



Dianne Saxe, J.D., Ph.D. in Law
Commissioner

Dianne Saxe, J.D., Ph.D. en droit
Commissaire

June 9th 2016

Hon. Glen Murray, Minister of the Environment and Climate Change
77 Wellesley St. West,
Ferguson Block, 11th Floor,
Toronto, Ontario M7A 2T5

Dear Minister,

Re: Reforming the *Environmental Bill of Rights, 1993*

I am writing to follow up on our discussion regarding the ministry's examination of potential amendments to the *Environmental Bill of Rights, 1993 (EBR)*. As you are aware, the *EBR* is a powerful tool to engage Ontarians in environmental decision making. The *EBR* has been critical in enabling many positive environmental outcomes in Ontario, but strengthening the *EBR* is long overdue.

We are grateful that your ministry is finally taking action on the request for review of the *EBR* that it accepted in 2011. As guardian of the *EBR*, I appreciate the opportunity to comment on your ministry's proposed scope for the review. We are also glad to hear that you are about to embark on a detailed public consultation on possible changes to the *EBR*.

Based on our 23 years of experience with the *EBR*, this letter outlines what we consider to be the key areas in need of reform. They include legislative amendments, exercising existing regulatory powers, and enhancing the effectiveness of the *EBR*'s existing tools through best practices and other administrative measures.

Legislative amendments

Elimination or scoping of the environmental assessment exemption

Section 32 of the *EBR* exempts instruments from the Act's public notice and consultation requirements if an instrument is part of an undertaking or project approved under the *Environmental Assessment Act (EAA)*, or approved under an act affording an opportunity for public participation. The practical effect of section 32 is that the public has no rights to receive notice or comment on instruments related to the many projects or undertakings subject to the *EAA*. Moreover, this exemption prevents public scrutiny of the

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broad range of activities explicitly exempted under the *EAA*. The ECO has raised this concern in several past Annual Reports. In January 2014, Ontarians used an *EBR* application for review to raise this and other concerns about Ontario's environmental assessment process. This exemption should be eliminated or scoped in order to allow Ontarians to participate fully in these important decisions. We are glad to see this item in your proposed review.

Elimination or scoping of the budget proposals exemption

Section 33 of the *EBR* exempts proposals that form part of or give effect to a budget or economic statement presented to the Assembly from the Act's public notice and consultation requirements. This exemption is intended to protect the parliamentary convention of budget secrecy; in the ECO's view, it is not intended, and should not be used, to allow the government to exempt primarily non-fiscal changes to environmental legislation from public participation. In short, this exemption should not enable the government to shield environmentally significant decisions in omnibus budget bills.

For example, Bill 55, *Strong Action for Ontario Act (Budget Measures), 2012* amended six *EBR*-prescribed acts¹ without notifying or consulting the public using the Environmental Registry. The ECO received four applications for review about the government's failure to consult on amendments to the *Public Lands Act*, *Lakes and Rivers Improvement Act*, *Provincial Parks and Conservation Reserves Act*, 2006 and *Fish and Wildlife Conservation Act*, 1997. By using Bill 55 to pass sweeping changes to laws that affect the ongoing management and protection of Ontario's wildlife and natural resources, the public was denied their *EBR* right to participate in these environmentally significant decisions.

Legislative reform is needed to remedy this problem so that prescribed ministries are no longer permitted to hide behind the section 33 exception to avoid public consultation on difficult ministry proposals. While the elimination of this exemption would be preferable, it is also possible that this issue could be solved by agreement with prescribed ministries, if ministries would commit to posting any non-financial environmentally significant proposals from budget bills on the Environmental Registry for meaningful public consultation – before it is too late in the legislative process.

Extension of appeal timelines

Section 40 of the *EBR* requires that applicants seeking leave to appeal a decision on a classified instrument file an application within 15 days of a decision notice being posted on the Environmental Registry. This 15-day timeline is a significant deterrent to members of the public hoping to exercise their appeal rights under the *EBR*. A 20-day timeline would be more reasonable, and would align with the

¹ *EBR*-prescribed acts amended by Bill 55: the *Fish and Wildlife Conservation Act*, 1997; the *Kawartha Highlands Signature Site Park Act*, 2003; the *Lakes and Rivers Improvement Act*; the *Niagara Escarpment Protection and Development Act*; the *Provincial Parks and Conservation Reserves Act*, 2006; and the *Public Lands Act*.

third party appeal rights under the *Planning Act*. Ontarians requested such a change through an *EBR* application for review (R2009009), which the Ministry of the Environment and Climate Change denied. It appears that this is within the scope of your proposed review.

