17] EBR Task Force Report, page 23.
[18] ECO Special Report, page 3. See also ECO, 2005-2006 Annual Report, pages 188 to 189.

and the Ontario Divisional Court in the well-known "Lafarge" litigation.[19] In the wake of the Lafarge litigation, CELA wrote to the Minister of the Environment to specifically request that he take certain measures to ensure that MOECC Directors understand and comply with their legal duty to consider the SEV when making instrument decisions.[20] However, in response to this request, the Minister merely stated that MOECC "officials are considering how best to move forward in light of the judgment of the Divisional Court in *Lafarge v. Environmental Review Tribunal et al.*"[21]

In any event, the ECO recently concluded that the current generation of SEVs "have not been effective in changing environmental outcomes to date."[22] In addition, the ECO is still encountering difficulty in obtaining adequate documentation from the MOECC to demonstrate how it has considered SEV principles when making instrument decisions.[23] The ECO further reports that Ministry of Natural Resources and Forestry "continues to assert that SEV documentation and/or consideration is not required for certain instruments."[24] Accordingly, the ECO recommends that the issue of SEV compliance requires both legislative reform (e.g. requiring Registry decision notices to explain precisely how the SEV was taken into account) as well as substantive improvements in SEV content.[25]

CELA fully concurs with the ECO's recommendation, and we submit that a number of specific reforms are necessary to strengthen and improve SEV content and implementation. For example, section 10 of the EBR should be amended to impose a specific duty upon Ministers to undertake a public review and revision of their SEVs every five years. This kind of periodic review would help ensure that the SEVs remain current and effective. In addition, Ministers should develop (with public input) appropriate guidance materials, procedures and protocols which explain <u>how</u> EBR purposes are to be considered and applied during the Ministries' environmental decision-making (including decisions to issue or amend prescribed instruments).

Most importantly, the SEVs require clearer goals, prescriptive detail, and measurable targets, which should be required through statutory amendments to the SEV provisions in the EBR.[26] To avoid further uncertainty (or more litigation), CELA recommends that section 11 of the EBR should be amended to clarify that all ministry decisions in relation to Acts, regulations, policies and prescribed instruments "shall conform with" the relevant SEV. This stringent conformity test has been used in other environmental statutes,[27] and is particularly appropriate in the EBR to ensure that SEV commitments are actually implemented by prescribed ministries in a traceable

[19] *Dawber v. Ontario (Director, Ministry of the Environment)*, (2007), 28 C.E.L.R. (3d) 281; affd. (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.); leave to appeal refused (Ont. C.A. File No. M36552, November 26, 2008). See also CELA, *Third-Party Appeals under the Environmental Bill of Rights in the Post-Lafarge Era: The Public Interest Perspective* (February 2, 2009).
[20] Letter from CELA to the Hon. John Gerretsen dated June 24, 2008.
[21] Letter from the Hon. John Gerretsen to CELA dated August 12, 2008.
[22] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 3. See also ECO, 2015-16 Annual Report, Chapter 1.5.
[23] ECO, 2014-15 Annual Report, page 28; ECO, 2015-16 Annual Report, page 43.
[24] ECO, 2015-16 Annual Report, page 43.
[25] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 3.
[26] ECO Special Report, page 3.
[27] See, for example, *Clean Water Act*, Part III. See also *Planning Act*, subsection 3(5)(b), which requires all planning decisions to conform to provincial land use plans.

manner. In the alternative, CELA submits that the EBR should be amended to provide that all Ministry decisions "shall be consistent with" the relevant SEV, which is the test used under the *Planning Act* to ensure consistency with the 2014 Provincial Policy Statement.[28]

In addition, CELA submits that this new statutory obligation for SEV conformity (or at least consistency) should be triggered regardless of whether the instrument falls within an "exception" (i.e. sections 29 to 33) that dispenses with the general obligation to post public notice of the proposal on the Registry.

Question 4: Should changes be made to the EBR requirements for "Public Participation in Decision-Making" to improve the engagement of the public regarding acts, regulations, policies, instruments and other processes? If so, what changes are necessary, particularly regarding the Environmental Registry and its notice requirements?

CELA submits that this question should be answered in the affirmative.

In general, the Environmental Registry has been one of the more positive developments under the EBR, particularly as the Registry itself has slowly evolved into a more user-friendly and interactive database system. However, as noted in the most recent ECO report, "the Registry is showing its age," and there is a need for further updates in the technical design and usability of the Registry.[29] In addition, there is considerable room for improvement in how the Registry is being used by Ministries to notify the public, and to solicit stakeholder input, about environmentally significant proposals.

For example, there is ongoing public and ECO concern that the minimum comment periods are too short[30] (or, in some instances, are wholly absent), especially in relation to complex or controversial proposals such as wholesale changes to environmental laws/regulations, provincial plans or policies, or complicated instruments for large-scale facilities and projects.[31] The ECO has also documented instances where discretionary "information notices" were misused by prescribed Ministries in relation to significant policy proposals.[32] These continuing problems have been highlighted in the ECO's most recent Annual Report,[33] and demonstrate the need for clear, concise and enforceable requirements regarding the posting of proposed Acts, regulations, policies and instruments.

The overall result is that despite the mandatory consultation requirements under Part II of the EBR, a number of environmentally significant proposals or decisions are still not being posted

[28] *Planning Act*, subsection 3(5)(a).
[29] ECO, 2015-16 Annual Report, Chapter 1.2.4; ECO, 2014-15 Annual Report, Chapter 1.2.1.
[30] ECO, 2009-2010 Annual Report, pages 182 to 184. See also ECO, 2007-2008 Annual Report, pages 153 to 154.
[31] For example, the controversial 2006 regulation that exempted Ontario's Integrated Power System Plan from the *Environmental Assessment Act* was not posted on the EBR Registry for public review/comment. See ECO, "Media Release: Third Decision on Government's Electricity Plan Evades *Environmental Bill of Rights*, says Environmental Commissioner" (June 19, 2006). See also ECO, 2007-2008 Annual Report, page 154 regarding Ontario's failure to post an EBR Notice in relation to its "Go Green" Action Plan on Climate Change.
[32] ECO, 2009-2010 Annual Report, page 190. See also ECO, 2008-2009 Annual Report, page 112; ECO, 2006-2007 Annual Report, page 160; and ECO, 2005-2006 Annual Report, pages 178 to 180.
[33] ECO, 2015-16 Annual Report, pages 29 to 32.

on the Registry, and are therefore being made without the public review and comment opportunities guaranteed by law.[34] Conversely, the EBR provisions relating to enhanced notice/comment (i.e. sections 24, 25, 28) appear to be largely unused over the past 23 years.

