The *EBR* Litigation Rights: A Survey of Issues and Six-Year Review

A Background Paper for
the *EBR* Litigation Rights Workshop
May 25, 2000

This paper has been prepared for a workshop being hosted by the Environmental Commissioner of Ontario (ECO), to be held May 25, 2000 at Queen's Park. The purpose of the paper is to provide background information and promote discussion. The paper may be revised at a later date to reflect the comments advanced at the workshop. For this reason, it is still considered a working draft. It should not be cited or referenced without contacting the ECO beforehand. Any comments or questions regarding this paper should be directed to Legal staff at the ECO.

The *EBR* Litigation Rights: A Survey of Issues and Six-Year Review[1]

1.1: Introduction

Ontario's *Environmental Bill of Rights* (*EBR*), which is now six years old, sets out three ambitious goals: to protect, conserve and restore the integrity of the environment; to provide for the sustainability of the environment; and to protect the right to a healthful environment.[2] The *EBR* assigns the primary responsibility for achieving these goals to the government. However, it also provides residents with the right to initiate legal proceedings before the courts or an administrative tribunal in some cases. The purpose of this paper is to consider the use of these "litigation rights" over the course of the past six years. There are four main litigation rights contained in the EBR[3]:

- **Leave to Appeal**: grants residents the right to appeal certain decisions made by designated government ministries if it can be demonstrated that there is good reason to believe that the decision is unreasonable and could result in significant environmental harm.

- **Harm to a Public Resource Action**: enables residents to sue in court persons or corporations that have contravened, or will imminently contravene, environmental laws and caused, or will cause, harm to a public resource. Specific remedies are set out, including the granting of an injunction or a court-ordered restoration plan.

- **Public Nuisance Action**: expands the rights of individuals to sue under the common law right of public nuisance persons or corporations that are harming the environment. Plaintiffs are no longer required to obtain the Attorney General's permission to initiate such an action and are no longer required to demonstrate that they have suffered damages above and beyond that suffered by the general community.

- **Whistleblower Protection**: provides protection to employees who exercise their *EBR* rights from reprisals by their employers. Employees may bring a complaint to the Ontario Labour Relations Board (OLRB).

Since the *EBR* was proclaimed, 30 leave to appeal applications have been filed, although leave has only been granted in 8 of those cases. Two harm to a public resource actions and two public nuisance actions have been initiated in the courts. No whistleblower complaints have been filed with the OLRB. The infrequent use of three of the four litigation rights, along with the relatively low success rate on leave to appeal applications, raises the following questions:

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1. This paper was written by Paul McCulloch, Policy and Decision Analyst, and David McRobert, In-House Counsel and Senior Policy Analyst at the ECO. Karen Beattie and Maureen Carter-Whitney, Legal Analysts at the ECO, provided constructive comments and research support.

2. *Environmental Bill of Rights, 1993*, S.O. 1993, c.28, s. 2 [hereinafter *EBR*].

3. For the legal wording for each right, see the following sections of the *EBR*: leave to appeal - sections 37-48; harm to a public resource action - sections 82-102; public nuisance action - section 103; whistleblower protection - sections 104-116. Section 118 of the *EBR* also provides a limited right to seek judicial review of a minister's lack of action. However, it is anticipated that this section will rarely be used and it is not considered a "litigation" right as defined for the purposes of this paper.

- What experience to date has the public had in using the litigation rights?
- Are these rights being used in the manner envisioned by the drafters of the *EBR*?
- Are there additional legislative or administrative measures that need to be implemented to support/promote the use of these rights? Are there barriers that need to be removed?
- Is there a need for better education/public outreach to make residents, citizens' groups, and professionals aware of these rights?
- Are these rights resulting (directly or indirectly) in good environmental decision-making by the prescribed ministries?

This paper reviews the use of the litigation rights over the past six years in an attempt to explore these questions. The purpose of this review is to stimulate a broad discussion of the effectiveness of these rights in achieving the goals set out in the *EBR*. This paper does not attempt to draw definitive conclusions. Rather, each section ends with a list of issues that need to be discussed further in public fora. The outcome of these discussions could provide the basis for administrative and possibly legislative reform of the *EBR*, if necessary. The paper may also provide useful guidance to those who may want to use the litigation rights in the future.

1.2: General Background

This section of the paper reviews some key background information sources in order to analyze the intent of the legislators when they enacted the *EBR*. A fundamental theme that emerges from this review is that it was always intended that the *EBR* would provide both proactive and reactive measures for Ontario residents to become involved in environmental decision-making. Moreover, it is clear that the use of proactive measures was to be the primary means of implementing the goals of the *EBR*. The reactive measures were designed to provide a backstop for residents to take action when other means fail or when there are no other means available. The litigation rights fall into this category.

The *EBR* was originally developed by a tripartite task force composed of members representing business, government and environmental organizations. The Minister of the Environment established the Task Force on the Environmental Bill of Rights (the "Task Force") and asked the members to develop a consensus position on the purpose and content of an Environmental Bill of Rights. The Task Force did reach a consensus, releasing its report in June 1992. The report made 102 recommendations and included proposed text for a new act. In its report, the Task Force specifically considered various approaches for holding the government accountable for its environmental decisions.[4] A judicial approach permits individual citizens to apply to the courts or an administrative tribunal to review a government decision and to have that decision overturned. The Task Force rejected this as the primary approach in favour of "political" accountability. As the Co-Chair of the Task Force explained in June 1994:

> [The] approach of judicial accountability relied on individual citizens or environmental activists to come forward after learning of a suspected harm and urge our courts to grant injunctions to halt the activity. This placed a heavy onus not only on the citizens to do the investigative work, but a financial onus on members of the public to underwrite the cost of litigation. As this type of litigation is often scientifically

4. Task Force on the Ontario Environmental Bill of Rights, *Report of the Task Force on the Ontario Environmental Bill of Rights* (Toronto: Queen's Printer for Ontario, 1992), p. 66.

> complex, time consuming, expensive and fraught with risk, the financial consequences of losing would be enough to discourage even the most enthusiastic litigant. Similarly, those who were accused of causing environmental harm were not satisfied with judicial scrutiny of their activity, as the legal process was slow and expensive....It was this realization that produced a dramatic departure in the deliberations of the Task Force on Ontario's Environmental Bill of Rights.....It was not thought at any time that there would be no role for the courts in environmental protection, but it was hoped that the courts would be seen as a forum of last resort.[5]

The Task Force instead recommended that political accountability remain the primary means for residents to hold the government accountable for its environmental obligations. In order to make political accountability more effective, the Task Force recommended that the public be given specific rights to participate in the decision-making process. Specifically, Ontario residents were given the right to receive notice of and comment on proposed environmentally significant decisions. The Task Force further recommended that the Ontario government establish an Officer of the Legislative Assembly to be called the Environmental Commissioner to provide objective oversight of compliance with the *EBR* by government ministries so that residents would be adequately informed of the ministries' progress.