Statements of Environmental Values

Statements of Environmental Values have not been effective in changing environmental outcomes to date. This feature of the *EBR* requires reform and public consultation. One small step would be to require additional transparency; as part of every decision posted on the Environmental Registry, a ministry should be required to explain to the public how its SEV had been considered. The substantive contents of SEVs also require improvement. We are glad to see that this is within your proposed scope of review.

Power to compel government documents

In fulfilling the duties established under the *EBR*, the ECO frequently requires relevant information from prescribed ministries and other government bodies. However, the ECO largely relies on ministries and agencies to voluntarily comply with requests for information, as the *EBR* does not expressly require co-operation with such requests (with some specific exceptions as set out in sections 58.1(3), 58.2(3) and 60 of the Act). In order to effectively exercise the mandate established under section 57 of the *EBR*, the Act should be amended to include an express power for the ECO to compel the production of government documents pertaining to environmental protection, energy conservation and climate change. We should not have to resort to section 60 of the *EBR* to obtain documents.

Broader reporting powers

The ECO's reporting powers are set out in sections 58, 58.1 and 58.2 of the *EBR*, and are the statutory basis for our annual reports on environmental protection, energy conservation, and greenhouse gas emissions. The *EBR* also allows the ECO to issue special reports on matters that should not be deferred until the release of an annual report. The effectiveness of the ECO would be enhanced by providing broader reporting powers, and more flexibility as to the form of reports. In order to allow the ECO to issue timely, focused and relevant reports on rapidly evolving issues, the *EBR* should be amended to explicitly provide the ECO with power to report on matters relating to energy, climate and environment at any point in the year; such reports could be of great value to the Legislative Assembly and to Ontarians.

It would also be appropriate to explicitly provide for our role in relation to the Greenhouse Gas Reduction Account.

Substantive Environmental Rights

We agree that a conversation on substantial environmental rights is a significant undertaking requiring considerable thought and consultation with a large number of stakeholders. We would prefer that other needed amendments to the EBR not be delayed pending the completion of this process.

Regulation

Allowing for stays pending applications for leave to appeal

Currently there is no mechanism to stay a decision on a site-specific instrument pending the outcome of a leave to appeal application. Harm to the environment could occur if an instrument is acted upon during the time that a leave to appeal application is in progress. Subsection 121(1)(s) of the *EBR* already provides regulation-making power to allow for stays pending leave to appeal, but this power has not yet been exercised. It should be.

Administrative measures

Environmental Registry

We have already written to you, under separate cover, concerning the updates required to the software of the Environmental Registry. We are glad that this work is getting underway without further delay.

Best practices by EBR-prescribed ministries

In addition to amendments to the Act and its regulations, the public could see some valuable improvements simply through best practices on behalf of *EBR*-prescribed ministries. The *EBR* Report cards for ministries have helped to initiate a conversation on strengthening *EBR* practices within ministries, and we are glad to have seen so much improvement over the last six months. Over the coming months, the ECO will work with individual ministries to help them optimize how they consult the public via the Environmental Registry and how they respond to *EBR* applications for review and investigation.

The ECO will develop tailored guidance for ministry *EBR* co-ordinators, including updated online guidance pages for ministries. Improved templates would also help ministry staff prepare more informative Environmental Registry notices for proposals and decisions. We are also glad to provide advice, on request, on the form, scope and content of proposed notices on controversial or disputed matters.

Legislative Standing Committee on the Environment

Members of Provincial Parliament could benefit from more direct access to and more informed

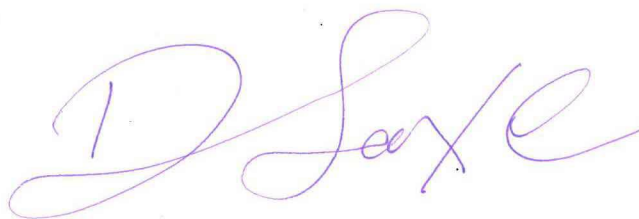
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engagement with the Environmental Commissioner of Ontario, and we could benefit from more structured engagement with the Members. New Zealand has found substantial merit in having their

Environmental Commissioner report to, and meet with, a legislative Standing Committee on the Environment.

We appreciate the opportunity to contribute to your review of this important environmental law, and look forward to being kept informed as your review proceeds.

Sincerely,

A handwritten signature in purple ink, appearing to read 'D Saxe', is centered below the 'Sincerely,' text.

Dianne Saxe
Environmental Commissioner of Ontario

cc: Pierre Sadik, Manager of Legislative Affairs – Ecojustice Canada
Theresa A. McClenaghan, Executive Director – CELA
Peter Robinson, Chief Executive Officer – David Suzuki Foundation
Sarah Rang, Senior Policy Advisor – Ministry of the Environment and Climate Change
Richard Lindgren, Counsel - CELA

