EBR LAW REFORM WORKSHOP JUNE 16, 2004

MEETING REPORT

Draft

Lura Consulting and the Environmental Commissioner of Ontario

October 2004

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Background

After a long process of discussion, consultation, and development Ontario's *Environmental Bill of Rights (EBR)* came into effect in 1994. This groundbreaking legislation provided the people of Ontario with a suite of new legal rights and formal process for participating in environmental decision-making. The passage of the *EBR* marked the beginning of the office of the Environmental Commissioner of Ontario, the creation of an Environmental Registry on which environment-related government proposals would be posted, and the requirement for ministries to develop Statements of Environmental Values to explain how they would apply the *EBR* in their decision-making. The *EBR* also provided the citizens of Ontario with two new legal rights (the Right to Seek Leave to Appeal and the Right to Sue for Harm to a Public Resource) and enhanced two existing rights (the Right to Sue for Public Nuisance and Whistleblower Rights). In the Legislature, then-Environment Minister, Bud Wildman articulated the vision behind the *EBR*: "It will change the way the government does business in Ontario. It will place an additional onus on the bureaucracy to stop *and* listen before acting, and it will bring environmental protection to a higher level…the whole thrust of the legislation is to involve members of the public early on in the decision-making process" (October 14, 1993).

To mark the decade of experience with the *Environmental Bill of Rights*, the Environment Commissioner of Ontario (ECO) initiated a 10-Year Review to examine the progress that has been made achieving the goals of the legislation. As part of the 10-Year Review, the ECO decided in February of 2004 to host a workshop on potential *EBR* law reforms. Eight individuals with varied perspectives on the *EBR* were identified to make presentations as panelists at the workshop. A wide range of stakeholders knowledgeable about or experienced in using the *EBR* were invited to attend. On June 16, 2004 54 participants from the environment, business, legal and government sectors attended the all-day workshop, which was held at the University of Toronto's Faculty Club. Appendices A, B and C (available by contacting the ECO) provide copies of the letter of invitation, agenda and list of participants.

The workshop was divided into two parts: the morning session looked retrospectively at what the *EBR* had accomplished to date, and the afternoon focused on potential changes to improve the *EBR*. The agenda was structured to provide a balance between presentations from ECO staff and panelists and small group discussions involving all the participants. This Draft Meeting Report has been prepared by the workshop facilitators and staff of the ECO as a record of the event and is intended to convey its major themes, recommendations and outcomes. It is being circulated in draft form for review by speakers and

workshop participants and other readers. Any comments on the Draft Report should be sent to:

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Setting the Stage

Welcome and Purpose of the Meeting

Facilitator, Joanna Kidd opened the workshop and welcomed participants. She noted that much had changed since the passage of the *EBR* in 1994 in terms of environmental policies and information technologies. She also noted that four years previously, some in the room had attended an ECO workshop on *EBR* Litigation Rights, and at that time the possibility of reforming the bill itself had been considered to be so remote as to be dismissed by participants. It was an exciting time, Joanna suggested, with great potential for change, and she was looking forward to hearing participants' perspectives on how the *EBR* has been successful, where its shortcomings lay, and where improvements might be made.

She reiterated the purposes of the workshop, which were to:

- provide information on the 10-Year Review of the *EBR*;
- gather feedback and information on the effectiveness of the *EBR* to date; and
- gather ideas and suggestions for potential improvements to the *EBR* and its regulations.

Joanna pointed out the four background documents that had been forwarded to participants as background for the day. These included:

- The *Environmental Bill of Rights* at 10: The potential for reforming the law (ECO);
- Legal Review of the *EBR* Leave to Appeal Process (Birchall Northey);
- Statements of Environmental Values under Ontario's *Environmental Bill of Rights*: Missed opportunities and options for reform (Gowling Lafleur Henderson); and
- Memorandum on Right to Sue for Public Nuisance (Torys).

Joanna reviewed the day's agenda and then introduced Environmental Commissioner, Gord Miller.

Opening Remarks

Commissioner Gord Miller welcomed participants and provided a brief overview of the *EBR* 10-Year Review. With ten years of experience in hand, he suggested that it was a timely and valuable exercise to review the *EBR*. The 10-Year Review had begun with pre-consultation through an on-line questionnaire, and he noted that some workshop participants may have already taken part in that process. The *EBR* Law Reform Workshop was intended to augment the

questionnaire and to focus discussion on the Act itself -- in particular on how well the Act has worked and how it can be made to work better. The Commissioner noted the vast experience that was reflected in the room including some original members of the *EBR* Task Force and stated that he was expecting spirited panels, dynamic discussions and thoughtful recommendations. He noted that the outcomes of the workshop would be captured in a meeting report and would be considered within the 10-Year Review process.

The ECO's Law Reform Paper

Maureen Carter-Whitney from the office of the ECO then gave an overview of the discussion paper that had been distributed to participants, "The *Environmental Bill of Rights* at 10: The Potential for Reforming the Law". She began by stating that the discussion paper was intended to stimulate discussion, but in no way to limit it. She observed that the time was ripe to examine the *EBR* as there had been significant changes to Ontario's environmental laws, regulations and policies since the *EBR* was passed. She also noted that during the last ten years there had been many advances in information technology that had changed the context for public participation processes such as those used in the Environmental Registry. In addition, some issues related to the *EBR* had arisen that were never contemplated by the original Task Force, and some sections of the Act had not worked as effectively as originally expected.

Maureen stressed her presentation would concentrate on some of the larger issues associated with potential law reform, but that the discussion paper also addressed many smaller "housekeeping" items that were important. She observed that the paper had been organized into three sections to follow the structure of the act and identified the following as major issues:

Registry Notice and Comment Provisions

- Currently ministries must post exception notices on the Registry when they don't post instrument proposals due to emergency circumstances or because there has been an opportunity for an equivalent form of public participation. Other types of exceptions don't require exception notices, such as certain types of classified instruments in specific and limited circumstances. It is hard for the public to know whether one of these instruments that has not been posted was legitimately subject to an exception or just not posted due to an error. If the ministries were required to post exception notices for these types of exceptions, there would be less uncertainty and confusion for the public.

- S. 32(1) allows instruments to be excepted from *EBR* notice and comment procedures where they relate to decisions under the *Environmental Assessment Act* in order to avoid duplication of public consultation under

two different laws thought to have similar public participation requirements. However excessive use of the s. 32 exception has resulted in minimal or no public consultation on important instruments that affect the environment. The ECO believes that Ontario's environmental assessment program should operate in a manner compatible with and complementary to the *EBR* and has identified a number of potential amendments.

- S. 34 of the *EBR* allows the use of mediation to assist with resolving issues related to Class II instrument proposals on the Registry, with the consent of the person applying for the instrument or the person who would be subject to it. In the first ten years of the *EBR*, the government has not made regulations on mediation, few Class I instruments have been bumped up to Class II, and nothing else has been done to promote the use of mediation. Amendments could be made to promote mediation as an effective option for resolving disputes about proposed instruments.

Leave to Appeal, ECO, Review and Investigation Provisions

- An application for leave to appeal under the *EBR* must be received within 15 days of the decision notice being posted on the Registry. Some see this as a tight and unrealistic time line that presents a significant barrier to those who seek leave to appeal. The 15-day application period could be extended to 20 days, and the tribunal could be given discretion to extend the application period in appropriate circumstances.

- Nothing in the *EBR* prevents the Environmental Commissioner from being compellable as a witness, even though this kind of provision appears in legislation creating other officers of the Legislature to ensure they are not required to give evidence about information related to their functions. The Commissioner and ECO staff have now been compelled to testify several times, and this raises stakeholder concerns about the ECO's impartiality and ministry concerns about sharing sensitive information with the ECO. A non-compellability provision could be added to the *EBR*.

- S. 60(1) gives the Commissioner the power to examine any person under oath, and to require a ministry to provide documents in the course of an examination, in relation to his duties under the *EBR*. In contrast with the Ombudsman, the Commissioner does not have the power to require ministry staff to provide information or produce documents related to matters under review by the ECO. To date, the Commissioner has relied on voluntary cooperation from ministries because an examination under oath would only be appropriate in an extreme case of non-cooperation. It would be useful for the ECO to have guaranteed access to ministry information needed to review ministry decisions and *EBR* compliance.