In addition, the supporting documentation (or actual text of the proposed laws, regulations, policies or instruments) are not always included as links or attachments to Registry notices,[35] thereby making it difficult for the public to access and comment upon the proposals in a timely manner. While the ECO has recently recommended that it should become "standard practice" for relevant documents to be linked in Registry notices,[36] CELA submits that amendments to the EBR should require this practice as a matter of law. In the past, the ECO found that the supporting documents could not even be found by Ministry staff, who appeared to lack efficient centralized systems for storing and accessing files.[37]

In other cases, significant delays have occurred between the original posting of a proposed instrument and the subsequent posting of the decision notice, which has allowed proponents to carry out the activities in question while simultaneously undermining the public's right to utilize the EBR appeals process in a timely manner.[38] On this point, CELA agrees with the ECO's recent recommendation that instrument decision notices should generally be posted within two weeks after the decision has been made.[39]

CELA further agrees with the ECO's repeated objections to significant delays in prescribing new instruments under the EBR, which again undermines public notice/comment rights, and the public right to apply for reviews, under the EBR.[40]

Moreover, the textual content of Registry notices can vary considerably, as some notices are drafted in a comprehensive and informative manner, while others simply set out sparse or inadequate descriptions of the proposal or its potential environmental impacts.[41] As recently noted by the ECO, this issue can be addressed, at least in part, by providing more detailed guidance to ministry staff and by using better standardized templates for Registry notices.[42]

In addition, the ECO has found that some Ministry staff remain uncertain or unaware that interested members of the public are entitled to review the proponent's supporting documentation without being forced to file FOI requests.[43] This matter is further discussed below in the context of third-party appeals.

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[34] ECO, 2009-2010 Annual Report, pages 186 to 190. See also ECO, 2007-2008 Annual Report, pages 156 to 158.
[35] ECO, 2006-2007 Annual Report, page 157.
[36] ECO, 2015-2016 Annual Report, page 27.
[37] ECO, 2009-2010 Annual Report, pages 177 to 178.
[38] *Ibid.*, page 195. See also ECO, Annual Report, 2015-16, page 27 and Chapter 1.2.3.
[39] ECO, Annual Report 2015-16, page 27.
[40] ECO, 2008-2009 Annual Report, page 122.
[41] ECO, 2014-15 Annual Report, page 13; ECO, 2009-2010 Annual Report, page 184; ECO, 2006-2007 Annual Report, page 159; and ECO, 2005-2006 Annual Report, page 172.
[42] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 4. See also ECO, 2015-16 Annual Report, page 22.
[43] ECO, 2009-10 Annual Report, page 177.

In every case where ministry decision-makers conclude that Registry notice is not required due to statutory exemptions (see sections 29 to 33 of the EBR)[44], then it should be obligatory upon the decision-makers to post an "exception notice" on the EBR Registry in order to provide clarity, traceability and accountability.[45] In addition, CELA agrees with the ECO's recent recommendation that the "budgetary exception" to public participation (section 33 of the EBR) should be scoped to ensure that non-fiscal environmental components of budget bills (particularly if set out in omnibus legislation) are still subject to meaningful public review/comment under Part II of the EBR.[46]

Question 5: Do you have any comments on the leave to appeal process?

Based on our extensive experience in bringing leave-to-appeal applications under EBR, CELA has a number of comments and serious concerns about the current process.

Where applicable to prescribed instruments, the third-party appeal is arguably one of the most important EBR mechanisms for protecting the environment and ensuring governmental accountability. Over the years, however, there has been considerable concern expressed about the relatively short timeframe (15 days) in which EBR leave-to-appeal applications must be served and filed (see section 40 of the EBR).

As noted above, for example, supporting documentation (and even the full text of the instrument itself) is not always posted with the decision notice on the Registry, which makes it exceedingly difficult for citizens to obtain and review such documentation within 15 days. For example, the ECO has recently commented that since the 15 day appeal period under the EBR serves as a "significant deterrent" to Ontarians hoping to exercise their third-party appeal rights, the appeal period should be extended to 20 days (which aligns with public appeal rights under the *Planning Act*).[47] Similarly, the ECO has expressed concern over the 15 day timeframe for filing a third-party appeal in respect of renewable energy approvals issued under the *Environmental Protection Act*.[48]

However, the MOECC has refused to consider the possibility of extending the timeframe to 20 (or 30) days under the EBR, and the ECO has been properly critical of this unpersuasive refusal.[49] Since the ERT has no statutory jurisdiction to extend the deadline (even in hardship cases), some leave applications have been dismissed by the ERT due to filing delays rather than

[44] CELA questions whether any of these exceptions should remain within the EBR, particularly in light of the province's Open Government Initiative launched in 2013. It further appears that only a small handful of exception notices have been annually posted on the Registry: see ECO, 2014-15 Annual Report, page 15; ECO, 2015-16 Annual Report, page 29.
[45] ECO, 2009-10 Annual Report, page 5.
[46] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 2.
[47] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, pages 2 to 3.
[48] ECO, 2009-10 Annual Report, page 18.
[49] *Ibid.*, pages 157 to 159. For more information about this matter, see also section 5.2.1.15 of the ECO's Supplement to the 2009-2010 Annual Report.

on the merits,[50] which, in CELA's view, tends to bring the EBR appeal process into public disrepute.

