

# **EXPLORING THE EXERCISE OF PARTICIPATORY RIGHTS AS MEANS OF ENVIRONMENTAL PROTECTION**

The Ontario Environmental Bill of Rights

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“The Court recognizes that the environment is not an abstraction but represents the living space, the quality of life, and the very health of human beings, including generations unborn.”

~ International Court of Justice, Advisory Opinion of 8 July 1996<sup>1</sup>

“When governments fail to meet their obligation to safeguard the environment, citizens should be able to hold them accountable...The proposed Environmental Bill of Rights is a unique piece of legislation that gives people unprecedented new power to protect the environment.”

~ Ontario Environment Minister Ruth Grier upon releasing the Draft Environmental Bill of Rights, 8 July 1992<sup>2</sup>

“It took years for me to learn about [these] matters, and I’m still learning. Members of the public wanting to use the Environmental Bill of Rights and [Registry] for the first time would find their learning curve rather steep and daunting. They need fortitude to see it through.”

~ Environmentalist Ken McRae on his experiences using the Environmental Bill of Rights, 20 March 2006<sup>3</sup>

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<sup>1</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996)

<sup>2</sup> *Environment Minister Ruth Grier Releases Draft Environmental Bill of Rights* (1992)

<sup>3</sup> McRae (2006)

## **Abstract**

The *Environmental Bill of Rights (EBR)* adopted in 1994 by the province of Ontario, Canada empowers members of the public with participatory rights in environmental decision-making. This thesis evaluates the *de facto* situation of public participation rights held within the *EBR* and focuses in particular on the notice and comment procedures.

Evaluation of the effectiveness of the participatory provisions held within the *EBR* is based on qualitative findings from interviews with individuals who have been involved in environmental campaigns. The focus of this thesis rests in the participatory processes entrenched for the purposes of environmental protection rather than environmental protection outcomes. The research question asks: does public participation facilitate the environmental protection goals of the *EBR* by considering the factors which respondents identified as having affected the exercise of the rights held within the *EBR*.

The thesis concludes that the *EBR* successfully provides the basis for a system of participatory rights in environmental decision-making despite the barriers identified by this research study. A number of recommendations are suggested to reduce these barriers. The recommendations focus on (1) improving access for individuals with resource constraints, (2) improved access to information, (3) improving proactive engagement by government officials, (4) enabling access to experts, and (5) increasing education and awareness about the *EBR* and Environmental Commissioner of Ontario. These recommendations would further strengthen participatory rights in environmental decision-making under the *EBR* to make access to such processes more feasible for the public.

## **Acknowledgements**

I would like to extend my sincere appreciation to the individuals who were willing to share with me their experiences with the *Environmental Bill of Rights* in Ontario. Their insight into the effectiveness of this instrument has been invaluable to my research. I appreciate the great deal of time they were willing to extend, and the thoroughness with which they answered my questions. They, along with many others are the ones who are involved in the fight for environmental protection in their communities and I would like to express my appreciation for their efforts. They include Brenda Johnson, Darrel Leonard, Lynda Lukasik, Ken McRae, and Heather Webb. Also, to Charlie Angus, Quentin Chiotti, Kevin Gamble, Aaron Isherwood for their contributions. Finally, I extend sincere thanks to David McRobert at the ECO for sharing his wealth of knowledge and resources, and for being willing to give me feedback on drafts of this paper.

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Oslo, 22 May 2006

*Lindsay Core*

## **Abbreviations**

CEAA	Canadian Environmental Assessment Act
CEPA	Canadian Environmental Protection Act
CERD	Convention on the Eradication of Racial Discrimination
CRC	Convention on the Rights of the Child
EAA	Environmental Assessment Act (Ontario)
EBR	Environmental Bill of Rights (Ontario)
ECO	Environmental Commissioner of Ontario / Environmental Commissioner's Office
ENGO	Environmental Non-Governmental Organization
EPA	Environmental Protection Act (Ontario)
ERT	Environmental Review Tribunal (Ontario)
ICCPR	International Covenant of Civil and Political Rights
MEPA	Michigan Environmental Protection Act
MNR	Ministry of Natural Resources (Ontario)
MOE	Ministry of the Environment (Ontario)
MP	Member of Parliament (Federal)
MPP	Member of Provincial Parliament
NGO	Non-Governmental Organization
NIMBY	Not In My Backyard
PTTW	Permission to Take Water
SEV	Statement of Environmental Values
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNECE	United Nations Economic Commission for Europe



# 1 Introduction

## 1.1 Research Question

In 1994, the province of Ontario, Canada adopted the Environmental Bill of Rights (*EBR*)<sup>4</sup> which establishes responsibility for environmental protection through political and administrative public participation processes.<sup>5</sup> The exercise of participatory rights has been encouraged as a primary means of environmental protection in hopes of empowering the public to participate in the environmental decision-making process.<sup>6</sup> The goal of this approach is to meet minimum environmental protection standards.

This study examines the participatory method taken by the province of Ontario in the *EBR*. This study attempts to evaluate whether environmental protection is being achieved by this human rights-based approach. My research initially posed the following question: does public participation achieve the environmental protection goals of the *EBR* by considering (1) the factors which respondents identified as having affected the exercise of the rights held within the *EBR*, combined with (2) whether environmental protection was achieved? In examining the former I was able to analyze some of the factors affecting *de facto* participation under the *EBR*. These factors include examining how parts of the *EBR* work in practice; uncovering challenges encountered by members of the public; and identifying enabling conditions for it to work according to its purpose. The answer to the latter part of the question proved to be more elusive as the research will indicate. Therefore, the focus of this thesis rests in the participatory processes entrenched for the purposes of environmental protection rather than environmental protection outcomes.

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<sup>4</sup> Selections of the *EBR* are reproduced in Annex 1

<sup>5</sup> Castrilli (1998) p.13

<sup>6</sup> See Birnie (2002) p.253, 261; Ksentini (1994); Boyle (1996) pp.48-64; Douglas-Scott (1996) pp112-113

## 1.2 Terms and Definitions

For the purposes of my examination, ‘procedural rights’ and ‘participatory rights’ are to be considered interchangeably. I will primarily use the term ‘participatory rights’ as it illustrates the aspect of participation more clearly.

For the purpose of this paper, “the environment” will be understood in a broad sense as the factors interacting within the ecological community such as land, water, and natural things. “Environmental problems” will be understood as the depreciatory impacts upon the environment resulting from human activity, for example, loss of biodiversity, air and water pollution, ecosystem degradation, and exhaustion of natural resources.<sup>7</sup>

## 1.3 Research Justification

I began researching this topic because I was of the opinion that additional mechanisms for environmental protection are needed. It seemed to me that guarantees of environmental protection should be considered as an indivisible and interdependent part of the human rights regime which considers human dignity as its central aspect. I believed that a safe and healthy environment, including drinkable water, arable land, and freedom from pollution and toxic substances are important to human dignity and could go a long way towards achieving other human rights. Additionally, that the plight of economic refugees, democratic processes, health, life, and access to education can all be influenced to some degree by environmental problems. Upon delving into research on the subject, it became apparent that many states are hesitant to provide substantive environmental guarantees. Instead, they establish guarantees to participatory rights for environmental protection as one of the only methods of environmental protection from a human rights perspective. This led me to examine the approach taken in my home province of Ontario, Canada as the basis for my case study.

## 1.4 Overview

In chapter one the context and rationale for studying participatory rights in environmental protection is introduced with the *EBR* as the focal point. Explanation of the methodological approach is presented and selection of interview participants discussed.

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<sup>7</sup> Examples taken from *Discussion Document for the Expert Think Tank Meeting* (2003)

The second chapter establishes the interrelationship between human rights and the environment. This chapter begins with a description of the purpose of and need for environmental protection, followed by establishing the link between human rights and environmental protection. Next, discussion moves to the value of a rights-based approach to environmental protection. Finally, the second chapter concludes by outlining the international legal basis for participation in environmental decision-making.

Chapter three provides a relevant description and analysis of the applicable environmental standards and participatory rights guarantees as they apply to environmental protection. The discussion covers the development of environmental protection in Canada and the value of participatory rights in the Canadian democratic context. These discussions provide background for the history behind and overview of the provisions held within Ontario's *EBR*. The *EBR* serves as the basis for the discussion examining participatory rights guarantees as they relate to environmental protection in Ontario.

The fourth chapter presents and examines the qualitative findings from interviews conducted about the *EBR*. The first part presents and evaluates the enabling factors identified as having affected the exercise of *EBR* rights. The second part presents and evaluates the barriers which respondents identified as having affected the exercise of the rights held within the *EBR*. This chapter is central in evaluating the effectiveness of the *EBR* for the purpose of establishing whether *de facto* participation was achieved. The interview data illustrates both the successes and failings (enablers and barriers) of the *EBR* participatory processes exercised by respondents in pursuit of environmental protection. Conclusions about each of the participatory enablers and barriers are drawn in order to facilitate further discussion and answering of the research question in the final chapter. Recommendations for improvement of the current practices and processes are offered for each of the barriers and these are summarized in Annex 10. Finally, the research findings are situated within the relevant literature (Annex 11) and conclusions are drawn about the effectiveness of the *EBR* from a participatory perspective.

Chapter five examines environmental protection outcomes and discusses the limitations which arose in making an effective evaluation in this area. The *EBRs*

purposes are considered in the discussion of how environmental protection outcomes would have been determined given adequate time and space.

The last chapter returns to the original research question and discusses whether the primary research succeeded in answering the question. Next, suggestions for further research are proposed. Finally, conclusions are drawn about the participatory approach to environmental protection including brief consideration of which direction any changes to the EBR should take in the future.

## 1.5 Research Method and Data Analysis

Literature sources were the principal means of research in the first half of this thesis. Primary legal sources include those from the international, national, and provincial levels. Secondary literature sources include articles, reports, and books on human rights law, environmental law, environmental ethics, democracy, and participation.

The primary research findings recorded in the fourth and fifth chapters are centered on data collected pertaining to the experiences and perspectives of individuals who have been involved with environmental campaigns in Ontario, Canada. The approach is qualitative in nature and relies on in-depth open-ended interviews and open-ended surveys. This approach was chosen for the following reasons; (1) limited time with the subjects, (2) a desire to ensure that the required data was collected, (3) a desire to enhance the study's credibility, and (4) for ease in comparison between interviews.<sup>8</sup> A combination of in-person, telephone interviews, and email surveys was used as they fit the timelines of the research project.

The interview and survey questions<sup>9</sup> were designed using the standard open-ended approach. Interviews and survey answers were transcribed and analysed for recurring themes using open coding.<sup>10</sup> The first analysis of the transcript allowed for major themes to be identified. Unique perspectives and features of each experience were noted. Subsequent analyses narrowed the themes and linked developing arguments. Core status was established if the ideas expressed by the participants were:

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<sup>8</sup> *Research Methods: The Big Picture* (website).

<sup>9</sup> See Annex 2 for interview questions.

<sup>10</sup> Open coding involves taking data and segmenting it into categories of information (Creswell (1998) p. 242)

(1) identified or discussed by multiple individuals; (2) mentioned multiple times by a single individual; (3) discussed as important in the literature; (4) unique in insight. The discussion in chapter four follows each of the major themes identified in declining order of significance.

## 1.6 Selection of Participants

In order to explore the experiences of Ontario residents who exercised the participatory rights held within the *EBR*, I chose to investigate a variety of environmental campaigns. Potential campaigns and interviewees were identified through a combination of literature, internet searches, personal recommendations, telephone, and email inquiries.<sup>11</sup> The final participants were selected based on some of the following criteria<sup>12</sup>:

- Experience as an individual or member of a group engaged processes held within the *EBR*;
- Consideration of geographic variety across the regions of Ontario;
- Consideration of various environmental campaigns and the varying purposes of those campaigns;
- Professional expertise with regards to the Environmental Bill of Rights;
- Prospective participants' willingness to take part in the study.

In the end, the following interviewees were chosen: two individuals were interviewed based on their expertise with the *EBR*<sup>13</sup>; four were interviewed based on their leadership involvement with specific environmental campaigns and organizations; and one individual was interviewed who had no affiliation to any particular organization at this time, but has been involved in a remarkable number of past campaigns and is distinguished as having filed more comments and appeals than any other resident.<sup>14</sup> In

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<sup>11</sup> Twenty formal requests for interviews were made, of those inquiries, a total of 10 communications which were appropriate for analysis resulted.

<sup>12</sup> See Annex 3 for an overview of interviewees.

<sup>13</sup> Interviews with McRobert and Lukasik were conducted more informally and the prepared interview questions were not used, however I referred to the questions to ensure that the relevant issues were covered.