Litigation Rights Provisions

- Many people have expressed concerns that the test a plaintiff has to meet to bring a civil action in Harm to a Public Resource is too strict. The current test requires a plaintiff to show both that the defendant has contravened or will contravene a prescribed Act, regulation or instrument and that significant harm to a public resource has been or will be caused. There is also concern that "significant" is too high a standard in the test. The test is considered a barrier to bringing Harm to a Public Resource actions; there have only been two such legal actions initiated to date. The test could be changed so a plaintiff need only show there has been a contravention or will imminently be a contravention, and is not required to show that significant harm to a public resource has been or will be caused.

- Before bringing an action for Harm to a Public Resource, a plaintiff must have applied for an investigation under Part V of the *EBR* and received an unreasonable response from the ministry. Many see this as another barrier to launching this kind of action, and argue that it should be enough that the plaintiff has attempted to engage the ministry through the investigation process. Removing this requirement would make these actions more accessible and allow the court to take a fresh look at the alleged contravention.

Looking Back: Ten Years of the *EBR*

Panel Presentations: "Is the *EBR* working?"

The panel members were asked to address the question "Is the *EBR* achieving what the Legislature intended?" In order to provide diverse perspectives in the limited timeframe, each panel presenter in the session sought to address a particular perspective in their respective presentation.

Michael Cochrane (Ricketts, Harris)

Michael started off by reminiscing about his time as the Chair of the Environmental Bill of Rights Task Force. The approach used by the Task Force was to identify and work on what was "broken" in the area of environmental protection. The Task Force eventually determined that the state of communication and trust between government and stakeholders was broken. In addition to the lack of communication and lack of trust, he recalled, there was a lack of government accountability and a lack of ability on the part of the public to participate meaningfully in environmental decision-making. It was clear, too that the government of the time lacked a coherent overarching environmental vision.

Michael reflected that the work of the Task Force involved working with a group of people who were intelligent, highly motivated and broadly representative of the stakeholders interested in environmental law. During its deliberations the Task Force met with and received submissions from hundreds of groups and individuals. In a sense, the Task Force provided an opportunity for an intelligent discussion on environmental reform.

Michael observed that on paper the *EBR* delivers four major products: an overarching environmental vision for the provincial government, an Environmental Registry for unprecedented public participation in environmental decision-making, opportunities to trigger reviews and investigations of environmental harm and policy, and increased access to the courts in areas that were previously unavailable. But what is the reality ten years later?

He suggested that we ask ourselves the following questions. Without the *EBR,* would the Hollick case have gone to the Supreme Court of Canada? Without the *EBR*, would we have an Environmental Registry or an Environmental Commissioner's office to audit the provincial government's decision-making on the environment and educate people about participation in such activities? Would government ministries have voluntarily prepared Statements of Environmental Values? Would the ECO be playing a leadership role in groundwater protection? Would the Oak Ridges Moraine have been given the same level of consideration without the participation of the Environment

Commissioner? The *EBR* has entrenched the opportunity for an ongoing intelligent discussion on environmental reform, he said. "In my view it has exceeded every single expectation in these last ten years. It is an untouchable piece of legislation and promises even more in the decades ahead."

Dianne Saxe (Saxe Law Office)

In preparing for the panel presentation, Dianne recalled that she had elected to take the "yes" position with respect to the question "Is the *EBR* achieving what the Legislature intended?" Her position on success of the *EBR* was better characterized as a "qualified yes". She began by observing that those who know the *EBR* in theory (such as students) think it is great, those who use it are frustrated, and those who study it closely are encouraged again. At the beginning there was tremendous optimism about the *EBR*. On September 27, 1993 the Environment Minister of the day, Bud Wildman stood in the Legislature and said that "The *EBR* is built on the principle that everyone must be given the power to make a difference, to help protect the environment in the province…[It] will give people unprecedented rights to act on their commitment to protect the environment in Ontario." On October 14, 1993 he predicted that it would "change the way the government does business in Ontario." Has this happened? Dianne suggested that there are four ways in which the *EBR* has made a significant difference: access to information through the Registry, opportunity to comment before decisions are made, leave to appeal ministry decisions, and the office of the Environment Commissioner.

Access to information: The Registry has been very useful, and was created long before the Internet information explosion. However, Dianne observed that the Registry has not necessarily been used solely in the way its creators imagined. Industries, for example, use it to keep track of their neighbours and then bargain for similar approval terms. The media probably also find it useful. Although the Registry has been partly overtaken by the Internet, which provides free and easy access to an astonishing amount of information, it is still a useful tool in terms of increasing the transparency of government decision-making.

Opportunity to comment before decisions are made: Dianne argued that this has been useful, although not to the extent that was expected or hoped for. It has not, she suggested, lead to an intelligent conversation about environmental proposals. As to whether people feel that they have been heard, this only happens occasionally. She cited the case of the proposal to end the spring bear hunt in which 35,347 people commented, 64% of whom were against the proposal. Did the proposal get changed through the *EBR* process? No.

Leave to Appeal: Referencing the Rod Northey paper, Dianne noted that Leave to Appeal is expensive to seek, is often refused, and is even more expensive to win. But the existence of the right to appeal ministry decisions, she argued, does

help to keep government and industry honest and increases the pressure to properly deal with issues. Leave to Appeal does increase cost and risk to proponents, so there is an incentive to spend money up front on biologists and other technical experts rather than later in the process on lawyers. Leave to Appeal does sometimes produce concrete improvements – for example, in the Petrocan case – by such means as forcing better record keeping and monitoring.

Environmental Commissioner: Dianne suggested that the Environmental Commissioner was helpful in three respects: to people trying to understand what is going on; to people trying to communicate with environmental agencies; and in terms of focusing attention on particular environmental issues.

Dianne finished off by referring to the preamble to the *EBR*. Does the environment have more integrity after ten years of the *EBR*? Are we more sustainable? These questions are debatable. What we do have, she concluded, is a better process for participation in environmental decision-making.

Rick Lindgren (Canadian Environmental Law Association)
Rick began his presentation by stating that he was a supporter of the *EBR*. However, he argued that in many respects it has fallen short of fully achieving the legislative intent underlying the statute. While the *EBR* has significantly improved public access to environmental decision-making, he suggested that there is little or no evidence that there has been demonstrable progress in attaining the environmental principles and policies entrenched in the Act. The overall legislative intent of the *EBR* is to:

- ensure meaningful public participation in environmental decision-making;
- enhance government accountability (through political and judicial means) for environmental decision-making; and
- ensure that governmental decision-making results in the protection, conservation and restoration of the environment.

Are the tools currently contained in the *EBR* actually achieving these objectives? Rick recalled that he was involved in the first Leave to Appeal case, in which a proponent was proposing to reopen a closed landfill site. The Appeal resulted in a revocation of the Certificate of Approval and permanent closure of the site. In retrospect, he reflected, this victory was a small one and uncommon. Most (80%) applications for Leave to Appeal are refused, often for unpersuasive reasons. Likewise, most (64%) of Applications for Investigation have been turned down. In ten years, he noted, only two parties have used the new Right to Sue for Harm to a Public Resource. Only 13% of the Applications for Review submitted by the public resulted in reviews being undertaken by the relevant ministries. In the aftermath of the Walkerton tragedy, Rick recalled, CELA filed an

Application for Review with the Ministry of the Environment (MOE) to review the need for a Safe Drinking Water Act. The MOE rejected the application, stating that the Act was not needed. At the Walkerton Inquiry, however, Justice O'Connor revisited the issue, agreed with CELA, and recommended that a Safe Drinking Water Act should be passed. This was indeed done, but because of Walkerton, not the *EBR*.

In summary, Rick suggested that there are many significant shortcomings to the *EBR*. However, that is not to say that it should be scrapped. Rather, he noted, the *EBR* needs to be fixed and this workshop is a good place to begin the task.

Len Griffiths (Torys)

The perspective that Len addressed was "why should I care whether the *EBR* is achieving what the Legislature intended?" He suggested that the benefits of the *EBR* were greatly oversold in the beginning. MOE forecast that there would be 200 Applications for Investigation and 60 lawsuits under the *EBR* a year for MOE alone. The reality has been very different, he said, suggesting that one possible explanation is that few people care to use these tools. There have been less than 20 Applications for Investigation a year since 1994, and about 8 third party applications for Leave to Appeal a year. There have been very few cases in Public Nuisance under s. 103 or Harm to a Public Resource under s. 84. He suggested that it was difficult to care about the theoretical ability to bring an action when it is prohibitively expensive, difficult to prove and you can't get damages if you win.