However, the Task Force recognized the need for judicial accountability in exceptional circumstances. The Task Force stated:

> The public participation system recommended by the Task Force does not prohibit the making of "poor" decisions. It does, however, make such decisions politically unwise. Is political accountability enough? The Task Force is of the opinion that in some circumstances political accountability may be insufficient. Government's failure to protect the environment and, in particular, our public resources, should involve more than political risk. It should result in the ability of the public to trigger an examination of the government's failure to protect the environment.[6]

This approach was carried forward by the then Minister of Environment and Energy, Bud Wildman, in introducing the *EBR* into the Legislature. During the Second Reading debates on the Bill, the former Minister stated:

> Again, one of the concerns that has been raised is that this might lead to a large number of cases and that there might indeed be frivolous attempts to tie up possible new developments in the courts. I emphasize that we don't believe this will be the case. In fact, we're confident that by involving members of the public from the very beginning of any approvals process or any changes by having the notification on the registry, by enabling people, groups and individuals, to take part at every stage and have input into approvals for development or changes in which they're interested, that there will be response to their concerns early on in the process so that they will not

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5. M.ichael Cochrane, *Overview of the EBR: Environmental Decision Making - Joint Responsibility, Public Participation and Political Accountability* in "The Environmental Bill of Rights: Practical Implications" conference proceedings, June 10, 1994 (Toronto: Canadian Bar Association, 1994), pp. 5-6, Tab 1.

6. Task Force on the Environmental Bill of Rights, *Report of the Task Force on the Environmental Bill of Rights* (Toronto: Queen's Printer for Ontario, 1992), pp. 83-4.

be dissatisfied and will be assured that the environment will be protected and so that we will not see an increase in the number of court cases.[7]

This underlying approach — that the government has primary responsibility for the protection of the environment and that the public has a right to participate in the decision-making process — was incorporated into the *EBR* in a number of ways. The *EBR* requires designated government ministries to set out environmental principles, referred to as the Statements of Environmental Values, that will be followed in making decisions while carrying out ministry functions. Ontario residents are provided with the right to participate in public environmental decision-making by requiring ministry decision-makers to solicit and consider public input into proposed decisions and to explain how this input is taken into account. The drafters of the *EBR* expected that increased public participation would result in environmental concerns over proposed decisions being addressed up front and better decisions being made.

Only if proactive means are unable or unavailable to deal with their concerns can residents use the litigation rights contained in the *EBR*. Two of the four rights include pre-conditions that generally must be taken before litigation may be initiated. The leave to appeal provisions encourage residents to comment on proposed actions by the government ministries in an attempt to have their concerns dealt with at the pre-approval stage.[8] If they still have outstanding concerns after the ministry has made its decision, initiating a leave to appeal remains as a secondary option. Similarly, in order to initiate a harm to a public resource action, a resident must first normally file an application for investigation and must receive an untimely or unreasonable response from the government before bringing the action.

It is with this background in mind that one must consider the effectiveness of the litigation rights. It was never the intention of the framers of the *EBR* that litigation would be the primary means of achieving its goals and purposes. The litigation rights were intended to empower residents to hold ministries accountable in instances where poor environmental decisions are made or to provide residents with a means to take action where the regulatory regime does not provide for proactive action. Moreover, the mere existence of these rights may have a significant impact on decision-making even if they are not actively invoked. Arguably, more attention may be placed on making decisions if the decision-maker knows that a law suit or other proceeding may be initiated if the decision is a poor one. Unfortunately, it is difficult to research and document evidence of this type of influence.

Issues for Discussion:

- Is the underlying approach of the *EBR* (that the litigation rights should be used only as a last resort) still appropriate?

- Are the litigation rights influencing environmental decision-making indirectly even when they are not being actively invoked?

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7. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 59, Third session, 35th Parliament (September 27, 1993), p. 3043.

8. While residents are not precluded from bringing an application for leave to appeal if they do not comment on the decision at the proposal stage, the *EBR* explicitly states that commenting on a proposed decision is evidence of interest in the decision, a key element in being granted standing by a tribunal.

2.1: The Right to Seek Leave to Appeal

(a) Background

The *EBR*'s leave to appeal (LTA) provisions were introduced to counteract a perceived imbalance in Ontario's pre-*EBR* environmental regulatory regime. Under this regime, individuals or companies (referred to as "proponents") that wish to carry out activities that discharge pollution or otherwise adversely affect the environment must obtain a permit or licence from the appropriate government ministry. These permits or licences are referred to as instruments under the *EBR*, examples of which include a certificate of approval (C of A) to discharge pollutants into the air, a permit to take water, or acceptance of a mine closure plan. Ministry staff must determine whether or not to issue instruments, what level of pollution or degradation may occur, and what terms and conditions will apply to the instrument. Most environmental statutes provide a right of appeal to proponents who are denied an instrument or are unsatisfied with its terms and conditions.

Before the introduction of the *EBR*, if a resident disagreed with a ministry's decision to issue an instrument, or was unsatisfied with the terms or conditions being placed on the proponent, there was no right of appeal. Only the proponent could appeal. The tribunal could allow residents to participate in the hearing. However, because this decision was left to the discretion of the panel member hearing the appeal, it was not a right.

The *EBR* entrenched a right of appeal for residents, although, unlike the situation faced by proponents, the right is not automatic. A resident must first be granted permission, or seek leave, to have the appeal heard. If the applicant is successful in obtaining leave to appeal, then a full *de novo*[9] appeal hearing will be held in the same manner as a proponent appeal. Some jurisdictions, notably British Columbia, have provided residents with an automatic right of appeal equivalent to that of proponents.[10] Ontario did not follow this example in enacting the *EBR*.

The LTA provisions do not apply to all government decisions. They apply only to instruments that (a) are prescribed, and (b) provide another person (usually the proponent) a right to appeal the decision. Prescribed instruments are set out in the instrument classification regulation passed under the *EBR*.[11] Before a decision is made to issue a prescribed instrument, it must be posted as a proposal on the Environmental Registry for at least 30 days to allow for public comment. Ministries are obligated to take these comments into account in making a decision, and must post a decision notice explaining how this was done. Once the decision is posted, residents must initiate an LTA application within 15 days. Most proponent appeals contain similar deadlines.

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9. A *de novo* appeal means that the persons hearing the appeal may consider any relevant evidence, including new evidence and make a decision as if they were in the shoes of the original decision-maker. Thus they may make the same decision or make an entirely different decision. This can be contrasted with other types of appeals where the persons hearing the appeal may only consider the evidence that was before the original decision-makers and in some cases may be limited either to upholding the decision or sending it back for reconsideration by the original decision-maker.

10. *Waste Management Act*, S.B.C. 1982, c. 41, s. 44.

11. O. Reg 681/94, as amended.

(b) Summary Statistics on the Use of the LTA Provisions

Thirty LTA applications have been filed since decisions on prescribed instruments were first made and posted on the Registry in late 1994.[12] During this time, approximately 9,000 decisions were posted on the Registry, constituting an appeal rate of 0.33 percent (or 1 in every 300 decisions on prescribed instruments were subject to an application for leave to appeal). All of these applications involved instruments issued by the Ministry of the Environment (MOE) and were brought before the Environmental Appeal Board (EAB). Applications may also be brought before the Mining and Land Commissioner and the Ontario Municipal Board in the future.[13] Furthermore, other tribunals may become involved once the Ministry of Natural Resources (MNR) files its Instrument Classification Regulation. Whether other tribunals will follow the approach developed by the EAB in dealing with LTA applications is yet to be determined.

The 30 LTA applications filed with the EAB have been resolved as follows:

- 4 were withdrawn before a decision on the LTA request was rendered
- 2 were not filed within the 15-day time period and were denied
- 16 were denied
- 8 were granted

Therefore, the success rate on obtaining LTA, for cases that were not withdrawn and were filed within the required time limits, is 33% (8 of 24).

(c) The Leave to Appeal Test

The test for obtaining leave to appeal is very demanding. The criteria are set out in section 41 of the *EBR*.

41. Leave to appeal a decision shall not be granted unless it appears to the appellate body that,

(a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and

(b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

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12. This is the number of instruments that have been appealed, not the number of applications. There have actually been 52 applications filed with the EAB as of March 31, 2000. However, many of these appeals involve applications filed by more than one party concerning the same instrument. In these situations, the ECO considers these applications together as one appeal. The Environmental Appeal Board typically renders one decision in cases where there is more than one applicant.