<sup>14</sup> Ma (2005)

addition, three email communications were considered; however, formal survey questions were not asked of these individuals.<sup>15</sup>

## 1.7 Limitations

I acknowledge that the sample size of my interviews is small; however, based on the time and resource limitations of this master's-level study, I decided that my goal would not be to generalize in a large population. Rather, I wanted to examine individual experiences and perspectives in hopes of gaining a deeper understanding of their observations and what it might mean for environmental protection and the participatory approach.

I explained to participants from the outset that my role was as a master's student investigating the use of participatory rights for environmental protection and that I was interested in identifying factors that had facilitated or impeded their success as members of environmental campaigns. When participants asked about hypotheses I might draw, I attempted to explain that although I had some idea as to what I might find, I was not dedicated to any particular outcome and was willing to share my findings with them prior to submitting my final thesis in order to ensure that I represented our conversations correctly. I attempted to ask open-ended questions in a non-leading manner which would allow for responses to be based on participant experience.

As will be discussed in chapter five, research limitations arose which made it impossible to deal with the second half of the original research question. These limitations included time and space constraints as well as interview responses that overwhelmingly focussed primarily on participatory experiences rather than on environmental protection outcomes. Conducting further interviews in order to gather more information was not feasible and I made a choice to focus instead on presenting my findings with respect to interviewee participatory experiences.

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<sup>15</sup> These individuals were not interviewed, however were willing to provide some reflection of their own experiences and perspectives.

## 2 Human Rights and Environmental Protection: The Theoretical and International Legal Perspectives

This chapter discusses the purpose of environmental protection and examines the debate surrounding a rights-based approach to environmental protection. An in-depth analysis of the purpose of pursuing participatory rights in environmental protection is provided, followed by an overview of participatory rights guarantees in international law.

### 2.1 The Purpose of Environmental Protection

Broadly, international environmental law “aim[s] to protect the earth’s living and non-living elements and its ecological processes.”<sup>16</sup> This relatively recent body of law developed in response to growing public awareness of warnings from scientists that environmental degradation caused by humans is endangering the Earth.<sup>17</sup> These problems include extinction of biological resources, pollution of lakes and rivers, smog, desertification, and the creation of vast urban areas.<sup>18</sup>

The preamble of international instruments on environmental protection outline many conceptions of the purpose of environmental protection - some include humans at the centre of protection<sup>19</sup> and others recognize to some degree the intrinsic value of nature.<sup>20</sup> A great many instruments discuss the value of environmental protection to sustainable development.<sup>21</sup> The *Canadian Environmental Protection Act* adopts this final approach to environmental protection.<sup>22</sup>

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<sup>16</sup> Kiss (2004) p.1

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> Examples include: the *Stockholm Declaration* (1972); *UN Climate Change Convention* (1992); *Can-US Air Quality Agreement* (1991); *CCAEC* (1997); *Aarhus Convention* (1998)

<sup>20</sup> Examples include: the *Rio Declaration* (1992); the *UN Convention on Biological Diversity* (1992); *Agenda 21* (1992); *OECD Principles Concerning Transfrontier Pollution* (1974); *World Charter for Nature* (1982)

<sup>21</sup> For example, the *Rio Declaration* (1992) and *Agenda 21* (1992)

<sup>22</sup> *CEPA* (1999), Preamble

The Special Rapporteur on human rights and the environment concluded that there is a shift in environmental law from “aim[ing] to protect the biosphere from major deterioration that could endanger its present or future functioning” towards increased focus on the right to a healthy and decent environment.<sup>23</sup> In its Advisory Opinion of 8 July 1996, the International Court of Justice acknowledged that “The Court recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”<sup>24</sup> Other documents indicate an overarching desire to preserve and enhance the human environment,<sup>25</sup> to “protect the integrity of the global environmental and developmental system, [r]ecognizing the integral and interdependent nature of the Earth,”<sup>26</sup> and to recognize degradation of the environment “may adversely affect natural ecosystems and humankind”<sup>27</sup> and in particular, the interests of future generations.<sup>28</sup> These various approaches and perspectives are discussed and examined at length within the field of environmental ethics.<sup>29</sup>

## 2.2 Linking Human Rights and the Environment

It has been suggested by Kiss and Shelton that of the four principle approaches to rights-based environmental protection,<sup>30</sup> the incorporation of participatory human rights guarantees into environmental law and the exercise of participatory rights in an environmental context is the most effective method for ensuring environmental protection.<sup>31</sup> A participatory rights approach is potentially the most effective method of protection because civic participation is already reflected in existing civil and political

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<sup>23</sup> Kiss (2004) p.11; Boyle p.44

<sup>24</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996)

<sup>25</sup> *Stockholm Declaration* (1972), Preamble

<sup>26</sup> *Rio Declaration* (1992), Preamble

<sup>27</sup> *UN Framework Convention on Climate Change* (1992), Preamble

<sup>28</sup> *World Charter for Nature* (1982), Preamble

<sup>29</sup> The following works exemplify this body of research and debate: Stone (1972), Nash (1993), Livingston (1984), Elder (1984), Næss (1999), Callicott (2003), Rolston (2003).

<sup>30</sup> The four approaches Kiss and Shelton outline include (1) interpreting human rights law with an environmental dimension, (2) elaborating a substantive right to a healthy environment, (3) establishing ecological limits to existing human rights, (4) and exercising participatory rights in an environmental context.

<sup>31</sup> Kiss (2004) p.663



rights guarantees<sup>32</sup> and has also been subsequently incorporated into environmental conventions.<sup>33</sup> Such an approach “seeks to ensure that those who have to live with the consequences of environmental degradation will be able to have a say in how, if and when it should occur.”<sup>34</sup>

Despite the fact that human rights and the environmental movements developed independently of each other after World War II, a human rights approach to environmental protection is not new.<sup>35</sup> Of the interrelationship between the two, “it is generally accepted that there exists a direct functional relationship between protection of the environment and the protection and promotion of human rights”<sup>36</sup> especially since environmental degradation cannot often be repaired, and thus a variety of protection mechanisms are essential.<sup>37</sup>

The United Nations General Assembly first recognized the link between human rights and the environment as early as 1968 when it underscored the effects of the quality of the environment on the enjoyment of basic rights<sup>38</sup> and has since considered the interdependent nature of environmental protection and human rights on a number of occasions.<sup>39</sup> Kiss and Shelton clarify this position by explaining that:

“Human rights exist to promote and protect human well-being, to allow the full development of each person and the maximization of the person’s goals and interests, individually and in community with others. This cannot occur without ... a safe environmental milieu.”<sup>40</sup>

In 1972, the *Stockholm Declaration* established the intrinsic link between human rights and the environment by stating: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the

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<sup>32</sup> Boyle (1996) p.60 and the following international conventions: *UDHR* (1948) §8,19-21; *ICCPR* (1966) §2,19,22,15; *CERD* (1966) §5; *CRC* (1989) §12-15.

<sup>33</sup> By way of international instruments, Birnie and Boyle point to participatory rights in Principle 10 of the *Rio Declaration* (1992); Principle 23 of the *World Charter for Nature* (1982), and even more significantly the *Aarhus Convention* (1998). (Birnie (2002) p.261)

<sup>34</sup> Douglas-Scott (1996) p.112

<sup>35</sup> Kane (1993) pp.389-390

<sup>36</sup> Handl (2001) p.303

<sup>37</sup> Kiss (2004) p.725; Kiss (2003) p.32

<sup>38</sup> Ksentini (1994) §26

<sup>39</sup> Kiss (2003) p.31

<sup>40</sup> Kiss (2004) p.730

environment for present and future generations.”<sup>41</sup> The language of the *Stockholm Declaration* was reiterated in 1990 when the UN General Assembly passed *Resolution 49/95*.<sup>42</sup>

The UN Conference on the Environment and Development held in Rio in 1992 issued many influential documents including two international agreements, two statements of principles and a major action agenda on world wide sustainable development.<sup>43</sup> The *Rio Declaration* concentrated on the extension of participatory rights, and as consequence the rights of access to information, participation in decision-making, and access to justice have been encouraged instead of substantive environmental rights in subsequent years and international instruments have favoured “environmental democracy”.<sup>44</sup> In addition, since 1992 virtually every international convention pertaining to multilateral cooperation has included environmental protection as a goal, and the human rights community has increasingly accepted environmental protection as a part of the human rights agenda.<sup>45</sup>

The 1998 *Aarhus Convention* signed by members of the United Nations Economic Commission for Europe, was designed to strengthen democratic environmental governance.<sup>46</sup> The three pillars of the *Aarhus Convention* include the right of citizens to obtain environmental information; the right to participate in environmental decision-making; and the right to appeal to courts or non-judicial bodies as delineated in articles 4-9.<sup>47</sup> Canada is not a signatory of the *Aarhus Convention* despite being party to the UNECE since 1973. Although the document is regional in scope, its significance is global as it elaborates on principle 10 of the *Rio Declaration*

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<sup>41</sup> *Stockholm Declaration* (1972), Principle 1

<sup>42</sup> *Need to Ensure a Healthy Environment for the Well-Being of Individuals* (1990) §1

<sup>43</sup> The international agreements include: the *Climate Change Convention* and the *Convention on Biological Diversity*. The principles include the *Rio Declaration* and a guide the management, conservation and sustainable development of all types of forests. The action agenda is *Agenda 21*. (Keating (1993) (website))

<sup>44</sup> Bérard (2003) p.44

<sup>45</sup> Over 90 countries have recognized the right to an environment of specific quality in their constitutions; in 1992 the G-7 nations recognized the link between human rights and the environment; and the OECD has an extensive environmental programme and has shown awareness of the link between human rights and the environment. (Kiss (2004) pp.58-59; Bérard (2003) p.46; Kane (1993) pp.406-407.)

<sup>46</sup> Rose-Ackerman (2001) p.1

<sup>47</sup> *ibid.*

and forwards the development of international environmental law.<sup>48</sup> The *Aarhus Convention* provides a checklist of minimum standards for public participation as accepted by the international community. Some elements of the *Aarhus Convention* will be examined in the final chapter in order to evaluate elements of Ontario's *Environmental Bill of Rights*.

### 2.3 Rights-Based Approaches to Environmental Protection

Usually, violations of human rights are identified to specific victims in the present. However, environmental degradation also affects future generations through harm which can include the benefit lost from extinct species; the inability to exercise economic, social and cultural rights because of a lack of resources; and the endangering of their very survival.<sup>49</sup>

In his article *Human Rights Approaches to Environmental Protection: An Overview*, Anderson discusses the advantages and disadvantages to taking a rights-based approach. Of the benefits he describes, one persuasive argument is that human rights are strong claims to absolute entitlements and are therefore immune to trade-offs. This would be advantageous in that the environment would be prioritized if given human rights standing.<sup>50</sup> Vulnerable groups such as ethnic minorities, women, children, and the poor are often disproportionately affected by environmental harm - only a rights-based approach would be able to address the problems these people confront.<sup>51</sup> A particular disadvantage discussed by Anderson is that an environmental right may not adequately address underlying issues such as causes of environmental damage.<sup>52</sup> Moreover, human rights procedures are largely remedial rather than preventative and cannot be used to protect other species.<sup>53</sup>

According to Leopold, positions which encourage conservation and environmental protection need to be encouraged and utilized in order to combat the

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<sup>48</sup> Foreword by Kofi Annan *in* Stec (2000)

<sup>49</sup> Kiss (2004) p.709

<sup>50</sup> Anderson (1996) pp. 21-22

<sup>51</sup> Aguilar (1994) p.197

<sup>52</sup> Anderson (1996) pp.22-23

<sup>53</sup> Chapman (1993) p.220

primarily economic driven approaches to environmental protection.<sup>54</sup> A rights-based approach can be used as one such position.