With respect to Statements of Environmental Values (SEVs), Len argued that it is difficult to care about them given their abstract nature, how little attention is paid to them, and the fact that they are not updated to reflect changing roles and mandates of ministries. Besides, he noted, it could be argued that we don't have to worry about environmental protection because Ontario now has the toughest fines around for breaking environmental laws, and the number of charges laid and convictions made have been steadily climbing since 1998.

Len finished by suggesting that the office of the ECO and the Registry have met and exceeded expectations but that few people may care about other aspects of the *EBR* for some of the reasons he cited.

Small Group Discussion: Environmental Registry and SEVs

The group was asked to address the following questions:

With respect to the Environmental Registry and SEVs:

- What do you think is working well?
- What are their key shortcomings or the key barriers to their use?

Statements of Environmental Values (SEVs)

David Estrin outlined the history of SEVs for the group. The *EBR* Task Force had envisioned that ministries would consider their SEVs when they made decisions on environmental issues. However, this process has failed, and perhaps law alone cannot make this work. He noted that ministries experienced no legal accountability if they didn't adhere to the SEVs, or if their SEVs were too weak, or even if the SEVs became markedly outdated. The ECO has criticized the ministries on all these points, but to little effect. Moreover, the ECO cannot provide guidance on SEVs unless ministries explicitly request it.

In contrast, David pointed out that corporations are now required to pay attention to environmental issues through management systems. But unlike what was originally expected, SEVs do not shape or guide ministry planning.

Jim Lewis from the MOE explained that an interministerial review of SEVs is underway, and is expected to take place in two or three phases. The first phase will involve a basic update, such as a re-alignment of ministry names. He noted that the SEV review will take place within a context in which the ministries have just shifted from annual business plans to results-based planning, to be evaluated over four years.

<u>What's Working Well</u>

Participants did not identify any aspects of SEVs that were working well.

<u>Shortcomings</u>

A participant noted that key underpinnings for SEVs were never provided and supportive elements are missing. This includes key accountability mechanisms such as measurements, connected to targets and goals.

A participant noted that noted that corporations had no choice in the matter, they <u>had</u> to change their attitudes about the environment around 1988-89. They suggested that government now is where industry was 20 years ago. There has been no attitude change, because there is no accountability.

Another participant noted that corporations now need to report annually on certain kinds of emissions. By contrast, there is no requirement for state of the environment reporting by governments. It is clear that accountability, measurement and benchmarks are all needed. Another participant referred to the National Markets Program at the National Round Table, which is developing performance measurements.

While SEVs are great documents, they have no teeth, especially in relation to Certificates of Approval. An additional problem is that the MOE has said that its SEV doesn't apply to the *Environmental Protection Act* (*EPA*) or the *Ontario Water Resources Act* (*OWRA*), because it wasn't incorporated into those Acts.

The Registry

Jim Lewis from the MOE noted that a major re-engineering of the Registry is about to commence and the ministry realizes that it is working with 10-year-old technology. There is a tender on the MERX system right now. Possible improvements include: improving the search technology to make it more comprehensive; developing individualized "My *EBR* pages"; allowing for some kind of push-technology; and accepting e-mailed comments.

<u>What's Working Well</u>

A participant noted that even if the public can't always see it, the Registry has resulted in a great shift in awareness among ministry staff that there is a need to consult with the public.

The Registry gets about 66,000 hits per month, although they are likely to be the same people month after month. The ministry hopes to make the Registry more visible and accessible to the general public as a result of the re-engineering process.

<u>Shortcomings</u>

Members of the group suggested that the ministry should try to make more background information available through attachments to notices (for example, by attaching Certificates of Approval (Cs of A) to Registry notices of decisions). The argument was made that the public can't make reasonable comments without adequate background information and such information should not be hidden. Another participant cautioned that Freedom of Information considerations may be a problem in this regard.

Participants suggested that all Cs of A , Director's Orders and Provincial Officer's Orders should be accessible on the Registry.

A group member suggested that it would be useful to be able to access all public comments electronically. (Currently public comments on Registry postings

are on the public record. Interested members of the public can either come in to look at them, or in some cases, the ministry may be able to make copies of them.) The Registry operated by the National Energy Board might be a useful model in this regard.

The ECO has an educational officer but could do more to publicize the Registry. There could perhaps be a connection to the "Educating for Sustainability" initiative. Perhaps the *EBR* should be included in the high school curriculum, and university students could be reached to make them aware of the Registry.

Small Group Discussion: Legal Actions

The group was asked to address the following questions:

With respect to the litigation rights under the *EBR* (the Right to Sue for Public Nuisance, the Right to Sue for Harm to a Public Resource, Whistleblower Provisions and Judicial Review):

- What do you think is working well?
- What are their key shortcomings or the key barriers to their use?

Michael Fortier from Torys opened up the session by presenting a short discussion of the Right to Sue for Public Nuisance (RSPN). He reviewed the certification process under the *Class Proceedings Act (CPA)* with respect to proceedings involving s.103 of the *EBR*. He noted that s. 103 alleviates the common law obligation of showing greater or special damages, and that all judicial considerations of s. 103 to date that he is aware of have occurred only in the certification process under the *CPA*. He said there have been four cases involving s. 103 where there has been an application for certification which appear to be completed – the two that were certified were settled, and the two that were not certified could not proceed under the *CPA*.

Michael then spoke about the *Hollick* case in which the plaintiff brought an action against the City of Toronto for, among other things, the release of toxic gases and noise from the Keele Valley Landfill in Vaughan. At trial, certification was granted. The certification was subsequently overturned on appeal, and this was upheld by the Court of Appeal. In its decision, the court suggested that there is no overlap between class proceedings and s.103 of the *EBR*. The decision was ultimately appealed to the Supreme Court of Canada where the ECO intervened. Michael noted three important points about the case:

(i) the Supreme Court decision did not address the narrow issue of the interaction between the *EBR* and the *CPA* and the issue remains unaddressed;

(ii) the City had a fund to compensate residents for claims (up to $500) and the court acknowledged in refusing to certify the action that the fund provided quicker access to justice than the courts, which may provide an incentive for defendants to establish effective alternative dispute resolution opportunities; and

(iii) the court noted there were legislative alternatives, including some in the *EBR* (i.e., reviews and investigations) that provided alternative means for redress. While the court found that this decision did not foreclose the

possibility of class proceedings for environmental actions, the other avenues for redress offered by environmental legislation in Ontario do not militate in favour of support for the certification of claims involving s. 103 or environmental claims more generally.

Right to Sue for Public Nuisance (s. 103)

It was noted that s. 103 hasn't facilitated cases without showing direct personal harm. It may be useful therefore to consider whether s.103 should be reformed to remove the need to show personal harm.

Barriers to Use

Participants noted that there are significant education and cost barriers to use of the Right to Sue for Public Nuisance. Also, it was suggested that there has been a chill in public nuisance actions in the wake of *Hollick* and *Pearson*.

Class Proceedings

A participant argued that *Hollick* and *Pearson* highlight the need to fix the *CPA*. Another participant agreed, noting that the courts have not explicitly referred to s.103 in certification processes; the focus has been on the procedural tests under *the CPA*. Therefore, it is time to take a look at the *CPA*.

A member of the group noted that *Hollick* does leave open the possibility that s.103 (the Right to Sue for Public Nuisance) is not limited to class proceedings (i.e., there is no bar to using it for individual proceedings).

Another participant noted that *Pearson* may not be certified as a Class Action (it is currently on appeal to the Ontario Court of Appeal by Port Colborne residents). If it is not certified as a Class Action, 1500 litigants may launch individual actions that will jam up the courts. Therefore, s.103 may be used for individual actions within the next six months. However, it was suggested that most lawyers and potential litigants don't see a lot of benefit to using the RSPN in *CPA* actions as judges are more familiar with traditional causes of action and they conclude that it is safer to stay with private nuisance and other traditional causes of action.

A participant noted that if Class Actions are available under s.103, people would be more willing to take cost risks, (e.g., 50 individuals were willing to take a $100,000 cost risk to launch a s.103 action as a class proceeding).

