

# Legal and Policy Tools for Source Water Protection in Indigenous Communities

## Legal Tool: Public Environmental Rights and Appeals Related to Source Waters

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## VII. Legal Tool: Environmental Rights

Throughout the series of workshops hosted in the communities, it was apparent that community members wanted to be informed of decision being made which could have a repercussive effect on the health and quality of their source waters and be provided the opportunity to comment.

This chapter details the environmental rights of all Ontario citizens. These rights are recognized in the *Environmental Bill of Rights* and exist to facilitate public participation in environmentally significant decisions with the aim of protecting, conserving and restoring the integrity of the environment. This chapter also provides a how-to guide on using Ontario's online Environmental Registry, where proposals are posted for public comment.

### 1. Overview of the Ontario Environmental Bill of Rights (EBR)

#### i. Purpose of the EBR

The *Environmental Bill of Rights*<sup>38</sup> (EBR) is a piece of legislation that seeks to protect, conserve and restore the integrity of the environment, to provide sustainability of the environment, and to protect the right of Ontario residents to a healthful environment.<sup>39</sup> In order to achieve these goals, the EBR provides legislative mechanisms for:

- Facilitating public participation in environmentally significant decisions by the Ontario government, such as providing comments on a proposal for a policy, Act, regulation or instrument; and submitting an Application of Investigation or Application for Review;
- Increasing the accountability of the Ontario government for its environmental decision-making;
- Increasing public access to the courts in order to protect the environment; and
- Enhancing protection for employees who take action in respect of environmental harm.<sup>40</sup>

#### ii. Application of the EBR

##### “Prescribed Ministries”

The EBR only applies to “environmentally significant” proposals by “prescribed” ministries. Prescribed ministries are those which are listed under regulation General, O. Reg. 73/94<sup>41</sup> under the EBR. Some ministries are only prescribed for certain parts of the EBR; for example, a ministry may be subject to the EBR public notice and consultation requirements and the Application for Review process, but not for the

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<sup>38</sup> Environmental Bill of Rights, 1993, S.O. 1993, c. 28 [EBR], online: <https://www.ontario.ca/laws/statute/93e28> [EBR]

<sup>39</sup> EBR, subsection 2(1)

<sup>40</sup> EBR, subsection 2(3)

<sup>41</sup> O. Reg. 73/94: GENERAL, under *Environmental Bill of Rights, 1993, S.O. 1993, c. 28*, online: <https://www.ontario.ca/laws/regulation/940073>

Application for Investigation process. The ministries to which the EBR applies may change from time to time. Currently, the ministries subject to the EBR are:

- Agriculture, Food and Rural Affairs (OMAFRA)
- Economic Development, Job Creation and Trade (MEDJCT)
- Education (EDU)
- Energy, Northern Development and Mines (MENDM)
- Environment, Conservation and Parks (MECP)
- Government and Consumer Services (MGCS)
- Health and Long-Term Care (MOHLTC)
- Indigenous Affairs (MIA)
- Infrastructure (MOI)
- Labour (MOL)
- Municipal Affairs and Housing (MMAH)
- Natural Resources and Forestry (MNRF)
- Tourism, Culture and Sport (MTCS)
- Transportation (MTO)
- Treasury Board Secretariat (TBS)

If a ministry is prescribed under the EBR, any environmentally significant policy or Act of that ministry is automatically subject to the EBR.<sup>42</sup> Proposals for environmentally significant regulations are only subject to the EBR if the enabling Act is prescribed under O. Reg 73/94.<sup>43</sup> Instruments (e.g. approvals, licenses and permits) are only subject to the EBR if they are listed in O. Reg 681/94, the Classification of Proposals for Instruments. Notice must be given for Class I, II, and III instruments.<sup>44</sup>

#### “Environmentally Significant”

It is up to the prescribed ministry to decide, on a case by case basis, whether a proposal for a policy, Act or regulation might significantly affect the environment. An effect can be either negative or positive outcome. The EBR provides some guidance to assist ministries in making this determination.<sup>45</sup>

Instruments that are determined by a ministry to have the potential to have a significant effect on the environment must be prescribed (listed) under the regulation, Classification of Proposals for Instruments, O. Reg. 681/94.<sup>46</sup>

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<sup>42</sup> EBR, subsection 15(1).