The relationship between human rights and the environment can be conceived of in two ways. The first is to use environmental protection of a secure, healthy, and ecologically sound environment as means for fulfilling human rights standards. The second is to use the legal guarantees ensuring the full realization of individual and collective human rights for enhancing environmental protection.<sup>55</sup> It is the second approach that is of relevance to the analysis at hand. Within this approach, there are four methods by which one can approach the issue.<sup>56</sup> The method of relevance to this study is that of mobilizing existing human rights guarantees in international environmental law to ensure environmental protection. This method emphasizes procedural rights and has a strong basis for protection in human rights law.<sup>57</sup>

## 2.4 Participatory Rights in Environmental Protection

Participatory norms have their basis in the *UDHR* and the *ICCPR* and allow citizens the right to take part in the conduct of public affairs and government through systems of direct democracy.<sup>58</sup> Participatory rights are imperative in the relationship between human rights, democracy, and environmental protection.<sup>59</sup> The concept of ‘public participation’ is taken to refer to those processes whereby “individuals and groups can influence government decisions which affect or matter to them.”<sup>60</sup> This influence should not be taken to imply control, but rather adequate opportunity for formal and informal input into decision-making processes. The basis for the argument defining an environmental approach from a participatory rights perspective is the claim that democratic decision-making leads to policies guaranteeing environmental protection;<sup>61</sup> this method thus advocates the exercise of existing participatory rights by citizens in environmental matters and decision-making. Douglas-Scott contends that

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<sup>54</sup> Leopold (2002) p.42

<sup>55</sup> Anderson (1996) p.3; Aguilar (1994) p.197

<sup>56</sup> *See supra note 30*

<sup>57</sup> Kiss (2004) p.663

<sup>58</sup> Steiner (1988) p.78

<sup>59</sup> Handl (2001) p.318

<sup>60</sup> Webb (1991) p.777

<sup>61</sup> Anderson (1996) p.9

even if the desired result of environmental protection is not achieved, the benefit of pursuing participatory rights for environmental protection is that this approach draws upon democratic norms and avoids problems associated with setting standards for a substantive right which would involve subjective value judgements.<sup>62</sup>

Increasing awareness surrounding environmental issues has led to greater recognition of the importance of public participation in governmental decision-making as it bears on the environment.<sup>63</sup> According to Popović, a 1980 survey by the American Advisory Committee on Intergovernmental Relations identified eight primary functions for public participation:

- providing information to citizens;
- acquiring information from and about citizens;
- improving public decisions and programs;
- building consensus and enhancing acceptance of decisions affecting the public;
- supplementing public agency work;
- changing political power patterns and power allocations;
- protecting the rights and interests of individuals and minority groups;
- and, delaying or avoiding making difficult decisions.<sup>64</sup>

The democratic ideal is that citizens should share in governance on the assumption that citizens can judge their own best interests.<sup>65</sup> Participation is considered as one of the cornerstones of democracy since democracy is by nature a system of governance in which the people rule.<sup>66</sup> Thinkers such as Jean-Jacques Rousseau, John Stuart Mill, C.B. Macpherson, and Robert A. Dahl have all pointed to political participation as an important element of democracy and argue that participation in fact improves the function of representative democratic institutions.<sup>67</sup> Democracy is a condition for environmental policy success; mostly because of the constitutional civil

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<sup>62</sup> Douglas-Scott (1996) p.112-113

<sup>63</sup> Popović (1993) p.684

<sup>64</sup> *ibid.*

<sup>65</sup> Fiorino (1996) p.196

<sup>66</sup> Sørensen (1993) p.3

<sup>67</sup> *ibid.* pp.7-12

rights including participatory and informational opportunity structures and the civil society contributions.<sup>68</sup> Petts and Leach explain that:

“In democratic societies the individual has the right to be informed, to be consulted and to express his or her own views on matters which affect them personally. Public involvement in decision-making, not merely consultation upon a preferred decision, supports both institutions and legitimacy, and the “bottom-up” approach to decision-making, and allows those with a weak voice to exert influence on decision outcomes to feel some degree of ownership of the issue. It is also something to be valued in its own right, social learning, responsibility and environmental awareness being significant outcomes.”<sup>69</sup>

Canada is considered to be one of the most democratic countries in the world.<sup>70</sup> Therefore, it follows that Canadian environmental policy success should be significant.

In the Canadian context, a 1972 federal task force proposed a general statement of reasons for public participation which has been adopted as background for the discussion of legal issues. These reasons stated generally that (1) participation allowed affected and typically underrepresented persons the opportunity to present their views; (2) that members of the public may provide useful additional information to decision makers; (3) open, public processes will only serve to reinforce accountability; and (4) public participation will increase confidence in the decision makers.<sup>71</sup>

The key participatory rights for environmental protection include the right to access information; participation in environmental decision-making; access to justice; the right to hold and express opinions; and the right to freedom of association. Each of these rights finds their basis in international legal instruments. For the purpose of this study the first two are of most relevance.

The right to access information relating to the environment is provided for in a number of international instruments<sup>72</sup> and is sometimes referred to as the “right to know”. It requires that there be transparency in the information-seeking process, for example, that responses from states be timely, and that any denial of requests for

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<sup>68</sup> Janicke (1996) pp.82-83

<sup>69</sup> Petts (2000) p.17

<sup>70</sup> *Freedom in the World* (2006) ; *Human Development Report* (2005)

<sup>71</sup> Lucas (1976) p.16

<sup>72</sup> See among others: *UDHR* (1948), §19; *ICCPR* (1966), §19; *Rio Declaration*, Principle 10; *Draft Principles On Human Rights and the Environment* (1994), Principle 15; *Agenda 21*, Chapter 23; the *World Charter for Nature*, §16; the *UN Climate Change Convention*, §6; the *UN Convention on Biological Diversity*, Preamble, §14; the *Aarhus Convention* §4,5.

information be based on narrow, specific grounds.<sup>73</sup> In her final report, the special rapporteur on human rights and the environment notes that the right to information is essential to the democratic process: “the concept of democratic governance...becomes meaningless unless individuals and groups have access to relevant information on which to base the exercise of the vote or otherwise express the will of the people.”<sup>74</sup>

The right to participate in environmental decision-making is based on the idea that those who are potentially affected by decisions affecting the environment have a say in their environmental future.<sup>75</sup> It is made up of two components, first is the right to be heard, and second is the right to affect decisions and requires genuine involvement in social and political decision-making.<sup>76</sup> It finds its basis in, among others, the *UDHR*, § 21; the *Rio Declaration*, Principles 10, 20, 21, 22; the *Draft Principles on Human Rights and the Environment*, Principle 18; the *World Charter for Nature*, Principle 23; *Agenda 21*, Preamble to Chapter 23; the *Climate Change Convention*, § 6; and the *Convention on Biological Diversity*, § 14.<sup>77</sup> To ensure full enjoyment of the right to participate, meaningful participation is essential; this depends on access to information to ensure that participation is informed; on the autonomy and independence of actors; on political willingness by the state to encourage participation; and on exhaustive incorporation of stakeholders’ opinions, and can include a variety of actions on the part of individuals from elections to lobbying to grass roots action.<sup>78</sup> The special rapporteur on human rights and the environment underlines the interrelatedness of popular participation with other rights such as the right to information and the right to remedy. She also explicitly states that participation is especially important during environmental impact assessments prior to potential damage being done since people must be able to prevent environmental harm.<sup>79</sup>

Exercising participatory rights in pursuit of environmental protection allows for the consideration of future generations and other species into the legal and democratic

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<sup>73</sup> Saladin (2003) p.61

<sup>74</sup> Ksentini (1994) §209

<sup>75</sup> Kiss (2003) p.36

<sup>76</sup> *ibid.* p.36; Piccolotti (2003) p.50

<sup>77</sup> Annex 4 provides a compilation of these key articles

<sup>78</sup> Piccolotti (2003) p.53; Kiss (2004) p.674

<sup>79</sup> Ksentini (1994) §218, §220

process.<sup>80</sup> In this way, it avoids problems of anthropocentricity that are often criticized for prioritizing values and practices which give preferential treatment to human interests without considering the potential environmental impact; and results in the destruction of nature.<sup>81</sup>

## 2.5 Pursuing Public Participation: Theory

There is no doubt public participation can help to correct problems with regulatory systems<sup>82</sup> and there should be adequate opportunity for input from the public to be creative.<sup>83</sup> Decision-makers must be aware of the implications for the types of participation they choose to employ since, according to Arnstein, “there is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process.”<sup>84</sup>

Arnstein, a pioneer in the study of participation theory, describes an eight-rung ladder of participation corresponding to citizen influence in decision-making (Figure 2.1). The ladder represents gradations of participation. The bottom rungs illustrate methods that are claimed to be participatory, but which in fact do nothing to enable public participation. The middle rungs represent improved participatory processes offering the opportunity to be heard, but where the public lacks the power to ensure their views are considered. The top rungs provide the public with increased degrees of decision-making power.<sup>85</sup>

Complementary to Arnstein’s ladder, the International Association for Public Participation cite five stages which increase the level of public impact. The first stage is informing the public with balanced and objective information and alternatives through websites or open houses. The second is to consult with the public by obtaining feedback, this can take the form of public comment or meetings. The third is to involve the public throughout the process to ensure public concerns are consistently considered, this can be done through workshops or polling. Fourth, is to ensure collaboration with

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<sup>80</sup> Redgewell (1996) p.86; Dobson (1996) pp. 131-138

<sup>81</sup> Light (2002) pp.8-9

<sup>82</sup> Beierle (1998) p.3

<sup>83</sup> Sewell (1976) p.1

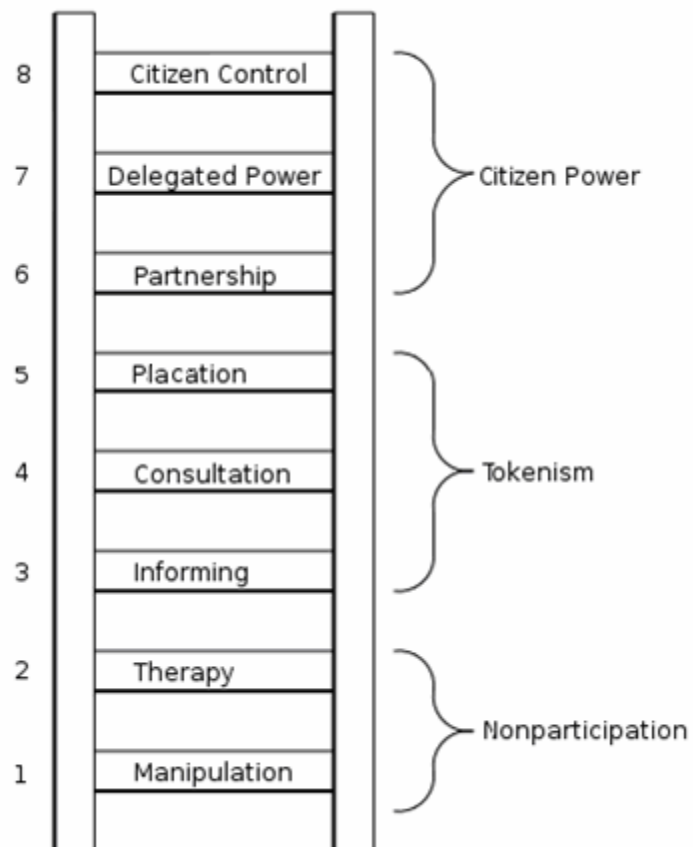
<sup>84</sup> Arnstein (1967) p.217

<sup>85</sup> *ibid.* pp. 217-221



the public as a partner in the decision-making process through advisory committees, consensus-building and participatory decision-making. Finally, the last level is to empower the public by placing final decision-making in their hands through citizen juries or voting.<sup>86</sup>

**Figure 2.1** – Arnstein’s Ladder of Citizen Participation<sup>87</sup>



In the environmental context, Popović delineates minimum criteria for effective participation (Figure 2.2). He claims that such criteria provide a foundation and network ensuring *de facto* system of public action in environmental decision-making.<sup>88</sup> Balancing Popović’s criteria, Beierle references a series of goals for analyzing public participation in environmental decision-making which he considers to be the valued outcomes of the participatory process. These participatory goals include: educating the public, incorporating public values and knowledge into decisions, building trust in

<sup>86</sup> IAP2 Public Participation Spectrum (Website)

<sup>87</sup> *ibid.* p.217

<sup>88</sup> Popović (1993) p.692

institutions, reducing conflict among stakeholders, and ensuring cost-effective decision-making.

**Figure 2.2** – Minimum Criteria for Effective Participation in an Environmental Context<sup>89</sup>

1. Education about the environment and the things that might affect it;
2. Access to information (including the fact that information exists and is available);
3. A voice in decision-making;
4. Transparency of decisional processes (by formal consideration of public input and explanation of how that input affected the decision at issue);
5. Post-project analysis and monitoring, as well as access to pertinent information;
6. Enforcement structures; and
7. Recourse to independent tribunals for redress.

For each of these elements, the public also needs protection against retaliation

Petts and Leach claim that participation lends legitimacy to decision-making, enhances democracy, and enlarges citizenship. They point to a Strengths, Weaknesses, Opportunities and Threats Analysis of public participation (created at the time of implementing the *Aarhus Convention* in the United Kingdom) in order to help understand the purpose of public participation (see Annex 5). In addition to this analysis, they list possible problems with involving the public but suggest that the disadvantages can be managed and reduced with effective implementation of participatory processes.<sup>90</sup> These theories of participation will be revisited in the chapter four when comparison will be made with the primary research findings of this study as mapped in Annex 11.