Public versus Private Harm

A member of the group suggested that there is a distinct advantage to public nuisance over private nuisance because in private nuisance actions, one is tied to the need for a piece of land. Public nuisance opens up standing for people

who do not have property. As an example, another participant suggested that s.103 could be used to address the concerns of a subset of people, such as canoe outfitters who do not own lakes or rivers, but who may experience a personal or economic loss from environmental degradation or pollution.

Reverse Onus

A participant raised the question of why the public should have to prove damages. What about reverse onus? In reply, another participant suggested that reverse onus would be radical for the current justice system and that it would be difficult or impossible to prove the absence of harm. There was acknowledgement, however, that there was a reverse onus with respect to liability for loss or damage arising from spills under Part X of the *Environmental Protection Act* and that there are reverse onus precedents elsewhere (e.g., in Michigan).

Right to Sue for Harm to a Public Resource (s. 84)

Use of the Right

A participant noted that the *EBR* Task Force had envisaged s.84 as a last resort. Therefore, the fact that it has not been used frequently is not surprising. It may be, they argued that it is the "front end" of the *EBR* process that is broken, i.e., there is a need to improve public participation aspects.

Encouraging Better Investigations

A member of the group suggested that the existence of the Right to Sue for Harm to a Public Resource (s. 84 of the *EBR or* RSHPR) has cajoled ministries into carrying out better investigations. Participants mentioned SWARU, and Ontario Hydro in 1997, as examples. One participant disagreed, suggesting that the pressure exerted by the ECO and ECO staff was instrumental in the SWARU case. Another participant acknowledged that they had previously thought in 1994 that the court remedy of s. 84 would be a stick to prod ministries to undertake investigations, but did not think so any longer.

Difficulty of the Process

A number of participants noted that a s. 84 action is a complex and cumbersome process with onerous tests and considerable hurdles. One participant acknowledged that this was why he dismissed the use of it and used private prosecutions instead.

Many participants agreed that s. 84 was essentially useless in its current form, and must be fixed. One participant wondered if use of s. 84 would increase if the application for investigation requirement were to be removed.

Cost of the Process

The cost to carrying out a Harm to a Public Resource action was identified as being a significant barrier. The cost (characterized as "staggering") can run from $50K to $300K. Participant funding might help to alleviate this in part.

Relator Actions

A participant suggested that s. 84 represents another way of trying to recreate what the Attorney General does by creating a right to sue in public nuisance using a relator action. He noted that a plaintiff can ask for a relator action under public nuisance but few have done so in the past thirty years. The right to a relator action might be as good or better than the s. 84 right.

Another group member argued that there are benefits to s. 103 over relator actions. The number of relator actions reflects the potential for the Attorney General not to act on requests. Also, they noted that the Attorney General can "call off the party" in a relator action, giving rise to a private prosecution rebirth. They recommended scrapping s. 84 and "souping up" s.103 and noted that the definition of public resource that applies in s.84 is too limited and doesn't apply to private land.

Greater Access to the Court versus Increased Political Accountability

While several participants argued for the need for greater access to the courts, one participant questioned whether we want judges to consider scientific disputes, given that they don't seem to really understand scientific principles. The Ontario Court of Appeal, for example, threw out some of the SLDF's charges in Belle Park based on a mistaken interpretation of science. [Dianne, is this accurate??] It was suggested that we should be cautious about supporting greater access to the courts. It may be mistaken to believe that judges can do better than governments: it can be argued that judges can't deal with policy issues effectively. The *EBR* put the emphasis on political accountability.

A participant noted that he would prefer a "lean, green" citizen suit provision such as the public trust provisions of the *Michigan Environmental Protection Act* (*MEPA*) to the s. 84 Right to Sue for Harm to A Public Resource.

In contrast, another participant argued that it should not be thought of as an either/or situation: there can be reforms to increase political accountability alongside a streamlining of s. 84 to make it easier to use, and the EBR sought to downplay judicial accountability.

Another participant challenged the theory that the Task Force didn't intend to promote judicial accountability; he argued that one glaring flaw of the EBR is that the privative clause in s. 118 has severely restricted the ability to legally

review most decisions made by the ministries under Part II of the EBR. He went on to state that s. 118 effectively has made the front end of the Act (Part II) "legally unenforceable". Thus, there is no way to improve political accountability using the courts because both sections 118 and the RSHPR are weak.

Litigation by the Attorney General

A group member noted that in the U.S. the Attorney General is empowered to do litigation. (This is also the case in Ontario and Canada, although less prevalent here.) Such U.S.-style consumer actions by the Attorney General are effective and provide an overlap between political and judicial accountability. Another participant cautioned that the Attorney General may not always be "on-side", but acknowledged that there is merit to the suggestion.

Whistleblower Provisions

While acknowledging the lack of use of the *EBR*'s Whistleblower provisions, a participant argued that someone may have to rely on the provisions some time, so that they should be retained.

Judicial Review

Privative Clause

A major concern with Judicial Review, said one group member, is that the privative clause (s.118) is written too tightly. They recalled that CELA had once asked for a Judicial Review, which prompted the Ministry of Natural Resources to post a notice for a draft instrument classification regulation on the Environmental Registry. In the opinion of the participant, the draft regulation was totally inadequate. The privative clause then prevented CELA from going back to address concerns about quality of the notice.

Another participant argued that there is no good reason to have a strong privative clause as other procedural Acts do not have tight privative clauses.

Other

Political Accountability

Despite the rights enshrined in the *EBR*, noted one participant, political accountability is still poor. A recent case involved a neighbour who was releasing carcinogens into the groundwater. The MOE stated that there are no adverse effects if no one drinks the groundwater, and did not act.

EPA and *EBR*

A participant suggested that the relationship between the *EPA* and the *EBR* should be examined and suggested that they are not a good match as there is no provision for fine-splitting in the *EPA* (as there is in the *Fisheries Act*).

Restoration plans under *EPA* should be used. Also, the MOE needs to give better reasons for environmental officer's orders under the *EPA*.

Small Group Discussion: Leave to Appeal, Application for Review and Role of the ECO

The group was asked to address the following questions:

With respect to Leave to Appeal, Application for Review and Role of the ECO:

- What do you think is working well?
- What are their key shortcomings or the key barriers to their use?

Leave to Appeal (LTA)

Rod Northey provided the group with a brief overview of his draft report, "Legal Review of the *EBR* Leave to Appeal Process". Several people agreed with Rod that there is no reason for the disparity between the appeal rights contained in the *Planning Act* and those in the *EBR*.

One participant mentioned that the small number of applications granted to date is not an indication of whether or not people care about the environment or whether or not or a particular issue is environmentally significant. Rather, they suggested that people are cautious about using the appeal right because there have not been a lot of positive experiences with leaves being granted. Also, they suggested that ten years is a relatively short time frame in which to draw conclusions.

Rod asked whether or not ministries should be required, in their proposals/decisions for instruments, to explain the policy context behind the proposal/decision. Currently the policy context is not obvious so it's not in people's LTA applications unless they're shrewd. The group seemed to feel that having the policy context in the Registry notice would be helpful. There was more discussion of this in the afternoon, regarding suggested improvements.

<u>What's Working Well</u>

One of the participants noted that the granting of a Leave to Appeal (LTA) leads to a fundamental change in the dynamics of negotiating with MOE. Therefore, they suggested it is important to move beyond the statistics on the number of Leave to Appeal applications granted, because settlements may be possible even if leave is not granted. While the test to have a judicial review granted may be easier than the test for LTA under the *EBR*, in the long run the cost of proceeding through the LTA route is cheaper.

<u>Shortcomings</u>

Several people noted that there are many problems at the front end of the *EBR* process, prior to seeking leave being an option. For example, some instrument

notices are of poor quality and ministry district offices do not always have information and/or files readily available on current postings. This makes it hard to have a good conversation about the proposal in the time available. Also, when a proponent rebuts comments made by applicants, applicants do not necessarily see the proponent's comments.

One of the group members was glad that Rod's paper addresses the test for LTA because they believe that one of the two current tests for granting leave [the "reasonable Director" test] does not link to environmental effect or environmental harm.

Several people raised concerns about the lack of clarity over the Environmental Review Tribunal's (ERT's) expectations, for example, whether or not it is necessary to be represented by a lawyer. It was suggested that the ERT does not provide a consistent message about this. It was generally felt that it should not be mandatory to have a lawyer to seek LTA.