13. Note that it is unlikely that an instrument issued under the *Planning Act* will be subject to an LTA application before the OMB because, under the *Planning Act*, residents may file an appeal as a right without having to seek leave. There is thus no reason for residents to avail themselves to the LTA provisions of the *EBR*. Note also that any resident may also ask an issuing director to reconsider a variance issued under the *Gasoline Handling Act* (a prescribed instrument under the *EBR*). However, this process is informal and will not be treated as an official leave to appeal.

The stringency of the test reflects the desire of the EBR Task Force to create a right that would be used only when there is a "failure" in government decision-making. The LTA procedure was not designed to provide residents with a routine opportunity to second-guess decision-makers.

Various EAB decisions have provided further interpretation of this test. In the first decision released by the EAB, the Board accepted the argument put forth by the proponent that the onus was on the applicant to prove on the balance of probabilities that the decision-maker had acted unreasonably.[14] However, in later decisions, the standard that an applicant must meet was made less stringent. The Board adopted the "serious question" test,[15] where an applicant must show that the evidence raises a serious question about or has preliminary merits in regard to the criteria set out in section 41 of the *EBR*, but does not need to actually prove this on the balance of probabilities. In a later case, this test was recast as "persuading the Board that their concerns have a real foundation."[16] Since the EAB lowered the threshold for LTA applications, a greater percentage have succeeded.[17]

The question for consideration is whether the EAB's interpretation of the section 41 test is consistent with the goals and purposes of the *EBR*. This interpretation tries to strike a balance between the need for a stringent test on the one hand and recognizing that leave to appeal is only a preliminary step on the other. Proving that a ministry decision-maker acted unreasonably on the balance of probabilities at a preliminary stage is a daunting task. The less exacting threshold of "raising a serious question" still provides residents with an attainable standard for questioning a decision they believe to be seriously flawed without opening the floodgates to numerous frivolous appeals. The success rate in obtaining leave to appeal (33%) would not encourage these types of appeals.

The rate of settlement in cases where leave has been granted is informative. Of the eight instances in which leave has been granted, five have settled without a hearing. Two other cases were withdrawn when the appellants no longer wished to pursue their appeals. Only one case has proceeded to a complete *de novo* hearing once leave has been granted.[18] In that case, the applicant's appeal was denied.[19] The high rate of settlement supports the position that the LTA process is working to catch "failures" in decision-making. The "second sober look" forced by the granting of leave to appeal has resulted in the ministry and the proponent agreeing to changes to the terms and conditions contained in the instruments that take into account the concerns of the applicants.

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14. *Re Hunter* (1995), 18 C.E.L.R. (N.S.) 22 (Ont. Env. App. Bd.), p. 28.

15. *Re Barker* (1996), 20 C.E.L.R. (N.S.) 72 (Ont. Env. App. Bd.), 79-81; *Re Residents Against Co. Pollution Inc.* (1996), 20 C.E.L.R. (N.S.) 97 (Ont. Env. App. Bd.), pp. 112-114.

16. *Re Knowles* (1997), 26 C.E.L.R. (N.S.) 71 (Ont. Env. App. Bd.), p. 74.

17. Of the 10 LTA applications considered by the Board in 1995 and 96, only 2 (20%) were granted leave. Of the 10 LTA applications considered in 1998 and 99, 4 (40%) were granted leave. However, due to the small number of cases involved, this is merely an observation, not a statistically significant conclusion.

18. An appeal hearing was initiated in the *Re Residents Against Co. Pollution* case (*supra* note 15), but the parties reached an agreement partway through the hearing. The remainder of the hearing was cancelled once the settlement was finalized.

19. *Kolodziejski v. Director, Ministry of the Environment* (April 10, 1999), File 99-127 (Ont. Env. App. Bd.).

The number of LTA applications can be compared to the number of proponent appeals. As noted above, 30 LTA applications have been filed in five years. During the same time period, 64 proponents have filed appeals for prescribed instruments, outnumbering LTA applications approximately 2 to 1. Proponents are not required to seek leave to appeal, but are granted an automatic right of appeal under the relevant legislation as long as they file an appeal within the required deadlines. The greater number of proponent appeals may indicate that the single-step appeal process invites appeals. However, the higher rate could also be explained by the fact that proponents have a direct stake (i.e. monetary) in the outcome of the decision-making process.

Therefore, changing the LTA test could have important implications. A less stringent test may result in more appeals being filed, with the benefit that more ministry decisions would be scrutinized more closely by independent tribunals. However, the final outcome of these appeals may ultimately not be as productive because the need to present a very strong case from the outset would be missing. It may result in more frivolous appeals being filed, with the disadvantage being that more ministry staff and resources would be allocated to resolving appeals as opposed to working on abatement issues. If the LTA test were to be made more stringent, the rate of success on LTA applications may decrease below its current rate of 33%. Too low a success rate may provide a strong disincentive to potential applicants to pursuing a leave to appeal, resulting in a lack of scrutiny of ministry decision-making. In thinking about the future of the *EBR*, these factors need to be considered in determining whether the section 41 test as currently interpreted is appropriate.

(d) Procedural Issues

A number of procedural issues have been raised through the 30 LTA applications that have been filed. Some procedural aspects of the LTA process are clearly set out in the *EBR*. Other aspects are not explained, leaving each tribunal to adapt its own procedures to accommodate the new appeal procedure.[20]

One of the first issues raised was whether the appeal tribunal may grant partial leave to appeal. In most instances, an applicant will contest specific terms and conditions contained within the approval, based upon several grounds. The *EBR* simply states that leave to appeal is to be granted if the applicant meets the test set out in section 41. It is silent as to whether this enables the tribunal to grant leave on specific issues or whether, once it has been determined that leave ought to be granted, the entire approval may be revisited at the appeal hearing. Thus far, the EAB has taken the position that it has the power to grant partial leave. In fact, in most cases in which leave has been granted, the Board has granted only partial leave.

The tight deadlines set out for the LTA process raises further issues. The applicants are required to submit their LTA application within 15 days of the decision being made and posted on the Environmental Registry. The *EBR* does not stipulate what information must be included in a leave application. Many applicants have submitted a wide range of materials, including affidavits, scientific studies, background reports, and government policies, all of which must be compiled within a very short time. Some applications have ended up being quite large (several volumes). These materials must be served upon the EAB, the ECO, the applicable ministry, and the proponent. Under the *EBR*, the tribunal has no discretion to extend the 15 day time limit under extenuating circumstances.

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20. See section 46 of the *EBR*.

A related issue is disclosure of information. In order to initiate an appeal, an applicant requires access to the relevant information. In some instances, the Ministry of the Environment has required applicants to obtain information by making an application under the *Freedom of Information and Protection of Privacy Act*. Unfortunately, the Freedom of Information (FOI) process may take many months, especially if either the applicant or the proponent initiates an appeal to the Information and Privacy Commissioner (IPC). In one case, the IPC ordered disclosure of information related to the issuance of a prescribed instrument that was subject to the right to comment and leave to appeal provisions of the *EBR*.[21]

The LTA process might be more effective if there were mandatory disclosure requirements for LTA applications. Currently, residents must contact the local MOE Director, and attempt to obtain paper copies of documents, while the 15 day LTA period is running. A positive development in this regard is that MOE is now providing electronic copies of documents for decisions on some instruments, such as permits to take water issued under section 34 of the *Ontario Water Resources Act*. This enables residents to obtain copies of the instruments very quickly. The ECO has encouraged the ministries to provide electronic copies of decision documents in the near future.