It is also clear that in many leave cases, the ERT has struggled to meet the 30 day deadline for its decision (see section 17 of O.Reg.681/94), and the ERT has often been forced to extend the decision deadline upon notice to the parties. CELA concludes that this practice reflects the legal, technical and scientific complexity of the issues typically raised in EBR leave applications (and governmental and proponent responses thereto), and calls into question the appropriateness of the arbitrary 30 day decision deadline.

More fundamentally, CELA submits that the current section 41 leave test should not remain intact within the EBR. The two-branch leave test (e.g. unreasonableness and significant environmental harm) has been characterized by Ontario courts as "stringent."[51] Although cases such as the above-noted Lafarge litigation demonstrate that it is possible for prospective appellants to satisfy the leave test, the fact remains that numerous EBR leave applications have been dismissed over the years.

For example, a statistical review of all EBR leave applications brought during the first ten years of the EBR revealed that out of an estimated 14,000 instrument decisions issued by the MOE, only 54 were subject to EBR leave applications, and only 13 of these leave applications were granted (in whole or in part) over the decade.[52] While some leave applications are withdrawn prior to adjudication, the ECO has reported that leave to appeal was granted in only 21% of the applications decided between 1995 and 2003.[53]

Even if a longer timeframe is used for statistical analysis purposes, it appears that there has been no material change in the success rate of EBR leave applications. For example, between 1995 and 2014, approximately 285 leave applications were brought under the EBR, but only 20% of the applications were successful.[54]

In light of these results, it is readily apparent that it remains exceptionally difficult for Ontarians to obtain leave to appeal under the EBR. The bottom line is that the majority of leave applications are dismissed under the EBR. Accordingly, CELA concludes that the section 41 leave test is still inappropriately preventing concerned citizens from accessing the ERT, even though, by definition, their leave applications pertain to environmentally significant activities which require the issuance (or amendment) of prescribed instruments.

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[50] See, for example, *Miller v. Ontario* (2008), 36 C.E.L.R. (3d) 305, where the ERT declined to hear a leave application that was not filed on time due to a courier delivery error. A motion for reconsideration was dismissed: (2008), 37 C.E.L.R. (3d) 214 (ERT).

[51] *Smith v. Ontario* (2003), 1 C.E.L.R. (3d) 245 (Div. Ct.) at para.8; *Dawber v.Ontario* (2008), 36 C.E.L.R. (3d) 191 (Div. Ct.) at para.41.

[52] Birchall Northey, *Legal Review of the EBR Leave to Appeal Process* (September 2004), page (i). This paper was prepared as part of the ECO's 10th anniversary review of the EBR.

[53] ECO, *Celebrating the 10th Anniversary of the EBR and the ECO* (2004), page 11.

[54] Paul Muldoon et al., *An Introduction to Environmental Law and Policy in Canada (2nd ed.)* (Toronto: Emond, 2015), page 371.

In addition, even for those individuals and groups which have been fortunate enough to obtain leave to appeal, there is no participant or intervenor funding available to help defray the cost of public interest participation under the EBR. In such cases, the costs of participating in ERT proceedings have often been extensive if not unduly prohibitive. In the Lafarge litigation, for example, the successful leave-to-appeal applicants were forced to bear legal and expert costs in excess of $200,000, which were incurred before the main hearing was terminated by the proponent's withdrawal of the impugned instruments.[55]

To address the foregoing concerns, CELA therefore recommends that the timeframe for filing an EBR leave application should be extended from 15 days to at least 20 days (see sections 17(24) and 34(19) of the *Planning Act*) or, preferably, 30 days (see Rule 61.04 of the *Rules of Civil Procedure*). At the same time, subsections 17(4) to (6) of O.Reg.681/94 should be deleted in order to remove the 30 day deadline for the ERT to render leave decisions.

While extending timeframes is important, CELA submits that it is also necessary to enact statutory reforms to ensure that Ontarians have access to relevant government records pertaining to instruments:

> Effective, affordable and timely access to information is an essential prerequisite to effective environmental governance. These rights are central to more representative, equitable and effective decision-making. Access to information empowers and motivates people to participate in a meaningful and informed manner.[56]

Therefore, CELA recommends that the EBR reform package should include a consequential amendment to the *Freedom of Information and Protection of Privacy Act* to clarify that all documentation submitted by proponents in relation to proposed instruments shall be immediately disclosed upon request by any person (without filing an FOI request), and that disclosure of such documentation cannot be refused by prescribed Ministries on the grounds that the records were submitted in confidence or contain proprietary information. Where residents have requested such documentation, the running of the leave-to-appeal period should be stopped until the documentation is provided in full by governmental officials.

In addition, CELA strongly maintains that the leave test in section 41 should be deleted so that it no longer serves as an unreasonable barrier to citizen access to the ERT. In our view, if instrument-holders continue to enjoy an unfettered ability to file an instrument appeal as of right, then so should neighbours or other persons who are interested in, or potentially affected by, the impugned instrument. In the unlikely event that a frivolous, vexatious or *ultra vires* third-party appeal is filed, then the ERT has authority to control its process and to summarily dispose of such appeals without a hearing.[57]

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[55] *Baker v. Ontario* (2009), 43 C.E.L.R. (3d) 285 (ERT). A motion for reconsideration of this cost ruling was dismissed: see (2009), 47 C.E.L.R. (3d) 118 (ERT).

[56] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 230.

[57] See section 4.6 of the *Statutory Powers Procedure Act* and the ERT Rules of Practice.

In making these submissions, CELA is fully aware that the EBR Task Force had suggested that there should be a "preliminary merits" screen for third-party appeals.[58] However, there was no consensus among EBR Task Force members on the actual wording of the leave test, and, in fact, the draft EBR within the Task Force Report contained no leave test at all. Thus, it cannot be seriously suggested that the EBR Task Force recommended or supported the "stringent" wording that was ultimately inserted into Part II of the EBR by the Ontario Legislature.[59]

In any event, the dismal track record regarding EBR leave applications over the past 23 years amply demonstrates that the current leave test is largely unworkable, unduly complicated, and unnecessarily restrictive. It is therefore appropriate and timely to reconsider the public policy rationale for even having a leave test in the EBR at all. By way of comparison, CELA notes that there is no leave test under the *Planning Act*. Instead, Ontarians can appeal planning instruments (e.g. Official Plan amendments, rezoning by-laws, etc.) to the Ontario Municipal Board as of right, without having to first obtain leave from the Board.