One of the members of the group said that even if a person is "*EBR*-savvy," Leave to Appeal is a difficult process that is not "citizen-friendly" and which contains too many hurdles and uncertainties.

One of the participants described the time restrictions on the LTA process as "insane," especially for an NGO to decide whether or not to seek leave, let alone file an application. This person also felt that the amount of information required to seek leave is almost the same as for arguing the application itself. This hardly appears to be a good use of limited resources.

One in the group mentioned that what can't be fixed through the *EBR* is MOE's adversarial approach which they described as attempting to block citizens' attempts to appeal by using every procedural tool available. Some examples were cited including that LTA wasn't granted because an application was a half an hour late, and that there were no extensions allowed due to the blackout in the summer of 2003.

Request for Review

What's Working Well

One member of the group said that the right to Request a Review compels a ministry to put its "policy cards on the table" and that it is useful to know why something is the way it is.

A participant noted that the Request for Review works if you are "playing the long game" by helping to raise the profile of particular issues. On that note, if applicants write the ministry back after they receive the ministry decision and copy the ECO, they can keep the issue in focus and perhaps encourage

positive action. A participant also suggested that although a requester might not get the result they want, over time mitigated failures may lead to small incremental changes.

Another member of the group noted that the Request for Review provision allows the ECO to speak to policy and the ECO is good at commenting and following through.

Someone else stated that making a Request for Review can spur on action at a ministry because of the information brought forward by the public and NGOs. In that regard, a participant noted that there might also be a potential effect on government territoriality and the cult of expertise, by pushing towards transparency over time.

As a success story, a participant noted that by requesting a review of the SWARU incinerator in Hamilton, the Certificates of Approval were reviewed by MOE and ultimately that resulted in a shutdown of the facility. It was cautioned that a Request for Review may take a long time and may take several volumes of information in the submission.

Shortcomings

A participant noted that few Requests for Review have been granted over ten years, compared to the federal process (through the Commissioner for Environment and Sustainability) where 80-90 petitions have been reviewed.

Another group member raised a concern that the ECO cannot self-generate applications for review. The provincial Ombudsman can initiate a review and the ECO should have a parallel power.

One of the participants said that the Request for Review is a "paper exercise". It is not much of a dialogue, but rather better characterized as a "black hole."

A member of the group noted that using the Request for Review provisions can have unfortunate and unanticipated consequences. For example, a request to the Ministry of Natural Resources to review its roadless areas policy resulted in a problematic response and later the NGO felt that there was nowhere else to go, as MNR had already said "no". The 5-year rule under the *EBR* means "you are stuck if you don't get the answer you like."

Role of ECO

What's Working Well

One participant said that the Environmental Registry and the office of the ECO are obvious successes of the *EBR*. It was felt that the ECO provides good reporting and uses its Special Report powers creatively. The office has pushed

the limits on a statutory basis by providing discussion of substantive issues not just process. This also includes comments on declined reviews.

Another member of the group spoke highly of ECO reports, workshops, and the education/outreach carried out. As well, people tend to have good response to their inquiries to the ECO. The library and CD-ROMs were noted as being very useful.

A participant suggested that the ECO's Business and Environment Networks are important tools for checking in with stakeholders.

Shortcomings

A member of the group noted a shortcoming in that there is no requirement for public submission of applications during the Commissioner's appointment process.

One participant noted "we've been lucky with the past Commissioners that we've had." They expressed a concern that there is no legislative prohibition against political interference in the carrying out of the Commissioner's duties.

Moving Forward: Options for Improving the *EBR*

Panel Presentations: "Moving the yardsticks"

The panelists in the afternoon section of the workshop were asked to address the following question: "What are the key changes that need to be made to improve the *EBR* and its regulations?"

Joe Castrilli (Barrister and Solicitor)

Joe began his presentation by tracing the history of environmental law in Canada and the US. There were similar concerns in both countries that prompted the development of environmental rights laws. These included: a myriad of environmental problems that could no longer be ignored; regulatory regimes that locked the public out of decision-making processes; and a burgeoning citizens' movement that was interested in long-term legal and institutional solutions.

The State of Michigan chose a very different solution than did Ontario to deal with these problems, Joe observed. The *Michigan Environmental Protection Act* is short and contains only six sections. The statute was designed to focus on the courts as an "engine of law reform." Its provisions include:

- standing to sue;
- imposing public trust obligations on government to protect the environment;
- shifting the burden of proof onto defendants to demonstrate a lack of feasible and prudent alternatives once the plaintiff has established a case of environmental impairment;
- judicial ability to inquire into and change environmental standards; and
- a minimal surety bond requirement for obtaining preliminary injunctions.

Ontario's response was to develop the *Environmental Bill of Rights*. Joe noted that it was designed to address four problems with traditional environmental and administrative legislation. These included: the lack of a right to a healthy environment, inadequate public participation in decision-making, a lack of government accountability and a lack of citizen access to the courts. He argued that the problems with the *EBR* include the following:

- it is an administrative rights regime that is dependent on government discretion (e.g., compliance with SEVs);
- although the ECO is highly effective in reporting on environmental problems, it mostly catalogues, and cannot reverse, poor environmental decisions;

- the Right to Sue for Harm to a Public Resource (s. 84) and Right to Sue for Public Nuisance (s. 103) have rarely been invoked.

Joe went on to list a number of problems with s. 84:

- there must be both a violation of prescribed law and significant harm to a public resource;
- the definition of "public resource" only includes public land;
- the plaintiff bears the burden of proving contravention on the balance of probabilities;
- the *EBR* allows a defense of compliance with interpretation of instruments that a court considers reasonable;
- damages are excluded from remedies, thus providing less incentive for public to use the provision;
- the Court may dispense with a plaintiff's undertaking to pay damages to obtain an interlocutory injunction only where it finds special circumstances (such as a novel point of law); and
- the high costs of litigation and the potential for adverse cost awards discourage use of the provision.

Joe went on to argue that key reforms to the *EBR* should include:

- adoption of some of the provisions of the *Michigan Environmental Protection Act*;
- reducing the obstacles to use of s. 84 (Right to Sue for Harm to a Public Resource);
- addressing the question of the costs of litigation; and
- placing limits on adverse cost awards.

Jerry DeMarco (Sierra Legal Defence Fund)
Jerry began by observing that there were two broad options for reforming the *EBR*: the "quick fix "and the "real fix". The quick fix, he argued, would take very little work but would be relatively ineffective. This would be to retain the text of the *EBR* as it is and simply change the title to the "Environmental Decision-making Processes Improvement Act". The real fix, he said, involved much more work and would be much more effective. It would involve retaining the title of the *EBR* and changing the text to make it a "true Bill of Rights".

Jerry used an example to illustrate the difference between procedural rights and substantive rights. Canada's *Charter of Rights and Freedoms* provides people with security of the person. This means that "We can't harm people, that is, I can't punch out your lights." The current *EBR* analogue, he argued is "We'll give you 30 days notice before we punch out your lights." The current *EBR* contains several procedural rights, he noted, but what we need is a true Bill of

Rights that provides substantive rights. He went on to say that a substantive *EBR* would contain the following:

- The Right of Action would be unshackled.
- It would include all modern environmental law principles (e.g., the precautionary principle, the polluter pays principle, a principle of intergenerational equity, the pollution prevention principle, and the public trust doctrine).
- It would operationalize the worthy purposes of the current *EBR* (e.g., provide an enforceable right to a healthy environment).
- It would remove the existing privative clause and make compliance mandatory and enforceable.
- It would give the ECO a much greater role in positively affecting environmental decision-making, rather than just reporting on it.

Jerry ended by saying, "Let's not just tinker with a paper tiger. Let's make it a bill with real teeth!"

Sarah Powell (Davies, Ward, Phillips & Vineberg)
Sarah introduced herself as a lawyer whose clients were businesses; she would present therefore a business perspective on the *EBR*. She then went on to observe that the *EBR* does not include provisions for participant funding for groups or individuals. Participant funding (which could come from government coffers or proponents) would provide financial resources to groups or individuals seeking to use the *EBR*. These funds could be used to hire legal experts, technical experts, or for other costs of participation. Participant funding, she argued, helps to level the playing field, and generally enhances the integrity and soundness of decision-making processes.