## 2.6 Summary

The value of participatory rights lies in their instrumental nature; they are a means to an end rather than an end in themselves.<sup>91</sup> In addition, civil and political rights are generally the strongest category of rights and provide individuals with the greatest opportunity for remedy in case of violation. They ensure empowerment and

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<sup>89</sup> *ibid.* p.691

<sup>90</sup> Petts (2000) pp.18-19

<sup>91</sup> Steiner (1988) p.100

compel governments to meet minimum standards of protection from environmental harm.<sup>92</sup> The democratic basis of participatory rights provides for a system of checks and balances in the decision-making process. The assumption in democratic models is that citizens can judge their own best interests and in the end their participation leads to better social choices.<sup>93</sup> It has even been suggested that civil rights structures have more influence on positive environmental policy outcomes than formal democratic institutions.<sup>94</sup> Although there is lack of consensus over whether participation serves to empower disenfranchised groups, allow for greater public involvement, or better environmental decisions; participation theory emphasizes the importance of complementary forms of public participation in order to ensure that participation is effective by redistributing power.

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<sup>92</sup> Birnie (2002) p.253

<sup>93</sup> Fiorino (1996) p.196

<sup>94</sup> Janicke (1996)p.82

### 3 Approaches to Environmental Protection Pursued in Ontario, Canada

Guarantees for public participation in Canada grew out of dissatisfaction with the fact that environmental decision-making relied exclusively on administrative and regulatory processes and lacked mechanisms for citizen involvement in the democratic process.<sup>95</sup> This chapter will begin by examining the foundations for environmental standards and public participation in Canada, and more specifically, as they apply to the province of Ontario. A discussion will be undertaken examining approaches to public participation in environmental decision-making and give particular attention to the approach adopted by Ontario. Third, an overview and analysis of the Ontario *EBR* will be undertaken including the history behind the document, the approach taken by the *EBR*, and by providing an overview of some key provisions held within the instrument.

#### 3.1 Environmental Protection in Ontario, Canada

Canada experienced two significant waves of environmentalism, the first in the late-1960s to early-1970s, the second in the late-1980s to early-1990s; both influenced the creation of environmental protection instruments and corresponding guarantees for public participation.<sup>96</sup> Prior to the 1980s the Canadian regulatory framework for environmental protection relied upon discretionary executive powers and was characterized by the development of environmental regulations and a growing bureaucracy and under this system opportunity was rarely provided for participation in environmental decision-making.<sup>97</sup> The *Constitution Act*<sup>98</sup> does not provide for any environmental rights and exclusive jurisdiction over environmental matters falls neither to the federal nor provincial governments and the provinces often administer both federal and provincial regulations with little national oversight.<sup>99</sup>

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<sup>95</sup> See Castrilli (1998) p.3

<sup>96</sup> See VanNijnatten (1999) p.284

<sup>97</sup> See VanNijnatten 1999 pp.271-272

<sup>98</sup> *Constitution Act* (1867)

<sup>99</sup> *Doing Business in Canada: Environmental Law* (website)

According to leading environmental lawyer Dianne Saxe, modern environmental law in Canada developed from three common law principles, these include:

(1) Nuisance, the right of each person to enjoy their land free from unreasonable interference by their neighbours. (2) Riparian rights, the right of downstream water users to receive water that has not been materially lessened or polluted by up-stream users, and (3) *Rylands v. Fletcher*, the obligations of those bringing hazardous things onto their land to pay for any damages if they escape.<sup>100</sup>

Environmental issues were accepted as a major concern by the Canadian government at the time of the signing of the *Stockholm Declaration* in 1972. This led to the adoption of environmental statutes and development of environmental departments at both the federal and provincial levels.<sup>101</sup> By the 1990s budget constraints had a considerable impact on the environmental regulatory regime and cuts were made to environmental departments across the country and a shift began toward voluntary initiatives for industry.<sup>102</sup>

**Table 3.1 – Key Environmental Instruments in Canada and Ontario**

<b>Federal Instruments</b>	<b>Provincial Instruments (Ontario)</b>
Canadian Environmental Protection Act (CEPA)	Environmental Protection Act (EPA)
Canadian Environmental Assessment Act (CEAA)	Environmental Assessment Act (EAA)

The primary instruments applicable to Ontario which promulgate environmental standards include the *Canadian Environmental Protection Act*<sup>103</sup> (*CEPA*), and the *Canadian Environmental Assessment Act*<sup>104</sup> (*CEAA*) at the federal level; and the *Ontario Environmental Protection Act*<sup>105</sup> (*EPA*), and the *Ontario Environmental Assessment Act*<sup>106</sup> (*EAA*) at the provincial level. There is not currently a federal

<sup>100</sup> Saxe (2003) p.8

<sup>101</sup> *ibid.* p.8

<sup>102</sup> VanNijnatten (1999) p.280

<sup>103</sup> *CEPA* (1999)

<sup>104</sup> *CEAA* (1992)

<sup>105</sup> *EPA* (1990)

<sup>106</sup> *EAA* (1990)

environmental bill of rights, nor is there any indication that one will be adopted in the near future.<sup>107</sup>

*CEPA* is the principle federal environmental statute that provides for environmental protection.<sup>108</sup> The Act provides for public participation and establishes an Environmental Registry which serves as a source of public information relating to *CEPA*.<sup>109</sup> The *EPA* is an equivalent act at the provincial level and provides for environmental regulation and the control of pollution. The purpose of the *EPA* is “to provide for the protection and conservation of the natural environment.”<sup>110</sup> The Ministry of the Environment administers the *EPA*, and pursuant to the act issues *Certificates of Approval* that address specific site concerns for the purpose of ensuring the protection of human health and the natural environment, and compliance with legislation and policy guidelines.<sup>111</sup> All environmentally significant policies, Acts, regulations or instruments which the Ministry deals with must be posted on the *EBR* Registry.

The *CEAA* is administered by an independent agency that reports directly to the Minister of the Environment. One of the main objectives is to providing for public participation in the impact assessment process.<sup>112</sup> The *EAA* is the equivalent piece of provincial legislation and requires that significant provincial and municipal public projects be subject to an assessment of their environmental effects; in some cases private projects which are environmentally sensitive are also subject to assessment.<sup>113</sup> The *EAA* was “heralded as one of the most progressive environmental assessment laws in the western world” when it was enacted in 1976, it is important to this study because of its complex interplay with the *EBR* through Bill 76 which amended the *EAA* in 1996.<sup>114</sup> In order to avoid duplication of processes, environmentally significant

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<sup>107</sup> Muldoon (1995) p.20

<sup>108</sup> *EnviroRegs: CEPA* (website)

<sup>109</sup> *ibid.*

<sup>110</sup> *EPA* (1990) §3.1

<sup>111</sup> *Certificates of Approval* (website)

<sup>112</sup> *Introduction and Features: CEAA* (website); *EnviroRegs: CEAA* (website); *Doing Business in Canada: Environmental Law* (website)

<sup>113</sup> *Doing Business in Canada: Environmental Law* (website)

<sup>114</sup> McRobert (2001b)

projects can be exempted from parts of the *EBR* if adequate participatory opportunity is provided under the *EAA*.<sup>115</sup>

### 3.2 Public Participation in Ontario, Canada

In order to understand public participation in Canada, it is important to have some knowledge of Canadian political participation. Being a democratic state, public participation is at the cornerstone of government decision-making in Canada. According to Mishler and Clarke, active political participation beyond voting in federal and provincial elections is low in Canada and political protest is engaged in by only a small percentage of Canadians.<sup>116</sup> In addition, levels of political participation apart from voting are uneven across different social groups with women; lower socio-economic groups; and less well-educated groups participating less often<sup>117</sup> making it all the more important to provide opportunities for participation. Enhancing participation allows all social groups more opportunities to participate in decision-making.<sup>118</sup> Consider thus, the relative importance of provisions in the *CEAA* which specifically facilitate participation by Aboriginal people; a group who have typically faced economic and social exclusion and who are less economically and socially well-off than their fellow Canadians.<sup>119</sup>

Research conducted in 1996 indicates that “Canadians are becoming more willing to participate in boycotts and other low-level forms of protest.”<sup>120</sup> With respect to values, Canadians born since World War II have a greater concern for the environment, are increasingly tolerant of alternative lifestyles, and are turning away from church-based morals; Canadians have also become more deferential as their loyalty to political parties and hierarchical institutions has declined.<sup>121</sup>

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<sup>115</sup> *EBR* (1993) Sections 30 & 31; Muldoon (1995) pp.82-84; *The Adams Mine Landfill Project: How Does the EBR Fit In?* (2000) p.4; McRobert (2001b)

<sup>116</sup> Jackson (2001) p.79

<sup>117</sup> *ibid.* p.79

<sup>118</sup> McRobert (1999b)

<sup>119</sup> It is important to note that specific reference to consultation with Aboriginal people on environmental issues is part in parcel because of land claim settlements. (Jackson (2001) pp.92-98)

<sup>120</sup> *ibid.* p.79

<sup>121</sup> *ibid.* p.72 *quoting* Nevitte (1997)

Apart from democratic participatory rights, the only instruments guaranteeing public participation in Canada are the statutes delineating environmental standards (Table 3.1) and the various acts providing access to information, described below.<sup>122</sup> In 1999, the Canadian Environmental Law Association published a document discussing and making recommendations regarding democracy and environmental accountability in Ontario. Key to this document was a section on public participation in decision-making which touts the establishment of effective mechanisms to this end. It states that the benefits to such an approach include

...ensuring that those who will be affected by environmental and natural resources management decisions have an opportunity to participation in those decisions, public participation processes are critically important accountability mechanisms. Effectively, these processes require the government to justify its decisions in open forums before the public or independent tribunals.<sup>123</sup>

There are a number of federal and provincial instruments guaranteeing participatory rights in Canada and in Ontario. The strongest legal instrument guaranteeing participatory rights is the *Canadian Charter of Rights and Freedoms* which was incorporated into the *Constitution Act* in 1982. The main participatory provisions are the guarantees of fundamental freedoms held in Sections 2 and the guarantees of effective political participation in Section 3.<sup>124</sup> These rights do not relate directly to environmental protection; however they are important in guaranteeing democratic participatory rights in general.

**Table 3.2** –Instruments Guaranteeing Public Participation in Canada and Ontario

Federal Instruments	Provincial Instruments
Canadian Charter of Rights and Freedoms	Freedom of Information and Protection of Privacy Act
Access to Information Act	Municipal Freedom of Information and Protection of Privacy Act

<sup>122</sup> Agreements establishing Aboriginal self-government often refer at great length to environmental standards and provide for additional law-making authority for environmental protection, *see* for example, *The Kwanlin Dun First Nation Final Agreement* (2005); *Anishnaabe Government Agreement* (2004).

<sup>123</sup> Muldoon (1999) p.16

<sup>124</sup> Garton (Website), notes to Section 3, Charter Decisions



With respect to access to information, there are three relevant pieces of legislation. Federally, the *Access to Information Act* facilitates the “right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public.”<sup>125</sup> The Act establishes the Information Commissioner of Canada who acts as an independent ombudsperson to investigate if someone believes their rights have been denied under the Act. At the Ontario level the act *Freedom of Information and Protection of Privacy Act*<sup>126</sup> provides similar guarantees and establishes the Information and Privacy Commissioner. The *Municipal Freedom of Information and Protection of Privacy Act*<sup>127</sup> is a document which ensures that information held by municipalities is available to the public except under certain limited and specific exemptions. Despite these statutes and programs, it has been noted that there are still significant problems in obtaining timely access to environmental information in that that formal procedures for accessing information can be complex, long, costly, and are sometimes circumvented by governmental discretion. This has resulted in conflict between public expectations for transparency and the exercise of executive authority by government officials because of long-held ideas of governance.<sup>128</sup>

### 3.3 The Ontario Environmental Bill of Rights (*EBR*)

Enacted in 1994, the *EBR*<sup>129</sup> recognizes both the provincial government’s role in environmental protection and the public’s right to participation in decision-making. It is considered to be one of the most significant environmental laws for Ontario of the past 25 years.<sup>130</sup> The purpose of the act is to protect, conserve and restore the integrity of the environment, to provide sustainability, and to protect the right to a healthful environment.<sup>131</sup>

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<sup>125</sup> *Access to Information Act* (1985) §2(1)

<sup>126</sup> *Freedom of Information and Protection of Privacy Act* (1990)

<sup>127</sup> *Municipal Freedom of Information and Protection of Privacy Act* (1990)

<sup>128</sup> Muldoon (1995) p.13; Roberts (2005) p.1,19-21

<sup>129</sup> Selections of the *EBR* are reproduced in Annex 1

<sup>130</sup> *Ontario's EBR and You* (2005) p.2

<sup>131</sup> *EBR* (1993), §2.(1)