Moreover, CELA notes that in light of the MOECC's recent initiative to "modernize" its approvals program, it seems likely that a number of so-called "low-risk" activities will no longer require the issuance of individual, site-specific approvals. If approval requirements are thus confined to fewer and fewer "high risk" activities, then CELA submits that it becomes even more imperative to ensure that citizens enjoy unconstrained access to the ERT in potentially "high risk" situations. In such circumstances, third-party appeals should be routinely available, rather than be arbitrarily restricted to exceptional cases that meet the current section 41 leave test.

In the event that a modified or less restrictive leave test is retained in the EBR (which CELA strongly opposes), then we would agree with Ecojustice and the ECO[60] that the EBR (or the regulations) should be amended to impose an automatic stay of the impugned instrument until the leave application has been heard and decided by the ERT. This would be subject to the ERT's jurisdiction to lift the automatic stay, in whole or in part, in appropriate cases in accordance with its Rules of Practice.

CELA further submits that the establishment of a participant or intervenor funding program is long overdue under the EBR in order to facilitate meaningful public usage of the review, comment and appeal provisions of the EBR in relation to instruments.[61] Over a decade ago, the ECO agreed that "this may be an appropriate moment to consider some form of participant funding under the EBR," and suggested that this could initially take the form of a pilot project.[62] However, no such project has been undertaken under the EBR to date.

Nevertheless, CELA submits that Ontario has already gleaned years of experience under the former *Intervenor Funding Project Act* ("IFPA"). Thus, the appropriate question is not whether funding should be available under the EBR, but <u>how</u> such funding programs will be designed and

[58] EBR Task Force Report, page 55.
[59] In the Lafarge litigation, the Divisional Court characterized the wording of section 41 as "unusual": see *Dawber v. Ontario* (2008), 36 C.E.L.R. (3d) 191 (Div. Ct.) at para.40.
[60] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 4.
[61] CELA, *EBR Registry #XQ04E0002: Looking Forward: The EBR Discussion Paper* (January 24, 2005), page 9.
[62] ECO Special Report, page 9.

implemented under the EBR. In our view, participant funding programs under the EBR should be based on the "proponent pays" model used under the IFPA. CELA further notes that the issue of funding to facilitate citizen participation in appeals under the *Planning Act* will be considered as part of the province's recently announced review of the Ontario Municipal Board.

Question 6: Should the section 32 "EA exception" to public participation be modified? If so, how?

CELA submits that this question should be answered in the affirmative.

Section 32 of the EBR created an "EA exception" to the public notice, comment, and third-party appeal rights which were established under Part II of the EBR. In short, this section provides that the Part II requirements do not apply to instruments which are necessary to implement undertakings which have been approved (or exempted) under Ontario's *Environmental Assessment Act* (EAA).

In 1992, the EBR Task Force rationalized this exception on the grounds that the opportunities for public participation then in existence under the EAA were "substantially compliant" with EBR requirements.[63] The EBR Task Force also drew comfort from the pending release of a major report by the Environmental Assessment Advisory Committee (EAAC) on long overdue reforms to Ontario's EA program.[64]

Since the early 1990s, however, most of the EAAC's suggested EA reforms have not been implemented by the Ontario government, and the EAAC itself was abolished in 1995. Moreover, the overbroad "EA exception" in section 32 has been used by ministries to deprive members of the public of their right to notice and comment "on many instruments that affect Ontario's environment."[65] In particular, the ECO has scrutinized public participation rights in a number of EA processes (i.e. individual and Class EAs), and concluded that "they are deficient in many respects compared to the EBR process for instrument approvals."[66] In 2005, the Environment Minister's EA Advisory Panel (Executive Group) agreed with the ECO that section 32 of the EBR was "being used to 'shield' important EA-related approvals from adequate public scrutiny, and that public participation rights are being frustrated as a result."[67]

CELA further notes that since the release of the EBR Task Force Report, there have been a number of retrogressive changes which have occurred within Ontario's EA program (i.e., no public hearing referrals since 1995; proliferation of "scoped" EAs; inadequate consideration of need/alternatives; questionable public consultation; growing number of regulatory exemptions; demise of intervenor funding legislation in 1996; etc.).[68] Thus, the underlying assumptions made

[63] EBR Task Force Report, page 33.
[64] *Ibid.*
[65] ECO Special Report, page 5.
[66] ECO 2003-2004 Annual Report, page 53.
[67] EA Advisory Panel (Executive Group), *Improving Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Volume I, page 90 [EA Advisory Panel Report].
[68] The many problems which continue to plague Ontario's EA program have been succinctly described by the ECO in the 2007-08 Annual Report, pages 28-48. See also ECO, 2013-14 Annual Report, pages 132-39; Richard Lindgren and Burgandy Dunn, "Environmental Assessment in Ontario: Rhetoric vs. Reality" (2010), 21 JELP 279.

by the EBR Task Force about public participation in Ontario's EA program are no longer valid, and it is now time to revisit and revise the section 32 "EA exception."

Given the devolution of Ontario's EA program, CELA submits that the section 32 "EA exception" is no longer appropriate and should be deleted from the EBR in its entirety. In the alternative, if section 32 is to be retained within the EBR, then the provision should be substantially amended to provide that the EA exception only applies where the undertaking in question has been subject to a public hearing under the EAA. Such a recommendation was made by the EA Advisory Panel in 2005,[69] but it has not been acted upon to date by the Ontario government.

Similar recommendations to amend section 32 have been made in various reports released by the ECO over the years.[70] Significantly, in the ECO's 2016 list of "key areas in need of reform" under the EBR, the first item mentioned is eliminating or scoping the section 32 EA exception.[71] CELA fully concurs with the ECO on the public interest justification for this long overdue change.