Sarah then went on to review the Ontario experience with participant funding. *The Intervenor Funding Project Act* was introduced in 1989 and renewed in 1992 for four years. It made funding available in limited situations, such as in matters before certain boards including the Environmental Assessment Board. The Act involved cost recovery through up-front proponent funding. The funding provided enabled groups and individuals to participate more effectively in decision-making processes. It also likely increased efficiency (by allowing issues to be scoped and conditions of approval to be settled) and increased the quality of participation in decision-making processes. The program ended in 1996 when the provincial government opted not to renew it. Sarah noted that this was done despite a survey in 1995 that suggested that 80% of stakeholders favoured continuing the program.

Sarah observed that proponents, lenders and investors want certainty and a predictable environment in order to proceed with projects involving capital

expenditures. A lack of meaningful public participation creates instability and uncertainty for businesses because citizens will seek other means such as protests to make their voices heard. She recalled a number of situations where this had happened and the proponents backed off from their proposal. In general, she argued, proponents would be willing to pay for participant funding as it increases the certainty that accompanies a predictable, meaningful engagement process. She also observed that participant funding is consistent with the government's democratic renewal process that is aimed at getting more people engaged in their communities.

Sarah finished off by listing the elements of best practices for participant funding. These include:

- proponent-funded initiatives where possible, and elsewhere funds from public coffers;
- up-front funding that is deductible from final cost awards;
- demonstrated financial need;
- careful accounting of "reasonable expenses" and avoiding duplication among participants;
- support for alternative dispute resolution where possible; and
- matching funds or "in kind" contributions from groups or individuals.

Lynda Lukasik (Environment Hamilton)

Lynda began by stating that she would be speaking from a citizen's perspective. She noted that she is an avid user of the *EBR*, has made extensive use of rights to comment on instruments and has encouraged others to do the same. She supports many of the suggestions for reform raised in the background papers but would focus her remarks on the true purpose of the *EBR* -- better environmental decision making. She noted that the larger processes – Leave to Appeal, Reviews and Investigations -- are important, but the ability to comment on instrument postings is the cornerstone of an effective *EBR*.

Lynda argued that if an individual can achieve a good, solid instrument through the public comment process, then we have gone a long way towards improving the environmental decision-making process. There are, however, significant challenges related to engaging the public in this most basic of rights under the *EBR*. Exercising the right to comment on an instrument or a proposed amendment to an instrument is the way in which most citizens are first exposed to the *EBR*, and yet very few *EBR* postings receive any public comments at all. In part, she argued, this is because even within the environmental community, very few people know how to use the *EBR*. Local environmentalists are aware of the Act, but very few of them are using it. This is not because of a lack of public interest or concern, she cautioned. People are simply unaware of their rights under the *EBR*. And, just as corporations like certainty, citizens like some level

assurance that they will be protected from negative impacts. They want some level of accountability to exist when it comes to environmental protection.

Lynda recounted that Environment Hamilton has come to play a sort of local gatekeeper role where the *EBR* registry is concerned. The group monitors the *EBR* Registry on a regular basis and take steps to notify potentially impacted individuals/neighbourhoods/organizations of relevant postings. Environment Hamilton also provides advice to groups or individuals on how to prepare and submit comments on postings.

Lynda went on to address three main changes that would help improve the *EBR* and make it more user-friendly.

Improve Notification

EBR reforms should explore better methods for notification, especially for those potentially affected by a posting to the Registry. For instance, this could require notification within a certain radius of a proposed undertaking for which an instrument is being sought or amended.

Improve Information Availability and Understanding

Once people are made aware of the opportunity to comment on a Registry posting, Lynda argued that the next challenge is to improve access to information and understanding. For example, if a posting involves an amendment to an existing instrument, then MOE should post the existing instrument on-line. MOE should provide citizen-friendly explanations of what an instrument is, why it is important, and how it might be changed by public comment. MOE district offices should provide greater public accessibility to hard copies of Cs of A. At a minimum, she argued, this should include Cs of A that are part of 'active' registry postings and ideally, it would include all Cs of A for facilities in the District. After the comment period, and once a decision has been made on the instrument posting, the posted decision should include a copy of the new or amended C of A. This is important so that people can review the decision and the new C of A and decide whether or not to pursue an appeal of the decision.

Provide Copies of Decisions to Commenters

Lynda argued that MOE should be required to post instruments with decisions and, ideally, to immediately provide hard copies to anyone who has submitted comments. Environment Hamilton's current experience is that it is often a battle to gain access to a copy of the final version of the C of A. Time is critical for anyone wanting to submit an application for leave to appeal.

Lynda related the case of a proposal to build an asphalt processing plant upwind of a Hamilton neighbourhood. Environment Hamilton helped to get the

neighbourhood involved in the process of commenting on the instrument posting on the Registry. This eventually led to a C of A with strict limits on emissions to control odours and air pollutants (1 odour unit at the closest sensitive receptor). The neighbourhood is now aware that there is a legal document (a C of A) to protect them and understand that they can fight to ensure that MOE enforces it.

Lynda finished off by arguing that reforms to the *EBR* need to focus on providing people with the basic awareness of their rights, improving their understanding of the importance of commenting on instruments, and providing them with the tools to do this. This will help ensure that we have better environmental decisions on a broad basis.

Small Group Discussion: Environmental Registry and SEVs

The group was asked to address the following question:

With respect to the Environmental Registry and SEVs:

- What are the key changes that need to be made to improve the *EBR* and its regulations?

Registry

Empowering Community Involvement

Referring to the presentation made by Lynda Lukasik, a participant noted that use of the Registry can evidently work well if there is community leadership. The salient question then becomes how to enable that leadership. They questioned the utility of intervenor funding by the government, likening it to a "bottomless pit", but could see the utility of proponent-funded intervenor funding of public participation.

A participant raised a key question: How best can we reach community networks with information about the Registry?

Exceptions for Environmental Assessments

A participant described a case in Hamilton where a major excavation of an old landfill site is proposed. This project has not been posted on the Registry because the landfill was originally approved under the *Environmental Assessment Act*. In addition to the lack of posting, there are no appeal rights in this case.

A member of the group suggested that a useful reform would be to require exception notices to be posted on the Registry where exceptions are being made for projects undergoing Environmental Assessments (s. 32).

SEVs

Performance Reporting

A participant argued that ministries should be encouraged to report on their progress using SEVs as a measure of their performance.

Mechanism for Updating

A number of group members spoke of the need for formal mechanisms for updating SEVs. Each ministry should periodically review, republish and recommit to their SEV, as environmental priorities may change over time or with changes of government. Current environmental priorities should be explicitly laid out in the revision to the SEV.

Province-Wide SEV

Participants discussed at length the idea of a province-wide Statement of Environmental Values. Key environmental values should transcend narrow ministry mandates. These key values could be enshrined in an over-arching province-wide SEV, and possibly be enshrined within the *EBR*. Underneath this umbrella, each ministry would have a SEV that reflects the differences in their day-to-day business, and these SEVs would drive day-to-day decision-making. As noted above, the ministry SEVs would need to change frequently, as ministry mandates evolve.

Linking SEVs to Environmental Conditions

A group member argued that to be effective, SEVs need to be linked to environmental conditions. It was suggested that this could be done through State of the Environment reporting, and that this would be an ideal function for the ECO to perform.

Sustainability as the Focus

A number of participants noted that sustainability rather than the environment should be the focus of the SEVs. In the ten years since the *EBR* was established, sustainability has been increasingly used as the framework and the prism used to effect change. The sustainability approach includes the environment but also includes economic and social components. It was argued that ministries should be doing their strategic planning based on a provincial sustainability vision -- using a 2004 lens, rather than a 1994 lens.

A member of the group noted that in some sectors, sustainability screens are already being used to help with decision-making. For example, the "triple-bottom-line" approach has been adopted by the City of Hamilton and by Dofasco, to mixed effect so far. As well, it was noted, sustainability plans are rising in importance at the Federal level. They used to be developed by junior staff, but are now high profile exercises. Though still far from reality, they are at least attempts to operationalize the ideals of sustainability.

Some participants raised concerns that using a sustainability approach would be too broad to have an impact. A question was also raised as to how a province-wide sustainability vision could mesh with the many thousands of site-specific Cs of A, all of which permit certain limited environmental impacts. In response, it was suggested that reforms need to take place at both levels: the policy at the top and the issuing of Cs of A at the bottom both need to be dealt with.