<sup>43</sup> EBR, subsection 16(1).

<sup>44</sup> EBR, subsection 22(1).

<sup>45</sup> EBR, section 14.

<sup>46</sup> *O. Reg. 681/94: Classification of Proposals for Instruments under Environmental Bill of Rights, 1993, S.O. 1993, c. 28*, online: <https://www.ontario.ca/laws/regulation/940681>

### **iii. Applying the “Statements of Environmental Values”**

The EBR also requires prescribed ministries to publicly prepare Statements of Environmental Values (SEVs) that explain how will integrate environmental values with social, economic and scientific considerations when they make environmentally significant decisions.<sup>47</sup> The Ministers of prescribed ministries have a mandatory duty under the EBR to take every reasonable step to ensure that the SEVs are considered whenever decisions that might significantly affect the environment are being made within the Ministries.<sup>48</sup>

### **iv. Tracking Proposals and Providing Comments: The Environmental Registry**

The EBR establishes the Environmental Registry, a searchable online database that provides public access to timely information about environmentally significant proposals and decisions made by the Ontario government.<sup>49</sup>

Prescribed ministries must give notice on the Environmental Registry when they propose to create new or amend existing environmentally significant policies, Acts, regulations under prescribed Acts, or prescribed instruments.<sup>50</sup> Ministries must also give an opportunity for the public to submit comments on such proposals.<sup>51</sup> When a ministry makes a decision about a proposal, it must post a notice on the Environmental Registry.

## **2. Exercising your Environmental Rights**

### **i. Public Notice & Comment Opportunities**

As explained above, the EBR gives the public the right to comment on certain proposed policies, Acts, regulations and instruments that are posted on the Environmental Registry. The “proposal notice” must provide a minimum of 30 days for the public to submit comments.<sup>52</sup>

For certain instrument proposals (i.e. Class II instruments, which have a higher potential effect on the environment) ministries are required to provide additional notice, longer comment periods and enhanced public participation.<sup>53</sup> The proposal notice summarizes the proposal and explains how to participate, the deadline by which comments must be submitted, where to send them, and where to get additional information. Submissions become part of the public record.<sup>54</sup>

There are certain exceptions to the requirement of posting a proposal. For example, proposals for policies or Acts that are predominantly financial or administrative in nature are exempt,<sup>55</sup> as are

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<sup>47</sup> EBR, section 7.

<sup>48</sup> EBR, section 11.

<sup>49</sup> Environmental Registry, online: [www.ebr.gov.on.ca](http://www.ebr.gov.on.ca)

<sup>50</sup> EBR, section 27.

<sup>51</sup> EBR, section 27.

<sup>52</sup> EBR, sections 15, 16, and 22.

<sup>53</sup> EBR, sections 22, 24, 25, and 28.

<sup>54</sup> EBR, section 27.

<sup>55</sup> EBR, section 16(2).

proposed amendments to or revocation of an instrument that in the minister's opinion will have an insignificant effect on the environment.<sup>56</sup> There is also an exception to requiring public notice and the opportunity to comment under an emergency that poses a serious risk of harm to a person, the environment, or property.<sup>57</sup> The minister can also circumvent the required notice period and opportunity to comment if in the minister's opinion, the proposal has already been considered in a process that is substantially equivalent to the public participation process under the EBR.<sup>58</sup>

When a ministry decides upon a proposal, it must post a "decision notice" on the Environmental Registry explaining the decision and describing the effect that the public's participation had, if any, on the ministry's decision. Ministries are required to consider any public comments before making a decision.<sup>59</sup> However, those who have provided comments will not receive a formal response from the Ministry.