Question 7: Should changes be made to Applications for Review part of the EBR, specifically timelines and content of government responses? If so, how?

Question 8: Should changes be made to Applications for Investigation part of the EBR, specifically timelines and content of government responses? If so, how

CELA submits that these two similar questions should both be answered in the affirmative.

Part IV of the EBR enables citizens to file Applications for Review of Acts, regulations, policies and instruments, while Part V of the EBR allows citizens to file Applications for Investigation of suspected environmental offences. Since 1994, over 600 Applications for Review and over 230 Applications for Investigation have been filed by Ontarians under the EBR.[72]

However, the decision whether to carry out the requested review or investigation rests within the discretion of the relevant Ministry, and over the years there have been many instances where such applications are improperly refused by Ministries on unconvincing or irrelevant grounds. In fact, it appears that the majority of applications for review or investigation have been refused by Ontario ministries over the past two decades.[73] Thus, CELA submits that the purpose, value and utility of Parts IV and V are being undermined, and that the public is growing increasingly frustrated, where meritorious applications are being rejected (or delayed) for specious reasons.

For example, the ECO has criticized the distressing tendency among prescribed Ministries to refuse Applications for Investigation on the grounds that the Ministries have already internally

[69] EA Advisory Panel Report, page 85, Recommendation 17.
[70] ECO Special Report, pages 5 to 6. See also ECO, 2007-2008 Annual Report, page 44.
[71] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, pages 1 to 2.
[72] ECO, 2015-16 Annual Report, page 47.
[73] Paul Muldoon et al., *An Introduction to Environmental Law and Policy in Canada (2nd ed.)* (Toronto: Emond, 2015), pages 371 to 372.

commenced an "investigation" of the matter.[74] As pointed out by the ECO, even where such claims are true, there are public interest benefits in having EBR safeguards apply to such applications in order to ensure timeliness, adequacy, and accountability.[75]

The ECO has also criticized the Ministry of Municipal Affairs for rejecting every single Application for Review that it has ever received under the EBR. As noted by the ECO, summary dismissal of duly filed Applications for Review (and serious issues raised therein) does not constitute good public policy.[76] The ECO has also expressed concern about unwarranted delays by prescribed Ministries in their preliminary responses to Applications for Review.[77]

In light of these problems, CELA therefore recommends that Parts IV and V of the EBR should be amended to clarify that nothing prevents prescribed Ministries from granting Applications for Review or Investigation, even if the subject-matter of the application is already known to, or under consideration by, the Ministries. It would also be helpful to restrict (or even eliminate) the grounds upon which Ministries' preliminary responses to Applications for Review or Investigation may be delayed beyond the prescribed timeframes under the EBR. It has been further suggested that questionable ministry refusals of Applications for Review or Investigation could be appealed to an independent entity (e.g. the ERT) to ensure that the refusal decision complied with EBR purposes and SEV principles.[78]

For both types of Applications, the EBR should prescribe 60 days as the deadline for the Ministry's preliminary response, and should further specify that it is a contravention of the EBR for Ministries to provide their preliminary responses after the prescribed deadline (or, alternatively, more than 30 days after the deadline if an extension was invoked by the Ministry).

In relation to Applications for Review, CELA notes that while this tool may be used to request a review of an existing instrument, the current wording of subsection 61(2) appears to prohibit applying for a review of the need for a new instrument (e.g. Director's order under section 17 or 18 of the *Environmental Protection Act*, which are Class II instruments under the EBR). In retrospect, this appears to be an unfortunate oversight within the EBR, and CELA recommends that this subsection should be amended to enable Ontarians to apply for review of the need for a new instrument.

In addition, CELA submits that ministries should be required to post an information notice on the Registry to publicly announce the receipt of an Application for Review on a particular matter, and to solicit public input from interested persons. The resulting public feedback would undoubtedly assist ministries in reaching an informed decision on whether or not the requested review should be granted. It goes without saying that this information notice cannot disclose any personal information identifying the applicants (see section 72 of the EBR). Decisions to grant or refuse requested reviews should also be posted, with reasons, in information notices.

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[74] ECO, 2009-2010 Annual Report, page 162.
[75] *Ibid.*
[76] ECO, 2008-2009 Annual Report, page 18.
[77] ECO, 2006-2007 Annual Report, pages 135, 143 to 144. See also ECO, 2005-2006 Annual Report, pages 138, 157.
[78] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at pages 234 to 235.

Where an Application for Review has been granted, CELA further submits that the updated information notice announcing this fact should also solicit input from interested persons (including the successful applicants). In our view, this feedback will assist Ministries in determining whether a new or amended Act, regulation, policy, or instrument may be appropriate in the circumstances. In accordance with the public participation purpose of the EBR, meaningful public comment opportunities should be provided where an application has been granted in order to improve the soundness, credibility and transparency of the review process. Among other things, persons participating in the review exercise should be entitled to access to all documents received or generated by ministry staff as part of the review process.

In cases where Applications for Review have been granted, the ECO has recently raised concerns about the slow pace of the ministries' resulting review activities.[79] In some cases, some applications (such as CELA's Application for Review of the EBR) have languished for years without any tangible progress and without adequate notice to the successful applicants. CELA appreciates the MOECC's recent commitment to maintain and update an aggregated Registry posting summarizing the ongoing status of reviews granted under the EBR. However, the mere posting of status updates does not necessarily mean that these reviews are being conducted and completed within a reasonable time, as required by section 69 of the EBR.

If the review outcome results in a specific proposal for a new or amended Act, regulation, policy or instrument, that then proposal should duly processed in accordance with the notice/comment provisions under Part II of the EBR.[80]

Question 9: Please share any additional comments you have about Ontario's Environmental Bill of Rights and its associated regulations.

CELA has several additional comments which should be taken into account as the MOECC reviews the EBR and considers potential legislative, regulatory, policy or administrative changes.

(a) The Need for a Substantive Environmental Right

As noted above, the EBR makes reference to the "right to a healthful environment" in the unenforceable preamble. Similarly, subsection 2(1)(c) states that the purpose of the EBR is to "protect the right to a healthful environment through the means provided in this Act."