Net Environmental Gain

Participants raised the example of "net environmental gain" as a goal for SEVs. It was noted that the Toronto Region Conservation Authority recently developed a watershed management plan for Duffin's Creek that includes the goal of net environmental gain. It would be useful to consider what a concept like net environmental that could do at a provincial level as a guide to decision-making.

It was acknowledged by some participants that that in some specific instances, e.g. when you are dealing with a pristine local environment, it is hard to implement net environmental gain. In such circumstances, any kind of activity is going to degrade the environment.

SEVs and MOE Instruments

A group member noted that the MOE's SEV right now doesn't apply to MOE instruments. Accordingly, members of the public who try to invoke the SEV in their arguments are stopped cold at the Environmental Review Tribunal, because ministry lawyers say it simply does not apply. There were several ways suggested for how to spur on reform on this issue:

- through the ongoing *EBR* review initiated by the ECO;
- through the Provincial Budget review process, which so far is not considering SEVs; and
- through the new Parliamentary Assistant to MOE, who is charged with the greening of government and may be receptive to a review of SEVs.

Miscellaneous

A participant noted that he supported the requirement for ministries to provide the ECO with information that was contained in the ECO's Law Reform paper. They felt that this would strengthen the *EBR*.

A caution was raised regarding the idea of forcing mediation on parties in a dispute. A participant suggested that forced mediation can be very counter-productive. In addition, it is unclear whether the MOE has much expertise in providing mediation services.

Small Group Discussion: Legal Actions

The group was asked to address the following question:

With respect to the litigation rights under the *EBR* (the Right to Sue for Public Nuisance, the Right to Sue for Harm to a Public Resource, Whistleblower Provisions and Judicial Review):

- What are the key changes that need to be made to improve the *EBR* and its regulations?

Right to Sue for Harm to a Public Nuisance (s. 103)

Cost

The group focused most of its discussions on the issue of cost, as it was identified as the principal barrier to carrying out an action under section 103 of the *EBR*. A number of options were identified for dealing with the issue. These included:

- *Each party to pay own costs:* Canada adopted the English rule that loser pays winner's costs but in the U.S. each party bears its own costs. Changes could be made to Canadian legislation so that each party bears its own cost so they "don't have to sell the farm" if they lose. This could be done by adding a single sentence to the legislation saying that the *Courts of Justice Act* and the civil procedure rules don't apply. There could be a provision to say that a plaintiff would have to eat his/her own costs in cases deemed to be frivolous or vexatious.

- *Have a public interest group act:* The cost issue could be addressed by having a CELA-type public interest group take on actions under s. 103.

- *Have special attorney's fees:* In the U.S., citizen suits are often made possible through a special attorney's fee. If the group wins, the group can get attorney's cost fees.

- *Merge sections 103 and 84:* One strong section could be created by merging s. 103 and s. 84 and including cost immunity provisions.

- *Address the link between s. 103 and the Class Proceedings Act:* Addressing the link between s.103 and the *Class Proceedings Act* might be a way to deal with the transactional cost issue.

- *Create an EBR Action Fund:* An "*EBR* Action Fund" could be created, similar to the fund created by the Department of Justice so that Charter challenges on equality rights issues could be undertaken. An *EBR* Action

Fund would have to have two features: come from alternative sources of funding (i.e., not tax dollars); and it would have to have sufficient funds.

- *An ECO Fund:* The ECO should put in for an allocation, i.e. for $250,000 to be kept in a blind trust. It should fund two actions with this.

It should be noted that the group was not unanimous in its belief that special cost rules are needed. One participant argued "there is no good policy basis for special cost rules on s. 103 actions."

Class Proceedings Fund

A participant noted that it was troubling that the Class Proceeding Fund seemed to stop funding environmental class actions after *Hollick*. Another member of the group suggested that the judiciary did not appear to like this fund. The Class Proceedings Fund was provided by the Law Society, not government. The Fund ran into a practical problem when it ran out of funds early. The fund supported 15 actions (environmental and other actions) and took a cut when there was a successful case.

Right to Sue for Harm to a Public Resource (s. 84)

Begin again

Two participants argued that s. 84 is so flawed that it should be thrown out and law reform efforts should "start from scratch." Other jurisdictions have found ways of simply providing public access to the courts in situations where the public trust/resources needs to be protected. Another member of the group suggested that he would like to see s. 84(2) to s. 86 "excised" from the *EBR*

Cost

A number of participants agreed that costs are a major impediment to actions under s. 84 and need to be addressed. Unlike in s. 103 where there is a financial incentive, one cannot collect damages under s. 84 and therefore special cost rules are needed. As one participant put it, "Section 84 is the purest form of advocacy in the *EBR* and therefore it deserves the addition of these cost provisions." A number of comments were made on potential cost reforms:

- The Chief Justice could issue a special letter to direct all judges that plaintiffs in s. 84 cases do not have to pay the costs of defendants if the plaintiffs lose.
- A one-way cost rule should be used for all s. 84 actions, unless alleged contravention and harm to the resource are frivolous or vexatious. This would make for no-risk lawsuits for ENGOs.
- The cost award provisions should be put in through legislation. The courts have said that they won't award costs in public interest cases.

- In U.S. law, it is easier for public interest groups to get at costs for injunctions.
- There is precedent related to innovative cost rules under the *Consolidated Hearings Act*. A positive contribution to the process can result in a cost award to intervenors or parties, i.e., shifting cost burden to proponents is not foreign to this jurisdiction.

Not all members of the group agreed with major reforms to address cost barrier however. One participant noted that having too many incentives to s. 84 would create "bounty hunters". How much encouragement is really needed? It was suggested that we should proceed in an incremental fashion.

Damages

A member of the group noted that s. 84 does not allow damages and suggested that this could be added back in as well as changing the cost rule. It was also suggested that there should be a provision for damage award splitting, e.g. similar to the 50/50 bounty provisions in the *Fisheries Act.*

Requirement for application for investigation

A number of participants argued that the application for investigation requirement should be deleted from the *EBR* as a condition for a s. 84 action. However, a member of the group suggested that the right to request an investigation should remain intact, and the two should be decoupled.

Merging s. 84 and s. 103

A participant suggested that s. 84 and s.103 could be merged into one cause of action. This should be done in a way that makes it necessary to prove only one or the other requirement, i.e., plaintiff would have to prove either harm to a resource or the contravention of a statute but not both as is currently required by s. 84.

Injunctive relief

A member of the group noted that s.103 gives a private citizen the right to do what the Attorney General can already do. S. 84 does this in a much more cumbersome way. However, it was noted that the Attorney General can get injunctive relief and raised the question: Could this be added to the *EBR*? They suggested a statutory amendment to permit a person, other than the Attorney General, to bring an application for injunctive relief to prevent the continuance of a public nuisance. This type of authority is already given to municipalities under s. 433 of the *Municipal Act, 2001* in respect of seeking a court order to close a building whose activities constitute a public nuisance. This could be achieved through the *EBR* or the *Courts of Justice Act*.

Judicial Review

Privative clause

A participant suggested wholly removing the privative clause from the *EBR*. "We should give the court the discretion to decide if there is something they want to do."

Standard of review

A member of the group argued that the *EBR* should be clarified so that the standard of review for judicial reviews under the *EBR* is "correctness" (i.e. something is either right or wrong), not "patent unreasonableness."

Whistleblower Provisions

There was general agreement in the group that there is no need to change this part of the *EBR*.

Other

EBR timelines

A member of the group argued that there should be *EBR*-mandated timelines, e.g. it should contain a requirement for a five-year mandatory review of SEVs.

Offence section

A participant suggested that an offence section should be included in the *EBR*. This was not considered by the Task Force.

Substantive right to environmental quality

A member of the group argued that the *EBR* should be amended to provide a substantive right to environmental quality. "If it's a bill of rights, give a right to it!"

Expand the scope

A participant suggested that the *EBR* should not be restricted only to the natural environment and that it should be expanded to include indoor environments as there are serious problems with indoor pollution. An alternative approach would be to prescribe the *Occupational Health and Safety Act* as an Act under the *EBR*. This Act is currently not prescribed. In this scenario, the definition of environment in the *EBR* would also need to be amended.

Power of the ECO to require information

Participants generally agree that the Commissioner should be given the power to require information of produce documents relevant to matters under review by the ECO.