The ministry and the proponent have the opportunity to submit a response to the LTA application. Some applicants have expressed concern that the ministry and/or proponent responses have raised new issues or contained information that was unavailable to them within the initial 15-day time period, and they have asked for a right to reply to the responses. The EAB takes the position that applicants must obtain Board approval to submit a reply, explaining what new issues were raised in the responses that were not contemplated in the application. Other tribunals may take a different stand on this issue. This raises the question as to whether there should be a consistent policy for *EBR* leave to appeals across all tribunals.

The tribunal is required to make its decision on the LTA application within 30 days of the application being filed. Unlike the 15-day time limit faced by applicants, this time limit is set out by regulation, not by the *EBR*, and the tribunal may extend the time period "because of unusual circumstances." The EAB has rarely been able to meet this time limit because the parties are unable to provide all the information required in a timely manner. It takes the EAB, on average, approximately 50 days to render a decision. This suggests that the 30-day time period is unrealistic and may place undue pressure on tribunals and the parties to complete the exchange of documents required for a written hearing, possibly to the detriment of the consideration of the merits of the case.

A further issue that arises is whether tribunals should have the statutory power to award costs on LTA applications. At present, the EAB does not have the power to award costs to parties in either leave to appeal cases or proponent appeals.[22] In one decision, an EAB member expressed an opinion that costs would have been awarded against the LTA applicant if the Board had the power

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21. *Notice of Order PO-1688 (Ministry of the Environment)*, (June 16, 1999), Appeal PA-980244-1 (Information and Privacy Commissioner/Ontario).

22. The Environmental Assessment Board, established under the *Environmental Assessment Act*, does have the power to award costs. This sometimes creates confusion because the Appeal Board and the Assessment Board have merged for administrative purposes and most board members are cross-appointed to each board. However, the two boards are still two distinct legal entities for the time being.

to do so.[23] If the Board were given the power to award costs, a basis for making such awards would be required. The Board could use the "costs follow the result" rule which is used by the courts, where it is assumed that the unsuccessful party would pay some of the successful party's costs. The Board could also follow the rule used by some tribunals, such as the Ontario Municipal Board, where costs are only awarded when one party acted in an unreasonable manner. The value of providing tribunals with the power to award costs would be to deter frivolous or vexatious appeals. The concern is whether it would deter some applicants from pursuing meritorious cases. The amount of time and effort required to file an application for leave to appeal is in itself a significant deterrent to filing an appeal. The relatively small number of LTA applications filed each year suggests that few frivolous appeals are being initiated. However, if the LTA test were to be made less stringent, it may warrant the need to grant the power to award costs.

Finally, in cases where leave to appeal is granted, the instrument subject to the appeal is stayed until the appeal is completed and a decision is rendered. This may impose a significant burden on proponents because they may not be able to operate without the instrument, causing a loss of revenue, or seriously delaying the construction of a facility. Section 42 of the *EBR* does empower the tribunal to grant relief from the operation of the stay. However, the proponent must apply for this relief, which may take valuable time. In some cases, the proponent has been able to negotiate with the successful LTA applicant to agree to the lifting of the stay until the hearing is heard. Other proponents have included a motion to lift the stay along with their submissions on the merits of the LTA application. This motion is conditional in that the tribunal is asked to consider the motion only if the panel member decides to grant leave to appeal. The tribunal may then consider the motion to lift the stay simultaneously with the decision to grant leave to appeal. If the panel member grants both leave to appeal and the motion, the proponent will not be subject to a shutdown in operations. Otherwise, the section of the *EBR* that provides for the stay could be qualified. The onus could be shifted to the applicant to demonstrate the need for the stay or the stay could take effect only where, in the opinion of the tribunal, there is the potential for immediate harm to the environment if the instrument were not stayed.

(e) Summary

As outlined above, there are important questions surrounding the use of the LTA provisions. Now that the LTA test has been subject to interpretation, it is time to consider whether it is working as first envisioned. There are also numerous procedural issues that have arisen. Some of these procedural issues could be addressed without legislative change. One important exception is the power to award costs. This power would need to be conferred upon the various tribunals by way of legislation. However, for other procedural issues, the *EBR* provides for procedural aspects of the LTA process to be set out in regulations.[24] One such regulation has been passed, O. Reg. 73/94. Section 17 of this regulation dictates that LTA hearings shall be conducted in writing, unless the tribunal orders otherwise. New provisions could be added to this regulation to address some of the concerns raised above. Similarly, under the *Statutory Powers Procedures Act*, each tribunal has the power to make rules governing its procedures and could make rules that apply specifically to the LTA

23. *Northwatch v. Director, Ministry of the Environment* (July 23, 1999), File 98-125 (Ont. Env. App. Bd.).

24. Section 121, subsections (p) to (t), of the *EBR*.

process.[25]

Issues for Discussion:

- **!** Is the test for granting leave to appeal still appropriate, or should it be made more or less stringent?

- **!** Does the leave to appeal procedure need to be amended or further articulated under the *EBR*, its regulations, or tribunals' procedural rules? This could include:
  - giving tribunals explicit authority to grant partial leave to appeal
  - altering current deadlines or empowering tribunals to extend deadlines
  - granting applicants a definitive right of reply
  - adding a requirement for disclosure of information
  - giving tribunals the power to award costs under the *EBR*
  - removing or making conditional the operation of the stay on the instrument where leave to appeal is granted

2.2: Harm to a Public Resource Action

(a) Background

The *EBR* creates a new statutory cause of action that enables residents to go to court to protect the environment. Prior to the *EBR*, an individual could initiate a civil action only under limited circumstances to seek redress for environmental harm (see the discussion of nuisance below). Typically, it was left to the state to take action against those who cause environmental harm, either by way of a quasi-criminal prosecution, administrative action, or civil lawsuit. In instances where the government failed to take action, there were few options open to residents. The harm to a public resource action now provides residents with a means of taking action to protect the environment through the civil courts.[26]

There are two preconditions that must be met before a harm to a public resource action can be initiated. First, the defendants must have contravened, or will imminently contravene, a prescribed environmental statute, regulation, or instrument. If the defendants are acting in accordance with the law, then they are immune from a harm to a public resource action, regardless of whether there is some harm being caused.[27]

Second, the plaintiff generally must first file an *EBR* application for investigation. If the relevant ministry conducts the investigation and takes appropriate action against the perpetrator, then there is no need for the plaintiff to pursue a harm to a public resource action lawsuit. Only if the

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25. The EAB has passed a set of general rules and practice directions that apply to all hearings, including leave to appeal applications. A specific practice direction concerning the leave to appeal process has also been published.

26. See sections 82-102 of the *EBR*.

27. However, the defendant may still be liable under common law actions of nuisance and negligence.

plaintiff can demonstrate that the government has failed to respond to the application for investigation in a timely or reasonable manner may the plaintiff initiate a harm to a public resource action. A plaintiff does not have to file an application for investigation first where it can be demonstrate that the delay involved would result in significant harm to the environment or where the plaintiff alleges that the defendant will imminently contravene an environmental law.

The plaintiff must include facts in the Statement of Claim that satisfy these two preconditions. Once the Statement of Claim is filed, the harm to a public resource action may proceed as any civil action would in accordance with the rules of civil procedure, with a few notable differences. The *EBR* prohibits the court from awarding damages to a successful plaintiff. Instead, the court may require that a restoration plan be developed or negotiated. Once approved, the court may then order the defendant to implement the plan. Failure to comply with the plan would constitute contempt of court. The harm to a public resource provisions of the *EBR* do not alter the general rule on costs in civil proceedings that the costs follow the consequences. There is provision made for the court to consider "any special circumstances, including whether the action is a test case or raises a novel point of law." Nevertheless, the discretion ultimately remains with the individual judge to decide whether or not to award costs in each case.