However, there is no stand-alone, substantive public right to a healthful environment actually entrenched within the EBR. This significant omission has prompted many stakeholders and commentators to lament the irony of having an EBR that does not actually confer any enforceable environmental rights:

> Apart from the section 84 statutory tort, citizens' recourse to the courts is precluded (apart from ordinary civil proceedings where personal injury or property damage occurs). The only real "rights" of citizens are rights of notice, opportunities to comment, and the right

[79] ECO, 2015-16 Annual Report, pages 51, 60-61; ECO, 2014-15 Annual Report, page 23.
[80] EBR, section 73.

> to have their comments taken into account when government makes its decisions; failure to respect such rights will not invalidate those decisions…
>
> To summarize, while the Ontario EBR no doubt provides a great deal of public notice and input into government decision-making, it provides very little in the way of a remedy if environmental security is, nevertheless, violated. There is no judicial review of government failings and the statutory tort which permits action directly against rights-violators is, as with the Yukon Act, extremely limited. Indeed, given the absence of any equivalent to the Yukon "public trust" action, the Ontario legislation has virtually no potential to fulfill our "strong" rights model.[81]

At best, the current EBR represents a collection of procedural rights, not environmental rights *per se*. As noted by a leading commentator, "the failure to clearly articulate the right to a healthy environment is one of the major shortcomings of existing environmental rights legislation in Canada", including Ontario's EBR.[82]

In CELA's view, it is now necessary to amend the EBR to include a substantive right to a healthy and ecologically balanced environment. We submit that creating such a statutory right is long overdue and represents a fundamental building block of a revitalized EBR. When accompanied by appropriate definitions, the new right can expressed in the EBR in clear and concise terms:

> Every Ontarian has a right to a healthy and ecologically balanced environment.[83]

CELA submits that for the purposes of greater certainty, the EBR should include the following additional provision:

> The Government of Ontario has an obligation to protect the right of every Ontario resident to a healthy and ecologically balanced environment.

In making these submissions, CELA is aware that the EBR Task Force was unable to agree upon the inclusion of a substantive environmental right within the EBR. However, it appears to CELA that with a few exceptions, little, if any, progress has been made on the significant environmental problems and challenges facing Ontarians.[84] In addition, we note that there is a federal private member's bill currently before Parliament that proposes to create a public right to a "healthy and

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[81] Elaine Hughes & David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999), 30 Ottawa L.R. 229, paras. 79 and 81.

[82] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 225.

[83] This is the most common form of wording used in constitutions around the world in order to entrench a fundamental right to environmental quality: see David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 225. Bill C-202 defines "healthy and ecologically balanced environment" as "an environment of quality that protects human and cultural dignity, human health and wellbeing and in which essential ecological processes are preserved for their own sake, as well as for the benefit of present and future generations."

[84] CELA, *The EBR Turns 10 Years-Old: Congratulations or Condolences?* (June 16, 2004), pages 3, 6 to 7.

ecologically balanced environment."[85] Accordingly, CELA submits that it is now timely and appropriate to revisit the option of including an environmental right in Ontario's EBR.[86]

Put another way, CELA does not agree that this concept should be deferred for an indefinite timeframe in order to allow a "national dialogue" to occur on this topic among other levels of government and stakeholders, as suggested by the MOECC consultation guide (pages 6 to 7). Creating an enforceable environmental right in the EBR falls squarely within the legislative competence of Ontario, and does not depend on further negotiations or developments in other jurisdictions.

(b) Enhancing Legal Accountability under the EBR

It has long been recognized that environmental rights legislation should enable citizens to initiate different kinds of legal proceedings:

> Access to environmental justice in the environmental context requires the availability of a number of diverse types of legal proceedings:
>
> - civil actions based on nuisance or harm to public resources;
> - civil actions or prosecutions for violations of any Act, regulation, standard or other statutory instrument where the offence has resulted or is likely to result in damage to the environment;
> - civil actions to prevent/remedy violation of the right to a healthy environment;
> - civil actions against the government for failing to fulfill its fiduciary duties in protecting and preserving the public trust (including air, water, land and biodiversity);
> - judicial review of government decisions; and
> - appeals of government decisions.[87]

At the present time, the EBR includes some – but not all – of the above-noted legal mechanisms, but attempts to strike a balance between political accountability and judicial accountability for environmental decision-making, standard-setting and permit-issuing in Ontario. In this regard, the EBR Task Force reported that "political accountability is at the foundation of the proposed EBR,"[88] but cautioned that meaningful judicial accountability is also required:

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[85] Bill C-202, section 9. See also CELA, *In Support of a Federal Environmental Bill of Rights: Submissions to the House of Commons Standing Committee on Environment and Sustainable Development on Bill C-469* (November 1, 2010).

[86] ECO and LURA Consulting, *EBR Law Reform Workshop June 16, 2004: Meeting Report* (October 2004), pages 26 to 27.

[87] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 241.

[88] EBR Task Force Report, page (vi).

> Is political accountability enough? The Task Force is of the opinion that in some circumstances, political accountability may be insufficient. Government's failure to protect the environment and, in particular, our public resources, should involve more than political risk. It should result in the ability of the public to trigger an examination of government's failure to protect the environment…
>
> The Task Force, in this section, has recommended two significant reforms concerning access to the courts for protection of the environment. The reform proposed with respect to public nuisance removes an impractical barrier to our court system… The Task Force's goal in creating the new cause of action for harm to a public resource was to develop a method by which the public could act to hold the government to its responsibility to protect public resources.[89]

Despite the Task Force's laudable intentions, CELA submits that real-world experience over the past 23 years amply demonstrates that the political accountability mechanisms in the EBR have not fully prevented acts or omissions which result in environmental degradation or resource depletion, nor have they deterred governmental non-compliance with EBR requirements.