Power to subpoena witnesses

It was suggested that any citizen who has applied for an investigation should have the power to subpoena (i.e., the ECO should be able to delegate its power to subpoena witnesses and conduct examinations under oath). Another member of the group liked the suggestion that the ECO be able to delegate its subpoena powers but cautioned that the ECO must maintain the perception of independence.

Powers of the Commissioner

Participants suggested some additional powers that should be given to the ECO. The *EBR* should be amended to authorize the Commissioner to go to court on certain matters, undertake an investigation or a review or even stop orders. The ECO could also be involved in standard setting.

Structure of the ECO

A member of the group suggested that the ECO could be split in two like the Ontario Securities Commission with one arm that deals with investigations and tribunals and the other which would contain the current structure.

SEVs

A member of the group suggested scrapping the SEVs and including the concepts and principles expressed in them in the *EBR* legislation instead. Another participant noted that there is precedent for the inclusion of the precautionary principle in legislation in Canada. It applies in the context of pesticide re-registration in the federal *Pest Control Products Act*. The *EBR* should state that policies, Acts and regulations shall be consistent with certain principles.

Small Group Discussion: Leave to Appeal, Application for Review and Role of the ECO

The group was asked to address the following question:

With respect to Leave to Appeal, Application for Review and Role of the ECO:

- What are the key changes that need to be made to improve the *EBR* and its regulations?

Leave to Appeal

Time Frame for Leave to Appeal

Much discussion took place on the issue of time frames for Leave to Appeal. The group eventually developed a new model for the process as outlined below:

1. Potential Leave to Appeal applicants should have 15 days from the posting of the decision notice on the Registry and/or the date the direct notice is sent to anyone who has commented on the proposal notice to signal their interest in seeking Leave to Appeal. The reasons presented must be given but they can be presented in cursory fashion.

2. The ministry should have as much time as they need to make available the full record related to the file to the potential applicants for Leave to Appeal.

3. Potential Leave to Appeal applicants should then have 30 days from the time that they receive the full record from the Ministry to decide whether or not to file a Leave to Appeal and make an application.

Content of Registry Notices (Pre-Leave to Appeal)

Many in the group seemed to agree on the need for the *EBR* to be amended to require that Registry notices for instruments include the policy context that ministry staff used in the proposal or decision on an instrument. This is important because decisions sometimes rely on unofficial policies in ministry districts or on the Minister's statements in the legislature.

Participants also suggested that it should be a requirement to have the notice explain how the issuance of an instrument relates to a ministry's SEV. This is very important because the Leave to Appeal process can involve consideration of the policy context whereas "you can't judicially review policy".

On a related note, it was suggested that MOE's web site in particular should provide much better access to current policies. These policies should be easier to find and should be linked to the SEV.

Members of the group also identified a need to remove the inconsistencies in various descriptors used in Registry instrument notices, (e.g., type of undertaking – "waste disposal site" vs. "landfill"; business name – numbered vs. named company; geographic location; and, quantity – especially as it relates to measurement of water). An MOE counsel noted that the ministry is concerned about this issue and is looking into it.

Location of Notices

A participant suggested that the *EBR* should be amended to require the posting of notice on the site related to a potential instrument or proposed changes to an instrument, and not just a notice in a newspaper or on the Registry.

Test for Leave to Appeal

There were divergent views on this issue. Some in the group feel that the current wording is not a problem. Others, however, felt that the current test regarding the "reasonableness" of the Director is not a good one, and that the test for Leave to Appeal should be related to the issue at hand (i.e., it should relate to the reasonableness of the decision).

Participant Funding

The group discussed participant funding at length. One participant expressed a preference for a government-pay model but acknowledged that the participant funding issue is broader than Leave to Appeal. Many people in the group agreed that participant funding was essential to enhance input into decision-making. There was general agreement that tight criteria should be used for accessing participant funding, but there was no consensus on where in the *EBR* process it should be made available. One member of the group noted that the provision for participant funding requires an additional step beyond what is now used for a decision/adjudication. There was a brief discussion about interim cost awards under Leave to Appeal, but the group did not seem to prefer this model.

Written Hearings

In response to a question from a member of the Environmental Review Tribunal (ERT), the group discussed the idea of whether it would be useful to have something more than written hearings in the Leave to Appeal process. For example, the ideas of oral presentations and teleconferences were raised.

There was a general feeling in the group that there was no need to change the *EBR* in this regard. It was suggested that the ERT could ensure that their

procedures speak to the issue, for example, by leaving the door open for a Board member to ask written questions of clarification. Regarding teleconferences or oral hearings, people felt that they should not be used except in exceptional cases. The sentiment expressed was that it is not useful to "raise the bar" and go beyond the prima facie case because then the decision on Leave to Appeal applications could become more like the actual hearing.

There was also some discussion of the time frame the ERT has for reaching a decision on a Leave to Appeal and whether or not the time should be extended. There was no consensus on the issue. Some options for addressing the issue include extending the time frame allowed or providing the ERT with the discretion to extend the time frame as needed.

Application for Review

Two possible reforms were suggested:

- The Request for Review process should be amended to accommodate a written "question and answer" format, similar to that used for the federal petition process with the Commissioner of Environment and Sustainable Development.
- There should be a reduction in the amount of information required up front in the application.

Role of the ECO

Role and Mandate

A number of changes were suggested involving the role and mandate of the ECO. These included:

- The ECO should be given more explicit powers to look at issues. These powers need to be clearer and more direct, including the role of policy review.
- The ECO should have the option of carrying out State of the Environment reporting.
- The *EBR* should be amended to require ministry cooperation with the ECO.
- The ECO should have the ability to comment on legislation affecting its mandate (as the Information and Privacy Commissioner can).
- The ECO should increase the amount of outreach it does on the *EBR*.
- The Commissioner should have a Deputy Minister level salary to ensure parity in his role.

Selection of the Commissioner

A participant expressed concern that the governing party has a greater say on the committee selecting the Commissioner than do other parties. They suggested that there should be an equal number of members from each party on the selection committee.

Another member of the group argued that there should be public input or participation into the selection of the Commissioner. Otherwise, they argued, the selection process is not in keeping with the accountability, public participation and transparency goals of the *EBR*.

Key Themes and Observations

There was a general feeling at the workshop that Ontario's *Environmental Bill of Rights* has achieved in part what it was created to do, but that it also has numerous failings that should be addressed. As one participant put it, "this workshop is a good place to begin."

Participants identified a number of ways in which the "front end of the *EBR* process" can be improved through such actions as more complete postings and improved notice. Concrete recommendations were also made on how to improve the SEV process through performance reporting and mandatory updating. The notion of a province-wide SEV was raised to provide province-wide direction in environmental decision-making.

Participants supported the work of the ECO, especially in the areas of reporting, education and special powers. It was suggested by some participants that the ECO's powers should be broadened and identified a number of areas in which they felt reforms would be useful.

A "new" model for Leave to Appeal was developed that addressed the time and information constraints that are currently a barrier to seeking Leave. Reforms were also suggested to improve Applications for Review. The issue of participant funding was discussed and many participants agreed on the need for reforms in this area.

There were many suggestions made on how the current litigation rights under the *EBR* should be reformed. In some cases, participants suggested minor reforms; in others, they suggested major surgery.

In all, there was an astonishing amount and breadth of ideas and suggestions put forward. The many ideas for law reform spoke to a number of key challenges:

- making it easier to understand the *EBR*;
- making it easier to access information;
- increasing the quality of the information available;
- making it easier to launch court actions;
- increasing the likelihood of success in court actions; and
- increasing government accountability.

Collectively, the package of ideas put forward by workshop participants contains a wealth of potential reforms that would help make it easier for the public to have a positive effect on the environment.

Next Steps

Commissioner Gord Miller thanked the participants for their hard work, thoughtfulness and creativity during the workshop. He remarked on the broad range of advice heard on virtually every aspect of the *Environmental Bill of Rights* and noted that the input received would be very useful to him as part of the ECO's 10-Year Review process. He finished off by saying that the output of the workshop would be documented in a Meeting Report, which would be circulated to all participants.

Facilitator, Joanna Kidd thanked the panelists, note-takers, facilitators and primary organizers, David McRobert and Maureen Carter-Whitney. She thanked all attendees for sharing their day and their thoughts with the ECO and adjourned the meeting.

Appendices to this report are available by contacting the ECO.