Thus far, only two harm to a public resource actions have been initiated.[28] In the first action, the plaintiffs allege that an illegal waste tire dump is leaking contaminants into the subsoil, groundwater, and surface water in the surrounding vicinity. They want the dump cleaned up and the contamination remediated. The plaintiffs reside on the adjacent property and thus have a private interest in the matter. They also plead other causes of action, including nuisance and negligence. On the basis of these causes of action, the plaintiffs are also seeking damages in excess of one million dollars. Also noteworthy is that the plaintiffs did not file a request for investigation. They relied upon the exemption that allows the plaintiff to proceed where a delay in filing an investigation would result in significant harm to a public resource.

The plaintiffs in the second action are two individuals who own property adjacent to a ski resort. The defendant is a District Board of Health Unit that issued a certificate of approval to the ski resort for a sewage system. The plaintiffs maintain that the defendant was negligent in issuing the certificate of approval because the sewage system was substandard and incapable of handling the expected loads. The plaintiffs further allege that in negligently issuing the permit, the defendant allowed excessive amounts of contaminants, including phosphates and bacteria, to pollute their property and the surrounding natural environment. In addition to the harm to a public resource action, the plaintiffs also rely upon the following causes of action: negligence, nuisance, and the public nuisance action provisions of the *EBR*. In their Statement of Claim, the plaintiffs, relying upon the negligence and nuisance causes of action, seek full compensation for their damages. They did not specifically request a restoration plan be developed as provided for under the *EBR*.

The plaintiffs did file an *EBR* application for investigation prior to initiating the lawsuit. The Ministry of the Environment (MOE) turned down the application, stating that "the concerns raised in the application with respect to issuance of the approval, even if proven to have occurred, would not constitute a 'contravention,' by the health unit, of legislation administered by MOE." The

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28. *Braeker et al. v. The Queen et al.*, action filed in Ontario Superior Court, Owen Sound, July 27/1998, File no. 3332/98; *Brennan v. Board of Health for the Simcoe County District Health Unit*, action filed in Ontario Superior Court, Barrie, July 16/1999, File no. 99-B222.

plaintiffs have proceeded with the harm to a public resource action after receiving this response, implying that they consider it to be unreasonable.

(b) Evaluating the Harm to a Public Resource Action

In evaluating the use of the harm to a public resource action, the first question that arises is why only two suits have been initiated over the course of the last six years. Part of the explanation lies in satisfying the precondition that the plaintiff file an application for investigation and receive a response from the ministry. Few investigations were filed and completed during the first two years under the *EBR*. Now that close to 100 investigations have been filed, more applicants may be in a position to commence a lawsuit. Some observers have also suggested that the threat of a lawsuit may have compelled ministries to take applications for investigation very seriously, undertake detailed investigations where warranted and respond accordingly. As described in the ECO's four annual reports, the ministries have undertaken thorough investigations in some cases, although the ECO has also documented cases where the ministries have provided poor responses.

Another likely reason for the small number of the harm to a public resource actions is that plaintiffs are deterred by the time and costs associated with bringing an action. Plaintiffs cannot be awarded damages and are likely to recoup only some of their costs if the suit is successful. These factors may be a significant deterrent to individuals initiating an action. It appears likely that a plaintiff could end up being out of pocket at the end of the process, not to mention the significant time that would be required to see the process through submitting an application for investigation, awaiting a response, filing a statement of claim, completing discovery, and finally persisting through the trial. In addition, there is always the possibility of appeals. It may be unreasonable to expect someone to make this sacrifice, especially where there is no possibility of full recompense.

If this view is accepted, it may be necessary to provide greater incentives to potential plaintiffs. A unique example is provided by the federal *Fisheries Act*. A regulation passed under the Act provides for half of any fines levied against a guilty defendant to be shared between the Crown and an individual where the individual lays the charge against the defendant.[29] The Northwest Territories *Environmental Rights Act* contains a similar provision.[30] As the *EBR* involves a civil proceeding, it cannot provide for the levying of fines if a harm to a public resource action is successful. A similar incentive would need to be provided such as empowering the court to award punitive damages against the defendant, payable to the plaintiff.

Some means of compensating plaintiffs for their time and disbursements may also make the action more attractive. More attractive cost provisions is one possibility. The *EBR* could explicitly require that a successful plaintiff be awarded solicitor and client costs unless there is good reason not to, changing the assumption that a successful plaintiff receives only party and party costs. The *EBR* could also emulate Ontario's *Class Proceedings Act, 1992*, which provides an incentive to the plaintiffs' counsel. If the action is successful, the solicitor may apply to the court to have his or her fee increased by a multiplier that represents the risk incurred in undertaking and continuing the proceeding on a contingency basis.[31] It is interesting to note that a harm to a public resource action

29. *Fisheries Act*, R.S.C. 1985, c. F-14, s. 85; *Fishery (General) Regulations*, SOR/93-53, s. 62.

30. S.N.W.T. 1990, c. C. 38., s. 5(2).

31. S.O. 1992, c.6., s. 33.

may not be conducted as a class proceeding, taking away this incentive.[32]

Class proceedings provide a second innovative example of removing financial barriers to litigation. When the *Class Proceedings Act* was passed, the *Law Society Act* was also amended to create a fund to support class actions.[33] The purpose of the fund is to make monies available to support plaintiffs who initiate a class action. The fund is self-sustaining in that, once established, 10% of any awards or settlements resulting from a class action is returned to the fund. The class proceeding fund was initially endowed with $500,000 by the Law Foundation. A similar fund could be considered for the harm to a public resource action.

Another possible impediment to an individual undertaking a harm to a public resource action is the three defences provided to the defendant under section 85 of the *EBR*. The defendant may demonstrate that the alleged contravention was authorized by law, that the defendant acted with due diligence, or that the defendant acted on the basis of a reasonable interpretation of the legal instrument. A potential plaintiff would need a great deal of information about the defendant, information that may require expert advice in order to interpret, to know whether or not any of these defences would be applicable. The plaintiff would not be able to obtain the information necessary to evaluate the strength of the defendant's defence until the discovery stage of the lawsuit, making the lawsuit a risky prospect.

The harm to a public resource action shares some characteristics with a private prosecution. Similar to the *EBR*, private prosecutions provide citizens with an opportunity to take action when they believe government action to be inadequate. However, there are important differences between the two.[34] The harm to a public resource action requires the plaintiff to prove the merits of the case on the lower standard of proof for a civil action (balance of probabilities) as compared to the higher standard in a criminal proceeding (reasonable doubt). The public resource action also provides an opportunity for the plaintiff to recover costs of the action. There are only limited cost provisions in a criminal proceeding. Finally, a public resource action explicitly empowers the court to order a restoration plan be implemented.[35] The disadvantage is that a harm to a public resource action generally takes more time and costs to proceed to trial. Furthermore, the plaintiff may be required to pay the defendant's costs if harm to a public resource action is unsuccessful.

At least six prominent private prosecutions involving environmental offences have been commenced since the *EBR* was enacted.[36] One of these prosecutions was initiated under the

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32. Section 84(7) of the *EBR*.

33. *Law Society Act*, R.S.O. 1990, c. L.8, s. 59.1to 59.5.

34. Paul Muldoon and Rick Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery Publications Ltd), p. 154.

35. Some environmental statutes do give the court general powers to make orders. The powers have been used to issue remedial orders. However, the *EBR* makes this power explicit and requires the defendant to attempt to negotiate the contents of the plan with the plaintiff.