### 3.3.1 The Creation of Ontario's *EBR*

The first environmental bill of rights was the *Michigan Environmental Protection Act (MEPA)* enacted in 1970.<sup>132</sup> The Michigan model provided the impetus for Ontario's environmental bill of rights legislation.<sup>133</sup>

Between 1979 and 1991 successive private members bills were introduced in the Ontario Legislature based on the *MEPA*, these proposed diverse conceptions of an environmental bill of rights and guaranteed primarily substantive rights; all were unsuccessful for various political reasons.<sup>134</sup> The *EBR* and other similar environmental rights documents are based on the assumption that environmental rights are an integral part of an overall protection strategy; they are also based on the notion that "there are certain common rights to a healthful environment and to public access to natural resources. These common rights are intended to protect not only the resource for the overall public good, but also the value of the resource for its own sake."<sup>135</sup> In addition to this, the Ontario *EBR* works from the assumption that "certain rights are needed for the public to allow them to enforce environmental laws and compel governments to act in situations where they would otherwise be reluctant to do so."<sup>136</sup> Prior to the *EBR* there was no uniform policy by the province to ensure public participation. The level of public involvement in environmental decision-making was at the complete discretion of the Ministry of the Environment, and in many cases the public was not consulted at all.<sup>137</sup>

### 3.3.2 The Approach Taken in Ontario's *EBR*

The *EBR* addresses a range of rights including those which are administrative, procedural, and substantive in nature. The approach taken by the *EBR* is based on the understanding that decisions that relate to the environment should be open and allow participation of affected parties without having to engage in expensive litigation or court action. The rights held within the *EBR* aim to ensure that the residents of Ontario

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<sup>132</sup> *MEPA* (1970)

<sup>133</sup> Castrilli (1998) pp.351-356

<sup>134</sup> *Facts compiled from:* *ibid.* pp.392-405; McRobert (1999a) pp.3-4; Muldoon (1995) pp.5-20

<sup>135</sup> Muldoon (1995) p.6

<sup>136</sup> *ibid.* p.5

<sup>137</sup> McRobert (2001b)

have the right to: “know when a decision affecting the environment will be made; obtain information respecting the nature and scope of the proposed decision; provide their views or opinions on the proposed decision; and have their views taken into account before the proposed decision is finalized or implemented.”<sup>138</sup> The *EBR* is intended to ensure better public participation and greater accountability of decision-makers in provincial Ministries.<sup>139</sup>

The participatory rights regime of the *EBR* provides that, at minimum, the public have the opportunity to express their views in writing on particular issues to the relevant minister. The minister then has the positive duty to consider all relevant comments in decision-making related to the environment. There also exists the presumption that greater opportunity for public participation should be provided as the degree of environmental significance increases.<sup>140</sup>

### 3.3.3 Overview and Key Provisions Held within the *EBR*

The *EBR* is divided into eight parts and contains 124 sections. Part 1 contains the interpretive provisions and the purposes of the bill. Part II is considered as the cornerstone of the document and establishes the requirements for minimum levels of public participation, including provisions for creating an Environmental Registry and requiring Ministries to develop Statements of Environmental Values (SEVs). Part III delineates the appointment of the Environmental Commissioner of Ontario (ECO) who reviews compliance with the Bill. Part IV authorizes applications for review if a resident believes that review of a government policy, Act, regulation or instrument should be undertaken to protect the environment. Part V provides for residents to apply to the provincial government for an investigation in order to protect the environment if they believe a policy, Act, regulation or instrument has been contravened. Part VI permits limited court action when violation of a policy, Act, instrument or regulation has or will result in significant harm to a public resource. This part also removes some barriers to bringing an action resulting from a public nuisance that caused environmental harm. Part VII provides employee protection from reprisals by employers; these protections are more commonly known as ‘whistleblower’ protection.

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<sup>138</sup> Muldoon (1995) p.60

<sup>139</sup> For a list of Ministries prescribed under the *EBR* see Annex 6

<sup>140</sup> See Muldoon (1995) pp.89-92

Finally, Part VIII addresses general matters.<sup>141</sup> The following describes a few of the substantive provisions held within the *EBR* that are especially relevant to the interviews which follow in the next chapter.

### 3.3.3.1 Environmental Commissioner of Ontario

The ECO is an independent officer appointed by the Legislative Assembly of Ontario to provide accountability and oversight for the implementation of the *EBR*. Legislative history and the function of the ECO indicate that it is the primary accountability and transparency mechanism within the *EBR* along with the Environmental Registry.<sup>142</sup> The primary duties of the Environmental Commissioner include: (1) Auditing and Reporting, this happens through the publication of annual reports which give an overview of the effectiveness and compliance of government Ministries in meeting their responsibilities under the *EBR* as well as reviewing the use of mechanisms held within the *EBR*; (2) Clearinghouse, the Office of the Environmental Commissioner acts as a depository for various applications and notices and forwards them to the relevant ministries for consideration; (3) Education, the Office of the Environmental Commissioner is to help the public and Ministries understand the *EBR* through educational programs, newsletters, and by providing advice and suggestions. It also houses a resource centre which is available to the general public, and fields inquiries on how to use the provisions of the *EBR*.<sup>143</sup> The ECO receives on average 1 300 public inquiries per year.<sup>144</sup>

Establishment of the ECO has been heralded as one of the most successful elements of the *EBR*.<sup>145</sup> Subsequent to this, the annual reports published by the ECO are touted as being comprehensive and useful in “provid[ing]...analysis of the state of the environment in Ontario and highlights those areas that need attention.”<sup>146</sup> These

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<sup>141</sup> See *ibid.* p.246; Castrilli (1998) p.14

<sup>142</sup> *Independence, Accountability & Transparency: The Role of the ECO* (1999) p.3,5

<sup>143</sup> Muldoon (1995) pp.129-134; Castrilli (1998) pp.423-426; *Planning Our Landscape* (2004-2005) pp.7-8

<sup>144</sup> McRobert (2006a)

<sup>145</sup> *EBR Law Reform Workshop* (2004) p.21

<sup>146</sup> *ECO 10 Year Review of the EBR – Results of the Pre-Consultation Questionnaire* (2004) p.10 [hereinafter referred to as *Review of EBR-Questionnaire* (2004)]

strong statements of support lend legitimacy to the office responsible for overseeing the *EBR* and also thus to the Act itself.

### 3.3.3.2 Environmental Registry

The Environmental Registry is an online database which gives the public access to proposals for environmentally significant policies, Acts, regulations and instruments. It is the primary means for notice under the *EBR*. Its purpose is to open-up the decision-making process; to provide information to various sectors of society; and to ensure accountability of the governmental ministries who are responsible for decision which affect the environment. The Registry has exceeded expectations by being one of the most successful undertakings for which the *EBR* is responsible. It has increased transparency and has resulted in awareness among staff within the government Ministries about the need for public consultation, and gets approximately 4 000 registered user sessions month.<sup>147</sup>

The questionnaire distributed as part of the ECO's 10-year review of the *EBR* determined that there were many positive aspects of the Registry such as availability of information and general ease of operation. Questionnaire respondents also suggested improvements to the Registry. These suggestions pertained to improved technological processes, the posting of Registry notices, and process-related ideas relating to the notice and comment procedures.<sup>148</sup>

### 3.3.3.3 Statements of Environmental Values

SEVs are policy statements prepared by each of the Ministries which are intended to operationalize the *EBR*. These statements are intended to influence the ministry by incorporating the purposes of the *EBR* into their decision-making processes by providing an ethic, plan, and practice when it came to environmental considerations and are a unique development in environmental policy. SEVs were originally built into the *EBR* in order to substitute for judicial accountability and the public trust doctrine, but they are regarded as a failure as Ministries have not truly incorporated these

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<sup>147</sup> McRobert (2006a); McRobert (2001b); *EBR Law Reform Workshop* (2004) p.8-12, 21; Muldoon (1995) p.85

<sup>148</sup> *Review of the EBR-Questionnaire* (2004) pp.7-8

statements into their operations, and the statements themselves are vague in detail and impact, in essence they lack accountability mechanisms.<sup>149</sup>

#### 3.3.3.4 Public Notice, Comment and Appeal Procedures

The guidance document for Ministries published by the ECO on the notice and comment procedures is explicit in addressing the importance of these procedures for public participation. It states “...to be truly fair and efficient, the decision-making process must support early and accessible opportunities for public participation.”<sup>150</sup> When implemented, these procedures work to achieve those aforementioned goals and are at the ‘heart’ of the public participation guarantees.

The participation rights held in *EBR* Part II apply if the following criteria are met: (1) the proposal must fall within the scope of the *EBR*; (2) the proposal should have been prescribed or phased in; (3) the proposal is environmentally significant;<sup>151</sup> (4) there are not any exemptions under the *EAA*.<sup>152</sup>

After determining whether the *EBR* rights apply, the next step to determining threshold conditions is to establish what class of instrument the proposal falls under in order to determine which types of public participation are required. The notice and comment opportunities are increasingly formal depending if the proposal falls under class I, class II, or class III. Class III instruments require the greatest level of public participation, in particular, public hearings. Class II instruments have enhanced notice and comment rights. Examples of enhanced notice could include news releases, flyers, signs, mailings to members of the public and notifying community organizations; enhanced comment rights could include mediation, negotiation or hearings. Class I instruments are all those which could have a significant effect on the environment, but which have not been classified as either class II or class III.<sup>153</sup>

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<sup>149</sup> Estrin (2004) pp.14-15; Castrilli (1998) p.421-424; *EBR Law Reform Workshop* (2004) p.11; Lindgren (2004) p. 9; and Muldoon (1995) pp.122-128

<sup>150</sup> *Implementing the Environmental Bill of Rights* (1996) p.8

<sup>151</sup> Environmental significance determined by relevant minister using the following factors: (1) extent and nature of measures required to mitigate/prevent environmental harm; (2) geographic extent of any harm to the environment; (3) nature of the private/public/government interests in the decision; (4) any other matter the minister considers relevant. (*EBR* (1993), Section 14)

<sup>152</sup> Muldoon (1995) p.68

<sup>153</sup> *ibid.* p. 71, 87

Once the instrument has been classified, notice of the proposal is made on the Environmental Registry. As a general rule, thirty days are provided for public comment after which point the ministry considers any comments submitted by the public and then posts a response on the Environmental Registry. With respect to the right to comment, it is expected that meaningful opportunity be provided to the public to express their views on the proposal prior to a final decision being made by the ministry. The minimum participatory right allows for members of the public to write to the relevant ministry to share their experiences, and express their concerns and suggestions for the proposal.<sup>154</sup>

If the public is dissatisfied with the decision posted by the ministry they have the opportunity to seek leave to appeal under certain circumstances. This right to appeal was established by the *EBR* and allows class I and class II instruments to be appealed by the public to the Environmental Review Tribunal (ERT).<sup>155</sup> Substantively, in order to access this right to appeal, a person must (1) have standing, meaning; a person should be acting in good faith and have a “demonstrable interest” in the decision, and (2) must have a right to appeal arising from the underlying statute.<sup>156</sup> The person must also satisfy the criteria of the leave test as listed in section 41 of the *EBR* which requires that:

1. there is a 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
2. the decision in respect of which an appeal is sought could result in significant harm to the environment.

Procedurally, the person must file their application for leave within 15 days of the decision being posted on the Environmental Registry. If the aforementioned conditions are met, the Tribunal hears the leave to appeal and makes a decision. According to the ECO Annual Report 2004-2005, seven applications for leave to appeal were initiated during the reporting period, one of which was granted by the ERT, the other six

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<sup>154</sup> *ibid.* pp.88-93

<sup>155</sup> The ERT’s former incarnation was as the Environmental Appeal Board. Class III instruments are not included in this appeal process since those decisions are made by tribunal, and not by the Ministries.

<sup>156</sup> Castrilli (1998) p.415 *and* Muldoon (1995) p.96-102

applications were denied based on the determination that the applicants did not meet the leave to appeal test.<sup>157</sup>

Section II of the *EBR* holds some important guarantees for public participation; however it is not without its problems. For example, the 10-year review of the *EBR* identified that 64% of those who had used the Registry to comment on a proposal indicated that they “believe the government had not considered their comments when making a decision, or they had no way of knowing whether their input had any influence.”<sup>158</sup> It has been said that broad ministerial discretion has resulted in some environmentally significant proposals being classified as non-environmentally significant thus preventing public participation under the *EBR*, and on occasion ministries have also failed to post decisions on the Environmental Registry.<sup>159</sup> Another problem has emerged through the exercise of the exception clauses held in sections 29, and 30 of the *EBR*; this has been of great enough concern for the ECO to have addressed the issue in its annual reports and supplements.<sup>160</sup> Finally, the leave to appeal test has proven hard to meet and over a 10-year period leave has been granted by the ERT in only 13 cases, 4 of which proceeded to hearing.<sup>161</sup> The leave to appeal provisions have been criticized due to the hurdles they present to the public, and the question has been raised as to whether the current system is meeting *EBR*s purpose of protecting environmental integrity and increasing accountability in government decision-making processes.<sup>162</sup>

It is the experiences of people involved in environmental campaigns who have used the notice and comment provisions of the *EBR* that I will be examining at greater length in the next chapter to determine whether environmental protection was facilitated and achieved.