Accordingly, CELA strongly recommends that political accountability mechanisms under the EBR need to be supplemented by stronger judicial accountability mechanisms:

> Although the Environmental Commissioner has done an excellent job, Ontario's experience indicates that attempting to achieve accountability primarily through a watchdog mechanism is not an adequate substitute for ensuring effective judicial remedies. The Environmental Commissioner has repeatedly identified systemic non-compliance with elements of the EBR by the provincial government, but these revelations have not resulted in changes in behaviour as hoped. Therefore, stronger mechanisms for ensuring accountability are required.[90]

Unfortunately, the current EBR mechanisms for judicial accountability (e.g. the section 84 cause of action, etc.) have been ineffective or underutilized over the past two decades. Moreover, CELA concludes that there is a clear imbalance between political and judicial accountability within the EBR. Therefore, CELA recommends that is now necessary to undertake appropriate statutory reforms to enhance public access to the courts under the EBR.

Similar views have been expressed by the ECO, who found that the current EBR cause of action (section 84) was "essentially useless" because it was burdened with too many conditions precedent and other restrictive provisions.[91] In CELA's opinion, these statutory limitations undermine the availability and utility of the new cause of action, and they undoubtedly explain why there has been little or no litigation activity under section 84 over the past 23 years. On this

[89] *Ibid*., pages 83 to 84, 107 to 108.
[90] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at pages 247 to 248.
[91] ECO Special Report, page 7.

point, the ECO has agreed that "the test for bringing an action in harm to a public resource is too strict."[92]

With respect to the new cause of action, the ECO has identified potential reforms which could be considered by the Ontario Legislature (i.e. deleting the need for plaintiffs to demonstrate statutory contraventions or "significant" harm).[93] CELA agrees with these suggested deletions.

CELA further recommends that the filing of an Application for Investigation (and waiting for an answer from government) should no longer serve as the precondition to commencing the section 84 action.[94] In short, section 84 needs to be transformed into a streamlined and meaningful "citizens' suit" provision which enables Ontarians to commence a civil action in respect of breaches of environmental laws and regulations. As a potential model for this approach, CELA would point to the new civil action contained within the proposed federal EBR.[95]

Aside from revising the EBR cause of action, CELA recommends that the general EBR prohibition against judicial review (section 118) should be deleted in its entirety. CELA strongly submits that this undue constraint on judicial review is inappropriate and unduly impedes access to environmental justice. In our view, if the Ontario government has failed to meet its mandatory legal obligations under the EBR in relation to Acts, regulations, policies or instruments, then residents should be given standing under the EBR to seek judicial review of the non-compliance, and to request appropriate orders to remedy the non-compliance.

In short, if the rule of law is to fully apply to matters under the EBR, then the important right to seek judicial review should not be arbitrarily limited to instruments (see section 118(2)). In short, the prohibition in section 118 is an anachronism that no longer belongs in the EBR.

CELA's recommended statutory right of judicial review under the EBR should be subject to Ontario's *Rules of Civil Procedure*, and applicants should be entitled any relief available under the *Judicial Review Procedure Act* (e.g. declaration, injunction, mandamus, certiorari, etc.). The right itself could be framed as follows:

> Any Ontario resident may bring an application for judicial review in the Superior Court of Justice where the Government of Ontario has:
>
> (a) failed to comply with its duties under this Act or regulations;
>
> (b) contravened, or failed to enforce, a prescribed statute or regulation;
>
> (c) violated the right to a healthy and ecologically balanced environment; or
>
> (d) failed to fulfill its duty as trustee of the environment.[96]

[92] *Ibid.*, page 8.
[93] *Ibid.*, pages 8 to 9.
[94] CELA, *EBR Registry #XQ04E0002: Looking Forward: The EBR Discussion Paper* (January 24, 2005), page 6.
[95] Bill C-202, section 18.
[96] This proposal has been adapted from Bill C-202, sections 16 and 17.

In relation to this latter provision, CELA submits that it is time to expressly entrench the "public trust doctrine" into the EBR. In essence, this doctrine posits that governments do not "own" public resources, but instead have a positive (or fiduciary) duty to hold and manage public resources in trust on behalf of the public at large. Where it is alleged that governments have failed to properly discharge this duty, then the trust beneficiaries – members of the public – should be entitled to go to court to seek appropriate remedies.[97] Thus, "given its potential utility, the public trust doctrine should be incorporated into environmental rights legislation."[98]

CELA notes that the public trust doctrine has been included in environmental rights legislation passed or proposed in other Canadian jurisdictions (e.g. Yukon, Northwest Territories, Nova Scotia, and British Columbia). However, it remains absent from the EBR at the present time.

The public trust doctrine was considered by the EBR Task Force.[99] However, the doctrine was not included in the EBR, presumably because the Task Force anticipated that the SEV requirements and other political accountability mechanisms would effectively prevent environmentally unsound decisions by government in relation to public resources. As described above, however, it appears to CELA that these existing EBR provisions have been inadequate to achieve this important societal objective.

Accordingly, CELA submits that the public trust doctrine should now be codified in the EBR as follows:

> The Government of Ontario is the trustee of Ontario's environment within its jurisdiction, and has the obligation to preserve and protect it in accordance with the public trust for the benefit of present and future generations.[100]

"Public trust" should be defined in the EBR as: "the provincial government's responsibility to preserve and protect the collective interest of Ontarians in the quality of the environment for the benefit of present and future generations."[101]

With respect to public nuisances causing environmental harm, CELA notes that section 103 of the EBR partially relaxes the common law standing rule that restricts who can sue in relation to public nuisances. However, section 103 still requires plaintiffs to demonstrate that they suffered direct economic loss or direct personal injury resulting from the public nuisance. CELA recommends that section 103 should be amended to delete this precondition. In our view, it is in the public interest for the EBR to empower any Ontario resident to commence a civil action to enjoin a public nuisance causing environmental harm, regardless of whether he/she has personally suffered any loss, injury or damage.

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[97] Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond-Montgomery, 1995), pages 122 to 123.
[98] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 229.
[99] EBR Task Force Report, pages 84 to 85.
[100] Bill C-202, subsections 6(b), 9(2) and 9(3).
[101] *Ibid*.