36. *Fletcher v. Kingston (City)* (1998), 28 C.E.L.R. (N.S.) 229 (Ont. Prov. Ct.); *Perks v. R.* (1998), 26 C.E.L.R. (N.S.) 251(Ont. Gen. Div); The four cases currently before the courts are: *R. v. United Aggregates Ltd. (1999)*, 31 C.E.L.R.S (N.S.) 258 (Ont. Ct. of Justice) (alleging that the accused operated a quarry without the proper permit; *Fletcher v. Her Majesty the Queen in Right of Ontario* (Minister of the Environment), information

Fisheries Act and resulted in a conviction and a significant fine being imposed upon the defendant. The private prosecutor was entitled to half of the fine. The second private prosecution was withdrawn by the Crown. The other four are currently before the courts. The fact that these actions proceeded by way of a private prosecution may indicate that it is a more attractive option to a potential plaintiff/prosecutor despite the apparent advantages that the *EBR* harm to a public resource action provides.

(c) Summary

The small number of the harm to a public resource actions initiated may simply reflect the fact that the *EBR* is only six years old. As more applications for investigation are filed, and individuals become more experienced and comfortable with the *EBR* and its processes, more harm to a public resource actions may be initiated in the future. On the other hand, there is reason to believe, as outlined above, that the conditions and the time and effort necessary to sustain an action may be too onerous for the average plaintiff. Further incentives may be needed to make the harm to a public resource action an effective tool in promoting the goals of the *EBR*.

Issues for Discussion:

- Is it appropriate that only two harm to a public resource actions have been initiated over the course of the last six years?
- Are the preconditions to bringing a harm to a public resource action too onerous?
- Is there a need to provide further incentives to plaintiffs to initiate public resource actions, such as solicitor-client cost awards, removal of adverse cost awards, compensation for time, and punitive damages?
- Are the defences provided for under section 85 of the *EBR* appropriate?
- What are the important differences between a private prosecution and a harm to a public resource action? Why would a potential plaintiff or private prosecutor elect to proceed with one and not the other?

2.3: Public Nuisance Action

The common law cause of action known as public nuisance is one of the oldest known "environmental" rights. This longstanding cause of action enables individuals to sue those who unreasonably interfere with the use and enjoyment of public resources. In the 18th and 19th centuries, it was used successfully to address a number of environmental concerns, including interference caused by discharges of pollution to air and water. Public nuisance is distinct from private nuisance. A

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filed in Belleville on November 17, 1997 (alleging that the abandoned Deloro Mine site, now owned by MOE, is seeping arsenic into the Moira River); *Adams v. Her Majesty the Queen in Right of Ontario*, information filed in Belleville on November 20, 1998 (alleging that the abandoned Deloro Mine site, now owned by MOE, is discharging radiation into the environment); *Lukasik v. The City of Hamilton*, information filed in Hamilton on November 10, 1999 (alleging that the old Rennie Street Landfill site now operated as a public works yard by the City of Hamilton, is leaking PCBs into the Red Hill Creek).

private nuisance action may be initiated only by those whose use and enjoyment of property (or other similar interest) is unreasonably interfered with. Public nuisance is potentially wider in scope because it may be commenced by those who have an economic or personal interest in a public resource, not just their own property.

Prior to the *EBR*, potential plaintiffs to a public nuisance action were required to demonstrate that they had standing to bring the action. Standing could be shown either by obtaining the permission of the Attorney General to bring the action or by demonstrating that the plaintiffs had suffered some special or particular damage over and above that sustained by the public at large.[37] These requirements often proved to be a significant obstacle. Section 103 of the *EBR* removed these requirements from the public nuisance cause of action with the expectation that more individuals would be inclined to commence a public nuisance action to protect the environment.

Thus far, the ECO is aware of only two actions that have been commenced that rely upon the new *EBR* public nuisance provisions.[38] The first involves allegations that the operator of a municipal water works is providing contaminated drinking water and the second involves allegations of nuisance impacts from a landfill site. Both cases have been initiated as class actions. This has resulted in procedural motions in both instances related to the class certification process which have delayed the trials.[39] Thus the substantive elements of the public nuisance aspects of these cases have not yet been addressed judicially.

Many of the problems discussed above in relation to harm to a public resource actions also apply to public nuisance actions. Any court proceeding will entail significant costs for the plaintiff, both monetary and in terms of time and energy. These costs may also act as a deterrent to initiating a public nuisance action. However, there is a significant difference in that a public nuisance action can result in damages being awarded to the plaintiff, while the harm to a public resource action cannot.

It is also important to note that section 103 of the *EBR* places certain constraints on a public nuisance action. The action is limited to persons who have "suffered or may suffer direct economic loss or direct personal injury" as a result of a public nuisance that caused harm to the environment. The use of the word "direct" in section 103 probably excludes many would-be plaintiffs who observe environmental harm but whose only interest is in protecting the environment.

There may be other *EBR* public nuisance actions currently before the Ontario courts that the ECO is unaware of. There is no requirement that plaintiffs serve the ECO with their statement of claim, as required under the *EBR* for harm to a public resource actions. Similarly, there are no

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37. Mario D. Faieta et al., *Environmental Harm: Civil Actions and Compensation* (Toronto: Butterworths, 1996), p. 56.

38. *Grace v. The Corporation of the Town of Fort Erie et al.*, action filed in Ontario Court (General Division), Welland, August 22, 1997, File No. 8684/97; *Hollick v. the Corporation of the Municipality of Metropolitan Toronto*, action filed in Ontario Court (General Division), Whitby, February 3, 1997, File No. 78604/97.

39. The plaintiff in the *Hollick* case is currently seeking leave to have a decision of the Ontario Court of Appeal heard by the Supreme Court of Canada. For the Court of Appeal decision, see *Hollick v. Metropolitan Toronto (Municipality)* (1998), 32 C.E.L.R.S (N.S.) 1 (Ont. C. A.).

statistics on the number of public nuisance cases that were filed in the courts in the years previous to the enactment of the *EBR*. Therefore, it is difficult to assess whether two cases in six years is an appropriate number of cases or whether the public nuisance provisions have been used as expected.

Issues for Discussion:

- Are two public nuisance cases in six years an appropriate number of cases?

- Are the potential monetary and other costs involved in initiating a public nuisance action too great? Is there a need to provide financial incentives to plaintiffs?

- Should public nuisance actions be limited to those who have suffered a direct economic loss or personal injury?

2.4: Protection from Employer Reprisals

(a) Background

Employees are likely to have detailed knowledge of the environmental activities of private sector companies and public sector organizations. Employees who work at these places may know about, have witnessed or even been forced to participate in spills, unsafe practices or violations of environmental laws. They may also disagree with the manner in which their employer intends to proceed with an environmentally significant activity. Employees have the same rights as all Ontarians to use the *EBR*. They can formally comment on a proposal, seek leave to appeal a decision, or apply for a review or investigation. The *EBR* encourages employees to use the public participation provisions by providing safeguards for them if their employers retaliate against them for exercising their *EBR* rights.[40] These safeguards are known as the "whistleblower" provisions.