Furthermore, a ministry is not required to make a decision on a particular proposal within a set time frame. Therefore, the Environmental Registry must be monitored for a decision notice.

## ***ii. Review outdated or ineffective environmental laws with an "Applications for Review"***

Under the EBR, any two Ontario residents can formally apply for reviews of outdated or ineffective environmental laws, regulations, policies or instruments on the grounds that they should be amended, repealed or revoked in order to protect the environment.<sup>60</sup> Similarly, any two Ontario residents can use this mechanism to apply for a review of the need for a new law, regulation or policy to protect the environment.<sup>61</sup>

Previously, applications for review were filed with the Environmental Commissioner, who in turn, forwarded a copy to the relevant ministry. Recent amendments to the EBR now require applications for review to be filed with the appropriate minister. The responsible minister must acknowledge receipt of the application for investigation within 20 days of receiving the application.<sup>62</sup> Within 60 days of receipt of the application, the relevant ministry must inform the applicants (with reasons) and the Auditor General whether the requested review will be conducted.<sup>63</sup> If the minister determines that it is in the public interest to conduct the review, the review must then be completed within a reasonable time.<sup>64</sup>

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<sup>56</sup> EBR, subsection 22(3).

<sup>57</sup> EBR, section 29.

<sup>58</sup> EBR, section 30.

<sup>59</sup> EBR, section 35.

<sup>60</sup> EBR, subsection 61(1).

<sup>61</sup> EBR, subsection 61(2).

<sup>62</sup> Bill 57, Restoring Trust, Transparency and Accountability Act, 2018, schedule 15, section 7.

<sup>63</sup> Bill 57, Restoring Trust, Transparency and Accountability Act, 2018, schedule 15, section 8.

<sup>64</sup> EBR, section 69.

### **iii. Investigate potential environmental offences with an “Application for Investigation”**

The EBR enables Ontarians to formally request an investigation of suspected environmental offences.<sup>65</sup> Previously, applications for investigation were filed with the Environmental Commissioner, who in turn, forwarded a copy to the relevant ministry. Recent amendments to the EBR now require applications for investigation to be filed with the minister responsible for the administration of the Act, regulation or instrument for an investigation by that minister of the alleged contravention. The responsible minister must acknowledge receipt of the application for investigation within 20 days of receiving the application.<sup>66</sup> If the minister decides not to investigate the matter, it must provide notice (with reasons) to the applicants and the Auditor General within 60 days of receipt of the application.<sup>67</sup>

The EBR specifies that ministries are not required to conduct an investigation where the application is frivolous or vexatious, or where the alleged contravention is not sufficiently serious or is unlikely to cause environmental harm.<sup>68</sup> If the investigation proceeds, the Ministry must generally complete it within 120 days, and advise the applicants and the Auditor General of the outcome of the investigation within 30 days of its completion.<sup>69</sup>

### **iv. Appeal a Ministers Decision to Issue a Licence, Permit and Approval**

The EBR includes an appeal mechanism that Ontarians can use to hold ministries accountable for their decisions in relation to prescribed instruments (e.g. licences, permits, and other approvals). In particular, Ontario residents can seek “leave” (i.e. permission) to appeal instrument decisions to an independent appellate body (i.e. Environmental Review Tribunal).<sup>70</sup>

The appellate body will consider two questions when deciding to grant leave: (1) whether it appears that there is good reason to believe that the decision is unreasonable, and (2) whether it appears that the decision could result in significant environmental harm.<sup>71</sup> Leave applications must be served and filed within 15 days after the date that notice of the instrument decision was posted on the Environmental Registry.<sup>72</sup> If leave is granted (in whole or in part), then a public hearing is held and the appellate body can uphold, vary or revoke the decision related to the prescribed instrument. Appealing a ministry decision on an instrument can take time, money and expertise, and you may wish to consult with a lawyer before undertaking an appeal.

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<sup>65</sup> EBR, section 74.

<sup>66</sup> Bill 57, Restoring Trust, Transparency and Accountability Act, 2018, schedule 15, section 9.