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<sup>157</sup> *Planning Our Landscape* (2004-2005) p.158

<sup>158</sup> *Review of the EBR-Questionnaire* (2004) p.7

<sup>159</sup> Lindgren (2004) p.11; *Planning Our Landscape* (2004-2005) p.26

<sup>160</sup> *Planning Our Landscape* (2004-2005); *Choosing Our Legacy* (2003-2004); and *Developing Sustainability* (2001-2002)

<sup>161</sup> Of approx. 14 000 instruments issued by the MOE, 54 leave to appeal processes were initiated, of which 13 cases went forward (*Legal Review of the EBR Leave to Appeal Process* (2004)) p.i).

<sup>162</sup> *ibid.* p.iv



### 3.3.4 The *EBR* in Practice

The provisions guaranteeing notice and comment have been chosen as the focus since they are the provisions used most frequently by the public, and are referred to by the interviewees in chapter four of this study. In order to help understand the notice and comment procedures the following hypothetical (and simplified) example is provided here in order to understand the process in practice from the point-of-view of a member of the public.<sup>163</sup>

Stream Bend Golf Course<sup>164</sup> applied to the Ministry of the Environment for a new *Permit to Take Water (PTTW)*. In its application the golf club specified that they would take 200 000 litres of water per day from a well, 200 000 litres of water per day from an irrigation pond and 3 000 litres of water per day from a neighbouring stream for 10 years. The golf course's previous *PTTW* allowed for 1 000 litres of water per day from the stream and was otherwise identical. After the application was submitted to the Ministry of the Environment (MOE) as per the *Ontario Water Resources Act s. 34*, the MOE posted the instrument proposal on the Registry. The Registry notice provided information about the new *PTTW*, including what the water would be used for, the number of litres of water which would be taken on average, the maximum rates per minute and per day, the number of hours a day water would be taken, and how many days per year this activity would persist.<sup>165</sup>

In this hypothetical situation, the golf course's downstream neighbours Mrs and Mr Friendly were active environmentalists and checked the *EBR* Registry on a regular basis. One day they noticed the above posting on the Registry and were displeased about the golf course's application to triple the amount water that would be taken from the stream. They did some research and wrote comments in the form of a letter to the contact person at the MOE. In their letter they explained that they were concerned about decreased water levels in the stream since the water level had already dropped significantly during the recent dry years. They explained that they enjoy the stream that runs through their property because it provides their children a place to cool off and play in the summer. In addition to their concerns, they recommended that the permit be

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<sup>163</sup> Annex 7 provides an actual example of the public influence of a ministry decision in notice and comment; Annex 8 provides an actual example of a positive leave to appeal.

<sup>164</sup> This is a fictional name and case; resemblance to any actual case is purely coincidental.

<sup>165</sup> See Annex 9 for a Sample Registry Notice.

issued for 2 years only. Their comments were successfully submitted within the 30-day window.

When the comment period closed, it turned out that a number of comments were received from downstream neighbours who were concerned about low water levels. After visiting the neighbours to see the stream, a MOE staff member determined that tripling the *PTTW* for the golf course would have a negative impact upon the stream and the downstream neighbours. The MOE's decision was then posted on the Registry and the *PTTW* was granted for 3 years with the following conditions: the golf course could not take more than 20 % of the stream flow and was responsible for the monitoring of this provision. The MOE decision included a statement as to how the comments by the public were considered.

If the MOE decision had been that the increase in the *PTTW* would not have affected the stream, Mrs and Mr Friendly could have filed an request for leave to appeal within 15 days of the decision being posted on the Registry. They would have had to show that they had an interest in the decision, and the request would only have been granted if there was reason to believe that the decision would not have been made by a "reasonable person" and that there was the potential for significant environmental harm to occur. The ERT is the body which would have made a decision on the appeal.

This hypothetical situation followed the prescribed timeline set-out in the *EBR* and was straight-forward without any complicating factors. The campaigns in which interview respondents have been involved have not always gone as smoothly. The range of experiences across campaigns, and even within a single campaign can vary greatly. The following provides three brief summaries of the experiences explained by interviewees.

Environment Hamilton is a community group for which one of the interviewees works. Its core mandate is "to facilitate the ability of people in the Hamilton area to develop the knowledge and skills they need to protect and enhance the environment around them."<sup>166</sup> According to the interview conducted with Brenda Johnson, Environment Hamilton monitors the Registry and passes on relevant information to the community in order to facilitate comments to relevant notices. Over the ten years after

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<sup>166</sup> *Introduction to Environment Hamilton* (2006) (Website)

the *EBR* processes were established, Leave to Appeal has been granted in 13 cases and Environment Hamilton is distinguished by having successfully filed two of those.<sup>167</sup>

To give an example of the notice and comments process at work, the steps leading to the filing of a comment under the *EBR* by a resident of Hamilton may include: (1) attending a community meeting hosted by Environment Hamilton where a new posting on the Registry is mentioned which relates to a neighbouring industry, (2) followed by asking for guidance from Environment Hamilton to prepare a comment, (3) then taking the time to write down personal experiences and reflection upon how the proposed changes might affect the community and re-writing this account several times, (4) finally, submitting comments and waiting for a decision.

Another interviewee is involved in the Stop Dump Site 41 campaign. This campaign has been ongoing since 1985 in an effort to stop a proposed landfill site.<sup>168</sup> So far the campaign has been successful in improving the design of the site, but Darrell Leonard's experience has not been as straight-forward as the aforementioned scenarios. The campaign began long before the *EBR* was established, and there has been a long history of arranging public debates, letter-writing campaigns, printing lawn signs, and distributing petitions. Leonard explains,

- "...a lot of time is spent just as a watchdog...after twenty years of data and responses, this information must still be correlated with information they are bringing forward today."<sup>169</sup>

The campaign has filed three different applications under the *EBR*, and Site 41 was mentioned in the 2004 *Annual Report* by the Environmental Commissioner.

As a final example, Ken McRae, a third interviewee went to great length to explain for me the process of searching for environmental records on the Registry. Using a particular Registry posting for a *PPTW*, he illustrated that there were a number of pieces of information missing from the posting, and explains that:

- "In order to view the missing information [I] would have to phone the Kingston MOE office and ask the *PPTW* Coordinator, or the Director Section 34 to have someone in their office fax it, or have copies sent to the Ottawa MOE office for viewing. If you contact the local MOE office to see that information you might

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<sup>167</sup> *Legal Review of the EBR Leave to Appeal Process* (2004) p.i; Johnson (2006b)

<sup>168</sup> The campaign has existed in other forms since 1965. (*Waste Disposal in North Simcoe: A Chronology* (2005) (Website))

<sup>169</sup> Leonard (2005b)

be told that you have to submit an application under the Freedom of Information and Privacy Act to receive a copy of them.”<sup>170</sup>

McRae’s description illustrates that the process of commenting on a notice might not be as straight-forward as just reading a notice on the Registry and subsequently submitting a comment based on your own experiences. These examples have been described in order to put the experiences discussed in the fourth chapter into a greater context.

### 3.3.5 Efficacy of the *EBR*

A workshop was held in 2004 to discuss possible reforms to the *EBR* as part of its ten-year review. One of the participants made the following statement which seems to reflect some of the general feelings on the instrument: “Those who know the *EBR* in theory (such as students) think it’s great, those who use it are frustrated, and those who study it closely are encouraged again.”<sup>171</sup> Having said this, there is no complete agreement on which aspects of the *EBR* are most successful or in most need of reform.

The *EBR* has much strength stemming from the fact that success has been achieved in increasing public participation in the decision-making process. The provisions held within Part II of the document allow much greater opportunity for public participation by requiring notice to be posted on the Registry and allowing for comments to be submitted by the public. The Environmental Registry is a success considering that over 22 000 comments on policies, Acts, and regulation notices have been posted between 2001-2003.<sup>172</sup> The Environmental Commissioner and the office with which his position is associated are also examples of provisions provided for in the *EBR* which have been successful; the educational and reporting functions alone have resulted in much more public awareness surrounding the rights held within the *EBR*.

Criticisms of the *EBR* regime include, first, the fact that it is difficult to determine whether there has been any correlative influence on government decision-making towards decisions which improve environmental quality in spite of increased public participation.<sup>173</sup> Second, there has been little success in increasing government

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<sup>170</sup> McRae (2006)

<sup>171</sup> Saxe as quoted in *EBR Law Reform Workshop* (2004) p.8

<sup>172</sup> McRobert (2006a)

<sup>173</sup> Lindgren (2004) p.6

accountability and ensuring environmental sustainability.<sup>174</sup> Third, the provisions held within the *EBR* are complex, a factor that can prohibit public involvement despite the fact that the *EBR* is intended to facilitate public participation.<sup>175</sup> These criticisms parallel the interview findings and discussion presented in the following chapters. Criticisms of the *EBR* should be viewed in the context that that the rights and procedures held within the *EBR* are a great improvement from what existed prior to the Act when no such rights or opportunities for public participation existed.<sup>176</sup>

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<sup>174</sup> *ibid.* p.2

<sup>175</sup> *The Ontario Regulation and Policy-Making Process in A Comparative Context* (1996) p.20

<sup>176</sup> McRobert (2006b); Lukasik (2005); *EBR Law Reform Workshop* (2004)

## 4 The Environmental Bill of Rights: Enablers and Barriers in Practice

### 4.1 Introduction

This part of the thesis will present the major findings of my study. The discussion focuses on whether the *EBR* is effective by analyzing:

1. the factors which respondents identified as having affected the exercise of the rights held within the *EBR*, and
2. whether environmental protection was achieved.

Results of the former are grouped into two major themes, the first group outlines the enabling factors which were identified, and the second outlines the barriers. Within each section discussing a barrier I will analyse and provide examples, draw conclusions, make references to relevant literature, and provide recommendations. It is important to note that a significant review of the *EBR* took place in 2004,<sup>177</sup> and my intention is not to re-create this process since my goal is to answer whether protection is being achieved by taking a human rights approach.

The themes representing the respondents' experiences in accessing the *EBR* and their assessments of the processes at work are represented in Table 4.1. These themes are divided into two categories in order to differentiate between those which enabled feasibility of use, and those aspects which served as barriers. In both instances, the factors will be discussed in order of significance<sup>178</sup> with the exception of Determination and Commitment.

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<sup>177</sup> The ECO's review process was thorough and included the solicitation of a number of recommendations regarding particular *EBR* provisions from experts; a questionnaire sent to users of the *EBR* about their experiences; a workshop including stakeholders to develop recommendations was held; and feedback on the ECO's recommendations from the Canadian Environmental Law Association. Evaluation conclusions and recommendations can be found in: *Looking Forward: The EBR* (2004); and *Feedback on "Looking Forward: The EBR"* (2004)

<sup>178</sup> Determination of core status was explained in Section 1.5 of this thesis.

**Table 4.1** –Enablers and Barriers to using the *EBR* as Identified by Respondents

<b>Enablers</b>	<b>Barriers</b>
<ul style="list-style-type: none"> <li>• Good Relationships</li> <li>• Intrinsic Value of the Opportunity to Participate in Decision-Making Processes</li> <li>• Employing a Variety of Activities in Pursuit of Environmental Protection</li> </ul>	<ul style="list-style-type: none"> <li>• Limited Resources</li> <li>• Obstacles to Access of Information and Limited Timelines</li> <li>• Lack of Proactive Engagement by Government Officials</li> <li>• High Degree of Knowledge Needed</li> <li>• Lack of Education About and Awareness of the <i>EBR</i></li> <li>• Great Degree of Determination and Commitment Needed to Navigate the Processes</li> </ul>

A greater number of barriers emerged as themes from the respondent data than did enablers. This bias reflects respondent answers which emphasized the difficulties they encountered in accessing *EBR* rights. These barriers cover a broad range of areas, from the type of personality needed to effect results to administrative hurdles in filing applications.<sup>179</sup> Each of these barriers speaks to overall problems which prevent *de facto* participation. In a number of cases the barriers were interconnected. For example, an obstacle in seeking access to information (such as a lack of sufficient accompanying information for a proposal posting on the Registry) speaks directly to the effort one must go to in order to access the information and thus, the determination needed to navigate the process. In other circumstances, the enablers and barriers were interlinked. One respondent spoke of the importance of having good relationships with the various community leaders, however her reason for mentioning this factor was linked to her perception that comments by residents are taken more seriously by MOE if they are supported by, or reflect what a community leader has said.<sup>180</sup>

It is important to note that the themes which emerged illustrate extremes in some instances, and that nuance was evident across participatory experiences of interviewees. Brenda Johnson and Lynda Lukasik for example spoke highly of the *EBR* process and

<sup>179</sup> ‘Applications’ interpreted here to include various sorts of public involvement under *EBR*, such as comment provisions, leave to appeal, review.