Before the *EBR* was enacted, the Ontario government had recognized the importance of providing whistleblower protection for employees who wanted to report on contraventions of environmental laws. In 1983, the Ontario government amended the *Environmental Protection Act (EPA)* to provide whistleblower protection for employees who wanted to report violations of the *EPA*, the *Fisheries Act*, the *Ontario Water Resources Act (OWRA)*, the *Pesticides Act* or the *Environmental Assessment Act (EAA)*.[41] The *EBR* expands basic whistleblower provisions in the *EPA* to apply to all acts, regulations and instruments prescribed under the *EBR*. This means that employees who may be aware of contraventions of prescribed acts such as the *Crown Forest Sustainability Act* (MNR) or the *Gasoline Handling Act* (MCCR) are now protected from employer reprisals. It also protects employees when they exercise any of their rights under the *EBR*, not just for reporting a contravention.

The Environmental Bill of Rights Task Force recommended that once the *EBR* was enacted, the *EPA* whistleblower provisions should be repealed. However, this never occurred and both the *EPA* and *EBR* provisions are now concurrently in effect. It should be noted that the *EPA* does

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40. See Part VII of the *EBR*, section 104 to 116.

41. See *Environmental Protection Act*, R.S.O. c. E. 19, s. 174.

contain a general offence provision.[42] It is arguable that an employer who contravenes the whistleblower protections of the *EPA* could be prosecuted under this section in addition to being subject to a complaint filed with the Ontario Labour Relations Board. The *EBR* does not contain a general offence provision. Therefore, the *EPA*'s whistleblower provisions may provide a legal remedy that the *EBR* does not.

Section 50 of the *Occupational Health and Safety Act* (*OHSA*) also contains a whistleblower provision that is analogous to the whistleblower provisions in the *EBR* and the *EPA*. However, section 50 applies only to reprisals by employers against employees who are complying with or seeking the enforcement of the *OHSA*.[43] The *Canadian Environmental Protection Act* also contains employee protection provisions. Section 37 provides for an employee's name to be kept confidential upon making a report of the commission of an offence and further provides protection to the employee from employer reprisals. Up until this year, this section applied only to government employees.[44] However, under the new *CEPA* that was partially proclaimed in March 2000, the new employee protection provisions apply to all employees.[45]

Numerous federal laws in the United States also include protection from employer reprisal provisions, including the *Clean Air Act*, *The Comprehensive Environmental Response, Compensation and Liability Act (Superfund)*, and the *Toxic Substances Control Act*. Each law contains its own administrative or judicial rules to deal with complaints from employees who allege that they have been disciplined as a result of disclosures they have made, or actions that they have taken in accordance with the particular federal statute. Like the *EBR* and the *EPA*, these provisions generally provide for reinstatement and compensation for an employee who has been subjected to retaliation.

Although they are worded differently, Part VII of the *EBR* and Section 174 of the *EPA* achieve the same purpose of affording protection from employer reprisals to employees who comply with or seek the enforcement of environmental protection legislation. Under both Acts an employee may file a complaint in writing to the OLRB alleging that an employer has taken reprisals against the employee on a prohibited ground. The *EBR* does not set out a specific procedure for handling whistleblower complaints. The OLRB has indicated to the ECO that the usual procedures for OLRB complaints would apply. The OLRB ruled in 1985 that MOE may, with the consent of the OLRB, participate in a hearing under the *EPA* provisions.[46] This may indicate that ministries would be allowed to participate in a hearing conducted under the analogous provisions in the *EBR*, although this would have to be decided on a case by case basis.

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42. *EPA*, s. 186.

43. In 1998-99, the OLRB reported there were 87 new whistleblower complaints and 50 complaints pending related to alleged non-enforcement of *OHSA*. See Ontario Labour Relations Board, *Annual Report for 1998-1999* (Toronto: Queen's Printer, 1999). Four applications were granted, 61 were settled, 17 were dismissed, and 11 were postponed indefinitely during the OLRB reporting period. The remaining complaints are pending for the year 1999-2000.

44. *Canadian Environmental Protection Act*, R.S.C. c. 16 (4th Supp.), s. 37(4).

45. There are a number of employer reprisal provisions in the new *CEPA*. See, for example, *Canadian Environmental Protection Act*, S. C. c. , section 16.

46. *Kraan v. Custom Muffler Ltd.* (1985), O.L.R.B. Reports, October 1985, 1461.

Upon receiving a complaint, the OLRB may authorize a labour relations officer to inquire into the complaint, or the OLRB may hold an inquiry into the complaint, or both, or neither. It is important to note that the wording of both the *EBR* and the *EPA* is permissive with respect to whether the OLRB must conduct an inquiry about a whistleblower dispute. Also, the OLRB's Rules of Procedure allow the OLRB to dismiss an application without a hearing where the application does not make out a case for the remedy requested. Thus, it is possible that complaints filed with the OLRB under the *EBR* or the *EPA* might be dismissed. If the Board completes an inquiry and finds that there has been a reprisal against an employee, the Board may make an order directing the employer to cease its reprisal, reinstate the employee (with or without compensation), or compensate the employee for lost earnings or other benefits.

The *EBR* whistleblower provisions have not been used. However, between 1983 and 2000, the OLRB has dealt with at least five whistleblower applications under the *EPA*. In two cases, the employers were ordered to pay lost earnings to employees who had provided information about their employers' improper activities to MOE.[47] The third case was withdrawn. In a fourth case, a seasonal employee who had buried tanks for his former employer was found not to be an employee at the time the employer made inappropriate remarks to the employee about future employment opportunities.[48]

A fifth case was dismissed by the OLRB in 1990 because of delays.[49] At least two additional complaints under the *EPA* were received by the OLRB since 1989 for which there are no decisions reported in the OLRB Reports.[50] These complaints were settled, withdrawn, or dismissed without a hearing.

(b) Why Have the EBR Whistleblower Provisions Not Been Used?

It is difficult to assess how effective the *EPA* and *EBR* have been because relatively few cases have actually proceeded to a hearing. Some have argued that cases may never arise because employers have changed their policies to encourage internal whistleblowing, and refrain from retaliating against whistle blowers. This type of argument would be bolstered by evidence about the growth of awareness of environmental issues in many workplaces, and the increasing adoption of environmental management systems such as ISO 14000 by companies.

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47. *Mohindra v. Bakelite Thermostats Ltd.*, [1990] O.L.R.B. Rep.; and *Allan Marshall and Varnicolour Chemical Ltd. (Re)*, 1991, O.L.R.B. Special Report, p. 711. In *Mohindra*, the company was ordered to pay the complainant full compensation for all earnings lost between the date he was fired and the date he obtained new employment.

48. *Duxbury & Valliancourt Construction Ltd.* (Re) (1995), 18 C.E.L.R. (N.S.) 49. In this case, a loader operator was laid off and replaced by an employee with more seniority but less experience as an operator. Some time later, the complainant told an MOE investigator that he had buried tanks for his employer. The employer was later charged and convicted of related environmental offences. Before his trial, the owner of the company told the complainant that future work would depend on what happened at trial. The complainant brought a s. 174 complaint to the OLRB. The application was dismissed by the OLRB because there was no employment relationship at the time the complainant gave his statements to the MOE investigator. For further discussion, see Ramani Nadarajah, "Whistle Blowers: Seasonal Employees and Their Rights Under the *EPA*," *Intervenor*, September/October 1995, p. 4,8.

49. *Armtec Inc. (Re)*, April 12, 1990, unreported (O.L.R.B.).

50. Ontario Labour Relations Board, *Annual Report for 1992-1993 and 1993-1994* (1995). Toronto: Queen's Printer.

Some lawyers argue that rights such as the whistleblower provisions in the *EBR* work to prevent reprisals against employees. In this way they are like the provisions in the *Ontario Human Rights Code* because a large percentage of the time the Code provisions work reasonably well to encourage anti-discriminatory behaviour on the part of employers and employees in workplaces.[51] The human rights cases that are raised with the Ontario Human Rights Commission are those where the prevention mechanism did not work or the parties were unable to resolve their dispute without the intervention of the OHRC. A key factor ensuring the success of the prevention system is education of employees, employers and their lawyers so they are all aware of their rights and obligations.