<sup>67</sup> Bill 57, Restoring Trust, Transparency and Accountability Act, 2018, schedule 15, section 10; EBR, section 78.

<sup>68</sup> EBR, section 77.

<sup>69</sup> EBR, section 80.

<sup>70</sup> EBR, section 38.

<sup>71</sup> EBR, section 41.

<sup>72</sup> EBR, section 40.

## **v. *The Right to Sue***

### Public Nuisance

The EBR allows any person to sue for damages or other personal remedies where they have suffered direct economic loss or personal injury as a result of a public nuisance causing environmental harm, without the consent of the Attorney General, or where persons have suffered the same kind or degree of loss and injury as the plaintiff.<sup>73</sup>

### Harm to a Public Resource

The EBR also creates a statutory cause of action which permits Ontarians to bring a civil action to protect “public resources”<sup>74</sup> against significant harm caused by a contravention of a prescribed Act, regulation or instrument.<sup>75</sup>

The filing of an application for investigation is generally, a precondition to triggering this cause of action to protect public resources.<sup>76</sup> This action cannot be framed as a class proceeding<sup>77</sup>, and certain defences (i.e. statutory authority, reasonable interpretation, etc.) are expressly recognized by the EBR.<sup>78</sup>

Plaintiffs utilizing this EBR-based cause of action should promptly serve a Statement of Claim upon the Attorney General of Ontario<sup>79</sup> and post an appropriate public notice on the Environmental Registry.<sup>80</sup> If the action is successful, the court may award costs, order declaratory or injunctive relief, or require the parties to negotiate a restoration plan; however, the court has no jurisdiction to award damages or other personal remedies under the EBR.<sup>81</sup> There is a two-year limitation period prescribed by the EBR in relation to this cause of action.<sup>82</sup>

## **vi. *Whistleblower Protection***

The EBR prohibits employers from taking “reprisals”<sup>83</sup> against employees on certain grounds prohibited by the EBR. In particular, employers are prohibited from taking reprisals merely because an employee, in good faith, exercised public participation rights under the EBR, applied for reviews or investigations under the EBR, or provided information or evidence to appropriate authorities or in proceedings under prescribed Acts.<sup>84</sup> Where such reprisal occurs, the employee may file a complaint with the Ontario

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<sup>73</sup> EBR, section 103.

<sup>74</sup> “Public resource” is defined as air, water, certain public lands greater than 5 hectares, and any associated plant life, animal life or ecological system: EBR, section 82.

<sup>75</sup> EBR, subsection 84(1).

<sup>76</sup> EBR, subsection 84(2).

<sup>77</sup> EBR, subsection 84(7).

<sup>78</sup> EBR, section 85.

<sup>79</sup> EBR, section 86.

<sup>80</sup> EBR, section 87.

<sup>81</sup> EBR, section 93.

<sup>82</sup> EBR, section 102.

<sup>83</sup> This term generally refers to acts such as dismissing, disciplining, penalizing, coercing, intimidating, or harassing employees: EBR, subsection 105(2).

<sup>84</sup> EBR, subsection 105(3).

Labour Relations Board, which is given various powers under the EBR (i.e. compensation, reinstatement, etc.) to remedy the situation.<sup>85</sup>

### **3. Other online resources for tracking approvals and permits**

Access Environment provides Ontarians with an online map-based tool for finding detailed information about environmental approvals and registrations in your local communities and to locate Ontario facilities on an interactive map.<sup>86</sup>

Using this map-based online tool, you can search for, Environmental Compliance Approvals (ECA), Renewable Energy Approvals (REA), and Environmental Activity and Sector Registry (EASR) registrations issued by the Ministry of the Environment and Climate Change from December 1999 onward.

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<sup>85</sup> EBR, section 110.

<sup>86</sup> Available online: <http://www.accessenvironment.ene.gov.on.ca/AEWeb/ae/GoSearch.action?search=help&lang=en>.