At the same time, CELA submits that enhancing public access to the courts under the EBR will be meaningless unless additional steps are taken to prevent or minimize the risk of an adverse cost award against unsuccessful plaintiffs or judicial review applicants. In our experience, the general rule in Ontario that "costs follow the event" will undoubtedly continue to deter or inhibit residents from launching litigation aimed at safeguarding the environment. Given the public interest nature of such litigation, CELA recommends that the EBR should be amended to entrench a "no cost" rule (e.g. each party bears their own legal/expert costs) or a "one-way" cost rule (e.g. successful plaintiffs or applicants may recover legal/expert costs from the opposing party). For the same reasons, where an EBR plaintiff or applicant finds it necessary to seek an interlocutory injunction, CELA recommends that the undertaking as to damages (if required) should be capped at $1,000.[102]

(c) Expanding ECO Powers under the EBR

Part III of the EBR confers a number of important powers upon the ECO to review and collect information on various issues (see section 57), and to prepare annual and special reports to the Ontario Legislature on EBR matters, energy conservation, and greenhouse gas emissions (see sections 58, 58.1 and 58.2). While the ECO's review and reporting responsibilities have increased under the EBR in recent years, CELA remains concerned that the ECO's evidence-gathering powers have remained unchanged since 1993.

For example, although the ECO may examine a public servant under oath (and require him/her to produce documents for the examination: see section 60), the EBR does not compel prescribed Ministries to cooperate with the ECO, or to provide disclosure or production upon request. In some instances, the ECO has lamented the lack of cooperation that has been received from certain Ministries in recent years.[103]

Interestingly, sections 57 to 58.2 of the EBR do not expressly empower the ECO to make recommendations in Annual or Special Reports filed with the Ontario Legislature. Traditionally, the ECO has interpreted its reviewing/reporting powers as including the authority to make recommendations, and over the past 23 years the ECO's reports have included numerous procedural and substantive recommendations (including those relating to EBR reform). In this regard, CELA agrees with the ECO's recent recommendation that its reporting powers and responsibilities under the EBT should be enhanced and more flexible.[104]

However, the EBR does not legally require the MOECC (as the Ministry responsible for administration of the EBR) to actually respond to any of the ECO's important and well-founded recommendations. The result is that over the past decades, many key ECO recommendations (including those related to EBR reform) languish for years without implementation, or even a formal acknowledgement or response, by prescribed Ministries to the Ontario Legislature. In CELA's view, this continuing practice clearly underscores the limitations of political accountability mechanisms under the EBR:

[102] *Ibid*., subsection 20(3).
[103] ECO, 2008-2009 Annual Report, page 112.
[104] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 3.

> Thus, accountability for government failures is primarily political. To enable greater political pressure to be brought to bear, the Act establishes the office of the Environmental Commissioner, whose duties include monitoring the statute's implementation and reporting any deficiencies to the Legislature. However, the Environmental Commissioner has few powers and to date, despite the Commissioner's scathing reviews of government inadequacies and reports of blatant violations of the Ontario EBR, it seems that the legislature in receipt of those reports is unmoved.[105]

In addition, as recommended by the ECO in 2005 and again in 2016, CELA submits that the EBR should be amended to impose a positive legal duty upon Ministry staff to provide information and produce documents relevant to the matters under review by the ECO.[106] These new provisions could be modeled on the disclosure/cooperation obligations imposed upon Ministries and Crown agencies under sections 10 to 11.2 of the *Auditor General Act.* When analyzing the nature and scope of the ECO's current powers, consideration should also be given to creating further or better discovery mechanisms or compliance tools within the EBR to empower the ECO to investigate or enjoin governmental conduct that contravenes the EBR.

Moreover, for the purposes of greater certainty and accountability, CELA recommends that the EBR should be amended to expressly empower the ECO to make recommendations in the Annual and Special Reports, and to impose a positive legal duty upon the MOE (or other prescribed Ministries) to provide the Ontario Legislature with a written response to the ECO's recommendations within 90 days of their public release.

Alternatively, the Ontario Legislature could create a new standing committee (or use an existing committee) to review and report upon ECO recommendations and responses thereto by prescribed Ministries. This arrangement could be structured in a manner that required Ministry officials to testify before the committee on a regular basis about matters raised in ECO reports. Thus, this reform would be analogous to the obligation upon the federal government to respond to parliamentary committee reports regarding reform or renewal of Canadian environmental laws (e.g. *Canadian Environmental Protection Act, 1999*).

PART III – CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

For the foregoing reasons, CELA concludes that the current public review offers Ontario an important and timely opportunity to upgrade the EBR and to address long-standing gaps in the EBR and its implementation. In CELA's view, a comprehensive EBR reform package, consisting of statutory, regulatory, policy and administrative changes, should be developed by the Ontario Government in conjunction with all interested stakeholders and the public at large.

CELA's responses to the MOECC's consultation questions about the EBR may be summarized as follows:

[105] Elaine Hughes & David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999), 30 Ottawa L.R. 229, para.80.
[106] ECO Special Report, page 7; Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 3.

1. The EBR should be amended to include broader legislative purposes and updated environmental principles.

2. The EBR and its regulations should be amended to prescribe a number of additional ministries, statutes and instruments.

3. The EBR and SEVs should be amended in order to improve the content and application of SEV requirements during governmental decision-making in relation to prescribed Acts, regulations, policies and instruments.

4. Various improvements are needed in relation to the design and use of the Registry, and the EBR and its regulations should be amended in relation to Registry notice content, links to related documentation, and longer public comment periods.

5. The EBR should be amended by deleting the section 41 leave test, extending the appeal timeframe, ensuring timely access to information, and establishing an appropriate participant funding program.

6. The section 32 "EA exception" to public participation should be deleted in its entirety.

7. Various improvements are needed in relation to Applications for Review to ensure that ensure that governmental decisions on such applications are timely, credible and transparent.

8. Various improvements are needed in relation to Applications for Investigation to ensure that governmental decisions on such applications are timely, credible and transparent.

9. The EBR should be amended to include substantive environmental rights, expand judicial accountability mechanisms, and enhance the powers of the ECO.

November 4, 2016