<sup>180</sup> Johnson (2006a)

the opportunities it presented for an average resident to affect change in his or her local community; their experiences tended to focus on using EBR tools to enable local participation. The experiences of Environment Hamilton (the ENGO for which Johnson currently works, and with which Lukasik has former involvement) are in many ways exemplary of the *EBR* working as it was intended. Ken McRae's broad experience with *EBR* rights also has nuance and he has managed to affect significant change<sup>181</sup> yet is acutely aware of the challenges he faces in accessing the information he needs in order to make informed comments and appeals. Difficulties which arose were in some cases because of the Act, but in other circumstances they were as a result of the complexities of the cases at hand.

## 4.2 Enablers in Practice

Three themes representing enabling factors arose from the interview data. These speak to initiatives and aspects of interviewee experiences which were valuable to, or helped them in their pursuit of environmental protection. Not all were necessarily related to the *EBR* and in two instances speak more generally to key aspects beyond basic participatory rights which have been beneficial to the respective campaigns. The enabling factors produced on the whole, many fewer responses than did barriers.

### 4.2.1 Good Relationships

The nurturing of positive relationships with others for the purpose of environmental protection took on a variety of forms based on the interview data. Despite the differences in the types of relationships and the purposes of these relationships toward achieving the desired goals, the common core of these experiences seemed to be the basic value in establishing good relationships. Every interviewee identified the relationships built with others as having had significance for their campaign. Beneficial relationships included the public and individual community members; staff from the ministries; other environmental campaigns and groups; community members with expertise; scientists; ECO staff; local public officials and city council; and industrial neighbours.

Two particular examples seemed significant. The first is a relationship that developed between local residents and an industrial neighbour. In Hamilton, Ontario, a

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<sup>181</sup> Ma (2005) p.2



community liaison committee was established as a result of comments submitted under the *EBR*. The committee is comprised of local residents and representatives from a particular company and they meet approximately three times annually. By sitting down and discussing potential problems, the community members have been able to discuss their problems with the company representatives, and in a few examples, feasible and proactive suggestions have been recommended. The indication is those suggestions will be implemented by the company. Based on what Johnson shared, it seems as though this relationship has helped the company become a better neighbour. Other benefits have developed from this relationship as well. For example, the community was trying to raise money to move a historic anchor into a park. There was mention of this endeavour at a community liaison committee meeting, and the company “piped up in the meeting and said, why didn’t you call us?”<sup>182</sup>

The second significant relationship has been established between Professor Shotyk from the University of Heidelberg who specializes in water purity and the Stop Dump Site 41 campaign. He tested the groundwater in Springwater Township (the location of a proposed landfill site) for antimony.<sup>183</sup> His findings are potentially useful for detecting the impact of landfill leachates on pristine groundwaters.<sup>184</sup> He has voluntarily collaborated with the Stop Dump Site 41 campaign in order to (1) supplement their applications with his research since the instruments he used in analysis have greater precisions than those available to provincial officials, and (2) in order to provide documentation of the currently pristine quality of the groundwater in the area. Professor Shotyk also volunteered to hold townhall meetings with local residents to discuss with them the purity of their water.

Both of the aforementioned relationships have been valuable to local communities for different reasons. Despite these differences, the common element was that these relationships helped toward the greater common goal of cooperation for environmental protection. The first relationship was established in a committee mandated as a result of comments made under the *EBR* and has provided an opportunity for continued dialogue between a potential-polluter and local residents. In the second

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<sup>182</sup> Johnson (2006b)

<sup>183</sup> Antimony is measured because it is one of the elements commonly enriched in leachates from landfill sites. (Shotyk (2005))

<sup>184</sup> *ibid.*

example the relationship was established based on individual initiative and represents the ways in which people with different expertise can work together to build a case based on scientific fact. The two examples represent many more examples of the value of good relationships and cooperation. The key to building such relationships seemed to be actively identifying potential allies; even among those commonly perceived of as “adversaries”. These findings are consistent with the fact that it has been found that “strong partnerships between and among citizen groups, government agencies and project proponents are vital to the development of follow-up strategies that engage the public meaningfully and promote protection of valued natural and social features.”<sup>185</sup>

#### 4.2.2 Intrinsic Value of the Opportunity to Participate

The value of the opportunity for public participation in decision-making processes was repeated by many participants. The general feeling seemed to indicate that although the system established under the *EBR* is imperfect it is better than an alternative of no provisions for public participation in environmental decision-making. Respondents found value in the right to participate regardless of the protection outcomes, although, as discussed in Chapter 5, they were at times cynical of the actual level of environmental protection achieved by these participatory processes. Webb in particular commented that she has a greater appreciation for the provisions established under the *EBR* since working in the United Kingdom where no such provisions exist. The following quotes illustrate the general feeling which indicated that respondents recognized the importance of participatory opportunities:

- “...it is my view that it is a much more transparent process than before [the *EBR*] and can be a significant improvement in terms of offering the opportunity for public input and engagement.”<sup>186</sup>
- “...[these] opportunities didn’t exist prior to the *EBR*. Of course we always need to strengthen the framework, but you always need to involve community members to facilitate the exercise of rights – it’s always better to have these rights than not!”<sup>187</sup>

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<sup>185</sup> Hunsberger (2003)

<sup>186</sup> Chiotti (2006)

<sup>187</sup> Lukasik (2005)

- “Generally, my view is that procedural rights are a core aspect of our democracy and, on occasion, have a significant effect on the decision-making.”<sup>188</sup>

Respondents acknowledged the significance of the opportunity for participation and indicated that having clear provisions for such rights is important even if improvements do need to be made to the system. This indicates that the approach taken by the *EBR* is supported and valued, despite the barriers discussed later. The intrinsic value of citizen engagement is a worthy part of the participatory process independent of its effect on decisions.<sup>189</sup> Involvement in such processes can empower citizens through meaningful participation in their communities and it can provide opportunities for individuals to develop skills for promoting change, and in some instances, taking on a visionary role.<sup>190</sup>

#### 4.2.3 Employing a Variety of Activities

Employing a variety of activities in pursuit of environmental protection was identified as an enabling factor. Interviewees indicated that they found it useful to utilize a variety of “tactics” in their campaigns, although respondents sometimes contradicted each other about the value of specific methods. Overall, a huge variety of methods were identified as having been employed by the various interviewees who had been involved in campaigns, these included: holding and participating in meetings (townhall meetings, committee meetings, panel discussions, information meetings), writing letters and emails, soliciting outside expertise, employing the media, lobbying, flyers or mail campaigns, signage, making phone calls to community leaders, having booths and displays, holding barbecues, petitions, legislative proposals, presenting alternatives, holding rallies.<sup>191</sup>

Provisions for allowing such types of activities are not included in the *EBR*, but are held within other Canadian legislation guaranteeing the right to hold and express opinions, and the right to freedom of assembly. As discussed in Chapter 3, such

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<sup>188</sup> McRae (2006)

<sup>189</sup> Parson (2000) p.s138

<sup>190</sup> *ibid.* p.s138; Lukasik (2003) p.11

<sup>191</sup> Respondents were not uniform in agreeing that involving the media or holding rallies were effective means of achieving their goals - some suggested that these activities could backfire.

guarantees are valuable to the greater concept of participatory rights for the purpose of environmental protection.

### 4.3 Barriers in Practice

A greater number of themes representing barriers emerged than did themes representing enablers. No attempt was made to equalize these two as it was decided that awareness of problems faced by members of the public is important for facilitating improvements to the processes. A series of recommendations for improvements are included for each barrier.<sup>192</sup>

#### 4.3.1 Limited Resources

Resources identified by participants included financial resources, staff resources, and/or time resources. Limited resources were a significant concern across the participants from the environmental campaigns. Those within the ECO also mentioned the resource constraints they face (although to a lesser degree).<sup>193</sup>

Heather Webb and Johnson work for respective non-profit environmental organizations. Each identified limited resources as being limiting factors to their work either because they didn't have the funds or resources to run programmes; because of the prohibitive costs of hiring a lawyer in order to pursue a particular issue; or because they needed to be conscious of their funding sources. With respect to the last point, environmental non-governmental organizations (ENGOS) which are funded through grants or donations need to be careful of how they are perceived in the community for fear of losing support in the future.<sup>194</sup>

The ENGO Johnson works with has a mandate to enable working-class families in their local community to raise their environmental concerns through the *EBR*. The majority of the local residents do not have internet access, and it is difficult for them to be kept abreast of the postings on the Registry. Environment Hamilton monitors the Registry and informs the residents of the local community about relevant postings.<sup>195</sup> If it were not for the services of this ENGO a sizeable community of people who are

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<sup>192</sup> Recommendations summarized in Annex 10

<sup>193</sup> Lukasik (2006)

<sup>194</sup> Johnson (2006a)

<sup>195</sup> Johnson (2006b)

greatly impacted by their industrial neighbours (which produce various emissions) would probably not access their *EBR* rights. This is not as a result of a *de juris* limitation to rights held within the *EBR*, but the lack of formal methods to facilitate participation by vulnerable groups such as the working-poor is a *de facto* barrier to participation.<sup>196</sup>

Webb and Johnson respectively indicated that they have relied on the services of the Sierra Legal Defence Fund and/or the Canadian Environmental Law Association which offer free legal assistance to citizens and citizen groups. Webb noted that her organization had to carefully choose which cases to pursue legally since there were very limited funds for such projects.<sup>197</sup> She also stated:

- “...it’s important to note that individuals of average means and ENGOs might have a tougher time with access to justice...they don’t usually have money to hire lawyers, and environmental law firms and the like prefer to allocate their resources carefully, only taking on [precedent setting] cases.”<sup>198</sup>

Leonard and McRae are environmental activists who have respectively dedicated thousands of hours to the cause of environmental protection. Neither expressed frustration at the time and energy they have dedicated over the years to attending meetings, doing research, following-up with people, or driving to meet with officials. However they both acknowledged the significant time and expense required of their involvement:

- “Filing...and actually fighting through an appeal are still very time consuming and expensive processes.”<sup>199</sup>
- “You would be surprised how many hours are spent reading, writing, communicating which is all voluntary.”<sup>200</sup>

With respect to time resources, in one unique observation, McRae stated:

- “...my experience is that many people feel that they simply don’t have the time to get involved in such matters themselves, and therefore rely upon government agencies to protect their interests.”<sup>201</sup>

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<sup>196</sup> Osberg (2000) p.870

<sup>197</sup> Webb (2006)

<sup>198</sup> *ibid.*

<sup>199</sup> McRae (2006)

<sup>200</sup> Leonard (2005a)

<sup>201</sup> McRae (2006)

This observation struck me as significant because it illustrates that the time required to participate in these processes prevents people from participating. As a result, the observation indicates that barring participation, people rely on the government to protect their environmental interests. This is exactly the opposite to the intent of the *EBR*.

Leonard has been involved with a particular environmental campaign for more than ten years, and estimates that he spends an hour per day working on it. Leonard's campaign is evidence that within a single project there may be numerous processes and appeals which are going-on simultaneously which end-up taking months and years to conclude.<sup>202</sup> McRae has been involved in protection activities for nearly a decade and estimates that he spends upwards of four hours per day on research, writing letters, and following-up on Registry postings. Such huge commitments of time are not feasible for most people.

## Discussion and Recommendations

The various types of resource constraints identified by interviewees all serve to make the processes held in the *EBR* inaccessible to some parts of the populations. Volunteer-based environmental organizations with limited funding sources and people with limited personal financial resources would be hard pressed to hire a lawyer to file an Application for Investigation under Part V, or to proceed with the Public Nuisance or Harm to a Public Resource provisions under Part VI. Under normal circumstances a single-mother working full-time and raising two children would not be able to commit financial resources, time or energy to environmental causes considering the role-overload she would be balancing.<sup>203</sup> The informal resource costs such as the time spent on research, attending meetings, waiting for information, and the formal financial costs such as the nominal fees for accessing some types of information eventually add-up to create a potentially unreasonable burden on members of the public wishing to participate.<sup>204</sup> The ECO 10-year review touched upon the need for participant funding in order to level the playing field and enhance the integrity of the process. A variety of

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<sup>202</sup> Leonard (2006)

<sup>203</sup> Chilman (1991) p.193

<sup>204</sup> The fees can range from \$5 to \$25 for accessing information from the Privacy Commissioner. (*Access to Information under Ontario's Information and Privacy Act* (2000) (Website))

possible funding structures were discussed.<sup>205</sup> In an ideal world such initiatives would be valuable, however I do not foresee funding becoming available by many of the means suggested. Even if they did, I would continue to have concerns that the time resources could still be significant.

