

## **ONTARIO'S ENVIRONMENTAL BILL OF RIGHTS: CANADIAN ENVIRONMENTAL LAW ASSOCIATION, DAVID SUZUKI FOUNDATION, AND ECOJUSTICE PRIORITIES FOR REFORM**

The Ministry of Environment and Climate Change is currently finalizing its review of Ontario's *Environmental Bill of Rights, 1993* ("EBR"). Our position is that the EBR is a fundamentally important law that improves transparency and public participation in decision-making. However, at 24 years old it is in serious need of reform to bring it up to speed with legal developments in Canada and abroad.

The current review of the EBR was conducted in response to applications for review filed by Ecojustice and the Canadian Environmental Law Association in 2010. This list summarizes the most important legislative changes needed to improve Ontario's EBR. More detailed submissions outlining our organizations' respective recommendations were filed as part of the review.

**1. Substantive right to a healthy environment:** The EBR should be amended to provide explicitly that all Ontario residents have an enforceable right to a healthy environment and standing to enforce that right before a designated court or tribunal. The provision should ensure that enforcement of this right is affordable; for example, by limiting costs awards against applicants who seek a remedy in good faith.

Experience in other countries has shown that government recognition of citizens' right to a healthy environment leads to improved environmental performance and greater public participation in decision-making. It does not adversely impact economic performance or lead to a flood of litigation.

As part of the current consultation process, more than 19,000 Ontarians wrote to express support for inclusion of the right to a healthy environment in the EBR. Polling in 2016 demonstrates that 97% of Ontarians support the right to clean air and water.

**2. Improved government transparency:** In order to meaningfully exercise their rights to participate in environmental decision-making, people need access to information that is the basis of a government proposal. Unfortunately, experience has shown that members of the public often have difficulty in accessing such information. Therefore, the EBR should state that notwithstanding the *Freedom of Information and Protection of Privacy Act*, everyone has the right to access information needed to use effectively any of the rights available under the Act. We have also recommended that sections 15 and 16 of the EBR be amended to provide at least 60 days for the public to submit comments.

Section 32 of the EBR contains an "EA exception", such that section 22 (public notice of proposals) does not apply to proposals subject to Ontario's *Environmental Assessment Act*. At

the time the EBR was passed, it was appropriate to exempt proposals subject to the *EA Act* because such proposals were subject to robust consultation under that Act. However, as a result of amendments to the *EA Act* that is no longer the case. To promote transparency and public engagement, section 32 should be repealed or, alternatively, amended such that the exception applies only where the undertaking in question has been subject to a public hearing as part of the environmental assessment process.

**3. Improved access to justice:** The EBR provides that Ontarians can seek leave to appeal certain decisions to the Environmental Review Tribunal (“ERT”). However, the test for granting leave is extremely hard to meet and the deadline for filing an appeal is a mere 15 days. These two factors create a significant barrier to the meaningful exercise of appeal rights under the EBR.

For this reason, we have called for amendments to section 38 of the EBR removing the requirement for leave to appeal decisions or, alternatively, making the test less restrictive. We have also called for amendments to section 41 to extend to the deadline for seeking leave to 30 days.

Finally, to ensure that appeal rights result in meaningful resolution of disputes, we have recommended that where an application for leave to appeal is filed, the decision at issue is automatically stayed pending the outcome of the application. This would be subject to the ERT’s discretion to lift the stay in appropriate circumstances.

In addition to the right to seek leave to appeal to the ERT, the EBR contains a number of provisions aimed at ensuring government accountability for achieving the goals of the EBR. Recommendations to enhance these mechanisms include repealing sections 37 (effect of failure to comply with Part II of the EBR) and 118 (no judicial review) of the EBR, and improving the tests for public nuisance actions (section 103) and civil action for harm to a public resource (sections 84-99). Public nuisance actions should be available to plaintiffs regardless of whether they have suffered direct loss or injury, and the EBR should contain citizen’s suit provisions in line with successful models from jurisdictions such as New South Wales and the United States. These tools would improve access to justice in the case of serious environmental harm and represent a disincentive for environmentally irresponsible behavior, while maintaining necessary legal checks and balances to ensure such suits are not brought on frivolous grounds.