The ECO is aware of at least one application for investigation that was filed by employees against their employer (related to waste management activities and a contravention of O. Reg. 102/94 of the 3Rs regulations). The ECO is not aware of any reprisals against the employees who had prepared and submitted that application. In this case, the application resulted in compliance and enforcement actions by MOE. ECO staff have spoken to other employees over the past six years who were fearful of reprisals, and notes in staff files show that copies of the OLRB application forms were forwarded to the employees. However, no complaints have ever been filed with the OLRB. It seems probable that some employees have commented on proposals for instruments sought by their employers that are posted on the Registry. However, it is impossible for the ECO to track this kind of activity because individuals who provide comments on proposals probably do not indicate that they are employed by proponents.

There is evidence that a growing number of private corporations are establishing their own disclosure policies to encourage employees to raise their concerns about illegality or wrongdoing through internal mechanisms.[52] These internal disclosure programs are usually developed as part of the company's code of ethics. In large companies, these programs may include hotlines, ombudspersons and other formal investigation procedures. Employees are encouraged to disclose wrongdoing through these channels. In some cases, internal whistleblowers are provided with special recognition by management. While many companies are known to have environmental provisions in their codes of ethics, it is unclear how widespread this type of practice could be. A crucial part of any of these disclosure programs is a guarantee of protection for employees who, in good faith, provide evidence of suspected wrongdoing to management. Companies prefer internal whistleblowing because it gives management a chance to correct the problem and avoid negative publicity. Employees also avoid some of the stress associated with launching a public whistleblower action.

Another key issue to consider in analyzing experience with the use of the whistleblower provisions under the *EBR* is the current power relationship between Ontario employers and employees. Some observers argue that employees feel that it is unrealistic to challenge employers because they fear the repercussions of doing so on long-term job security and career advancement. The situation has been exacerbated by declining job opportunities in certain sectors, and a growing shift by employers toward hiring workers on a contract or part-time basis, making them feel more vulnerable. Some of the consequences of whistleblowing can be extremely daunting and include:

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51. The Code also works to prevent disputes between various other actors in Ontario society (e.g., tenants and landlords).

52. Marcia Miceli and Janet P. Near, *Blowing the Whistle* (Boston: Lexington Books, 1992).

- Negative publicity for the employer and/or the whistle blower.
- Career advancement will be severely limited, either by the former employer if the complainant is reinstated or by a new employer if the new employer worries about a future similar episode.
- The whistleblowing actions may cause serious physical and emotional upheaval for many employees and the employer and poison workplace relationships.
- Pursuing a complaint at the OLRB will require time and energy and the complainant will not be compensated until the end of the hearing.

The statutory provisions in the *EBR* may thus be perceived as ineffective by potential whistleblowers. In particular, the remedies they provide, such as reinstatement and/or back pay, may be viewed as weak in comparison to the potential consequences the whistle blower may suffer.

In unionized workplaces, collective agreements often contain provisions related to employee whistleblowing about occupational health and environmental issues. These collective agreements may contain extensive procedures for employees to raise concerns about management or workplace practices with members of a Joint Health and Safety Committee (made up of workers and managers) or an Environment Committee. In these types of unionized workplaces, employees are more likely to use these processes than rely upon the *EBR* whistleblower provisions.

(c) Summary

In trying to understand why the whistleblower provisions have not been used, some have argued that employer compliance with environmental laws has improved, decreasing the need for whistleblowing. On the other hand, it may be that the whistleblower provisions are ineffective for the range of reasons outlined above.

Issues for Discussion:

- **!** Are the *EBR* whistleblower provisions working indirectly by discouraging employers from taking reprisal action?

- **!** Are some employees, particularly in non-unionized settings, apprehensive about reporting contraventions of environmental statutes by their employers due to the potential repercussions, despite the whistleblower provisions in the *EBR*?

- **!** Are employers developing their own internal disclosure practices which are pre-empting the *EBR* whistleblower provisions?

3.1: Education and the *EBR*

One question that pervades the discussion of the *EBR* litigation rights is the extent to which most people in Ontario understand their rights under the *EBR*. To date, the ECO has not commissioned a research study or polling exercise designed to answer this question. If it turns out that few people are aware of their rights under the *EBR*, it would provide a further explanation as to why the *EBR* litigation rights are not being used extensively. It would also suggest that the ECO may need to re-evaluate its educational activities.

The ECO has a statutory mandate to carry out educational activities. During the past six years, the Commissioner and ECO staff have made hundreds of presentations to large and small groups across the province, including Rotary Clubs, municipal councils, chambers of commerce, community groups, conference participants, labour unions, and faculty members and students at Ontario high schools, colleges and universities. The ECO has also made limited efforts to educate professionals such as lawyers and planners. In 1995 and 1996, the ECO made presentations to county law associations in Ontario. In addition, staff have participated as speakers in conferences and workshops when invited by various organizations.

The ECO also handles approximately 1,000 requests a year for information about the *EBR*. ECO staff have produced 16 different fact sheets on a wide range of topics and approximately 2,500 of these were distributed in 1998. The fact sheets that cover the litigation rights have proven to be among the most popular.[53] The ECO has also published a user's guide entitled "Ontario's EBR and You," which briefly describes all aspects of the *EBR*, including the litigation rights. The user's guide has recently been revised and the second edition was published in April 2000.

In addition, the Environmental Appeal Board carries out educational activities regarding the right to seek leave to appeal under the *EBR*. The EAB produces a brochure explaining the steps involved in applying for leave to appeal. Furthermore, the Board maintains a comprehensive Web site that contains information about the LTA process.

However, the ECO's educational mandate is limited to providing information and assistance only. The ECO cannot provide what amounts to legal advice to residents or advice on how to use the *EBR* rights strategically. This would conflict with the ECO's duty to evaluate the use of the rights under the *EBR* and remain independent and impartial. Upon receiving requests for such advice, the ECO suggests that individuals hire their own legal counsel or refers individuals to a legal clinic funded by the Ontario legal aid plan.

Issues for Discussion:

- Are there other types of educational activities that the ECO should be undertaking? Should the ECO target more professional groups and associations? How should the ECO communicate with these audiences?

- Where should the ECO be directing individuals who are seeking strategic or legal advice in regard to the *EBR*?

3.2: Concluding Remarks

After just six years, the *EBR* is still a relatively new statute. As users gain more experience and become more comfortable with the *EBR*, the nuances of many of its provisions will become more apparent. There may be a need to fine-tune some of the rights contained in the *EBR*, perhaps with

53. The number of individual fact sheets distributed in 1998: ECONOTE 4 (Leave to Appeal) - 194; ECONOTE 7 (Harm to a Public Resource Action) - 256; ECONOTE 8 (Public Nuisance) - 240; ECONOTE 9 (Employer Reprisals - 170). The average number of individual fact sheets distributed in 1998 for all 16 fact sheets was between 75-100.

simple administrative changes. Other rights or processes may require a more in-depth overhaul, including legislative change.

The ECO is mandated to review the use of the litigation rights and report its findings to the Legislature. The Task Force contemplated that the ECO would make recommendations for improvement to or changes to the litigation rights.[54] This discussion paper is a step in that direction. The feedback received from this paper, and a workshop to be held in May 2000, will inform the ECO's review of the *EBR*. The ECO will report its findings to the Legislative Assembly through its annual reporting function.

54. See, for example, page 50 of the Task Force Report, *supra* note 4.