The potential burden placed on members of the public is great. In my opinion, many of the suggestions for participant funding made under the 10-year review are unlikely to be pursued; therefore, the ECO should be able to initiate a comment, leave to appeal, or investigation on behalf of the public if there is indication that such measures could not be taken by members of the public due to resource constraints. In order to fulfil such a broadened mandate, the ECO would need additional funding and staff. Lack of resources are in themselves a barrier to effectively participation, however they are also relevant when considering the level of determination needed to pursue a concern if one faces such resource constraints.

#### **Figure 4.2**

##### **Recommendation 1: Improving Access for Individuals with Resource Constraints**

- The ECO should be able to initiate a comment, leave to appeal, investigation or review on behalf of the public if there is indication that such measures would not otherwise be taken due to resource constraints.
- In order to fulfil such a broadened mandate, the ECO would need additional funding and staff.
- A legal funding programme be established.<sup>206</sup>

Also see Recommendation 4

#### **4.3.2 Access to Information and Limited Timelines**

The main obstacles identified with respect to accessing information included (1) a lack of, or lack of access to required information, and (2) the limited timeframes under the *EBR* which are reduced *de facto* because of the lack of access to information. In addition, recommendations for improved notice under the Registry were noted by multiple interviewees.

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<sup>205</sup> *EBR Law Reform Workshop* (2004) p. 27, 32-33

<sup>206</sup> This has been discussed under the ECO 10-year review of the *EBR*. In addition, there was an *Intervenor Funding Project Act* (1989) which is no longer in existence which could serve as a model.

The fact that the information needed to evaluate postings on the Registry is not easily available seemed to serve as a significant barrier to feasibly participating. A number of respondents indicated that improved online resources would be useful. McRae described extensive efforts to access the relevant information, sometimes travelling 200km to see a piece of documentation. McRae described some problems with ‘proposal’ postings in particular:

- “...[they] lack sufficient information by themselves for anyone to fully understand what an applicant has asked for, and what the environmental impacts or potential environmental impacts could be. They also don’t list any of the standard or general government conditions that are regularly applied to various instruments issued. In brief, they’re too vague. Therefore, people viewing a proposal generally would not know if they should be concerned about [it] or not.”<sup>207</sup>

He went on to explain that tracking down missing information can prove to be a significant barrier especially when one is trying to decide whether to submit a Request for Leave to Appeal on a decision posting, which has a 15-day timeline for any submissions.<sup>208</sup>

Leonard described his attempts to gain access to a series of relevant records which were deemed as un-releasable by the County. Another member of the Stop Dump Site 41 campaign applied to the Privacy Commissioner to request that the information be released. However, despite being initiated over a year ago, they are still waiting for the results and realize the process could be delayed again if the County rebuts any decision by the Privacy Commissioner.<sup>209</sup> Such hurdles speak not only to the barriers in gaining access to relevant information needed to effectively participate, but they also speak to the determination needed to navigate such processes.

Respondents identified that improvements could be made to the Registry which could facilitate the process of accessing information. Three interviewees, independently of each other and without being asked, identified that the Registry would be enhanced if individuals could sign-up to be notified about postings which impact their geographic region or by keyword. The Registry could then automatically email a

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<sup>207</sup> McRae (2006)

<sup>208</sup> *ibid.*

<sup>209</sup> Leonard (2005b)



notice to such individuals if relevant postings were made.<sup>210</sup> This would eliminate the need to trawl the Registry for relevant postings and may improve accessibility in general in two ways. First, people who would not necessarily check the Registry on a frequent basis could be notified by email so they wouldn't miss any postings. Second, people who have been involved in the *EBR* because of a single issue would be exposed to other issues in their region which may impact them. The development of such technology was also identified by the questionnaire developed to seek feedback on the use of the *EBR* under its 10-year review.<sup>211</sup>

## Discussion and Recommendation

The *EBR* requires that policies, instruments, Acts and regulations be posted on the Registry, however, there is no assurance that the supplementary information needed to evaluate these postings is available and reasonably accessible. This poses a problem to members of the public who are interested in commenting or filing request for leave to appeal. Every effort should be made by all relevant agencies to rectify this problem as the participatory processes should be feasible for the average person in order to truly achieve the purposes set-out in the *EBR*. Extensive barriers to accessing the relevant information could serve to discourage the public from participating and should not be tolerated by the ECO.

With respect to the issue of the narrow timeframes within which the public have the opportunity to comment or request leave to appeal, this issue was also raised during the ECO's 10-year review of the *EBR*. During the law-reform workshop it was noted that these timeframes were originally intended as minimums, but have in reality been applied as maximums.<sup>212</sup> Such timeframes are problematic, as can be illustrated by McRae's experience of having worked to submit request for leave to appeal a decision, only to be told that it would not be considered by the Ministry because it was submitted a few minutes past the midnight deadline.<sup>213</sup> Although it can be argued that deadlines are set in order to facilitate a timely process, it can also be argued that strict deadlines

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<sup>210</sup> Johnson (2006b); McRae (2006); Webb (2006)

<sup>211</sup> *Review of the EBR-Questionnaire* (2004) p.8

<sup>212</sup> *EBR Law Reform Workshop* (2004)

<sup>213</sup> According to McRae, as long as an internal decision hasn't already been made by MOE, comments on proposals will be considered even if they're late, as the MOE recognizes it's in their best interest. (McRae (2006))

prevent effective participation, especially if other factors are at play, such as inaccessible information, which make adherence to such deadlines difficult at best. There should be room to allow the public to notify the ECO and relevant ministries if inaccessible information has impacted their ability to comment or file a leave to appeal. In such cases leeway should then be provided and the deadline extended as seen fit.

Although on one hand it is important to dissuade irrelevant and frivolous comments and/or appeals, it is on the other hand important that procedures needed to make informed applications not be prohibitively difficult to obtain relevant information.

### **Figure 4.3**

#### **Recommendation 2: Improved Access to Information**

- All information relevant to a posting should be included on the Registry.
- Deadlines for submitting applications should be adopted as minimums, and deadlines be extended when circumstances have prevented public access to information.
- Upon updating the Registry website, a function should be built-in to sign-up for email notification for postings relevant by geographic region or keyword.

#### **4.3.3 Engagement by Government Officials**

Identification of a lack of proactive engagement by government officials emerged as a barrier from references made by respondents from their experiences with ministries, councils, and the informal processes which influenced the functioning of such processes.<sup>214</sup> Impressions expressed by interviewees indicated that consideration of their applications by provincial and municipal officials often depended on the perceived legitimacy of the person filing the application rather than the content of the application.

Concern was expressed at the fact that at times applications filed by “regular” members of the public have been dismissed since those individuals did not have “expertise” in the field. It was felt that applications were taken more seriously if they were backed by a well-respected environmental organization and/or had the support of those in public office. Indication was also made that the views of those in positions of

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<sup>214</sup> ‘Proactive Engagement’ is interpreted here as efforts by government officials to facilitate current political goals, priorities, or objectives. It is important to note that it was not the impression of respondents that all government officials showed a lack of proactive engagement. However, officials who did were perceived as hampering the participatory process.

power within government offices and ministries also influence to a great degree the success of an environmental agenda. The following quotations highlight examples of each these aforementioned issues:

- "...members of the ERT need to have a more open mind as to the worth of what "lay" (not professional) members of the public have to say in their arguments. People don't need to have a degree in hydrology, or whatever, in order to express legitimate concerns. Some in the past, have dismissed ... concerns because those expressing them (me and others) have been "lay" persons."<sup>215</sup>
- "It is much easier to have both the municipality and the provincial leaders on side. If their comments are similar to the residents' then the MOE seems to take the comments more seriously. [Our organization] is getting a reputation within the MOE, so our comments are also taken more seriously than others."<sup>216</sup>
- "As with all work involving policy and legislation, political will is essential, at provincial and local levels. If the 'wrong' government or minister is in place, conservation goals are much more difficult to achieve, if they can be achieved at all."<sup>217</sup>

One participant also raised the issue that in some instances many years of investment have been put into a particular project, and that the proponent then has "all their eggs in one basket".<sup>218</sup> He hypothesized that in such a case the likelihood of the proposed project (in this case a landfill site) being discontinued is highly unlikely because the stakes are too high. He is of the impression that the public is thus left merely trying to improve the project design to decrease the environmental impact and that, in his words: "[n]o matter how strong a defence we provide, it falls on deaf ears to the decision makers at the County and the MOE".<sup>219</sup> It was also noted by McRae that he feels that the MOE at times wants to make it difficult to file a well-thought-out request for leave to appeal as they do not want it to be proven that they were wrong in issuing an Approval for Industrial Sewage Works (for example).<sup>220</sup>

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<sup>215</sup> McRae (2006)

<sup>216</sup> Johnson (2006a)

<sup>217</sup> Webb (2006)

<sup>218</sup> Leonard (2005a)

<sup>219</sup> *ibid.*

<sup>220</sup> McRae (2006)

## Discussion and Recommendations

The mandate of the *EBR* is provide “means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario; [and ensure] increased accountability of the Government of Ontario for its environmental decision-making.”<sup>221</sup> These procedures are intended to be accessible to all Ontarians and improve public participation; therefore applications should be considered equally regardless of affiliation, expertise, or political will. If the goal is indeed improved environmental protection, as is pronounced in Article 3(1) of the *EBR* then such factors should not influence consideration of applications by residents. The experiences of interviewees which gave rise to the identification of this barrier bar effective participation in processes intended to protect the environment.

The findings of this section are consistent with some of the findings of the questionnaire distributed under the 10-year review of the *EBR*. One respondent to that questionnaire believed that the *EBR* had no meaningful impact upon decision-making and that it is primarily a public-relations tool used by the government.<sup>222</sup> Under the same questionnaire a government employee found that “[Ministry] staff frequently view Registry postings as a formality and that their decision on a topic has often been made long before the first comment arrives.”<sup>223</sup>

On a different note, if the failure of ministries to implement SEVs<sup>224</sup> is any indication, it seems as though there is a long way to go before the relevant government agencies truly believe in the value of the *EBR*. It has been noted that “the content of the SEVs certainly appears to advance the goals of the *EBR*. But [they]...are not often being paid proper attention.”<sup>225</sup> It is my recommendation that on-going efforts be made to impart the value of the *EBR* and of public participation to those within the relevant governmental bodies in order to change what seems to be a culture which does not always value public input. The recommendations made by the ECO following the 10-year review of the *EBR* suggest some improvements relating to integration of SEVs by

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<sup>221</sup> *EBR* (1993), Article 2(3)

<sup>222</sup> *Review of the EBR-Questionnaire* (2004) p.6

<sup>223</sup> *ibid.* p.7

<sup>224</sup> Estrin (2004) pp.4-8

<sup>225</sup> *Review of the EBR-Questionnaire* (2004) p.14

relevant ministries.<sup>226</sup> Serious consideration of SEVs by ministries in decision-making, especially if SEVs purported the value of public participation, could be valuable in counteracting this particular barrier.

Ministries dealing with the environment have faced significant funding cuts in recent years, and public servants are as a result over-worked and have fewer resources and this has led to decreased accountability and recommendations for major legislative and institutional reforms.<sup>227</sup> When and if such reforms are undertaken, it will be important to underscore that the public should not be perceived as making more work for provincial employees, but rather, as helping to bring to light potential problem-areas in Registry postings and the development of solutions. McRae for example recognizes the limitations faced by government officials who thus cannot guarantee the proper oversight of every proposed development; he perceives his efforts as an attempt at making up for these shortcomings.<sup>228</sup>

Further work can always be done in order to increase the value placed on public efforts in filing applications under the *EBR*. In writing about participatory processes under the *CEAA* Fritsch states that “determining the timing of public participation is highly contingent on the whims and will of the government...this [means] that the public engages in the review of the proponent’s plan and design, rather than public engagement in the planning stages of the project.”<sup>229</sup> This parallels the processes at work under the *EBR* where the public has the opportunity to comment on a plan rather than being engaged in the planning itself. In an analysis of the *EBR*, Walker points out that decision-making power is still effectively left in the hands of the government rather than the public<sup>230</sup> as is encouraged by the top three rungs of Arnstein’s ladder. A review of the *EBR* leave to appeal process concluded that some processes under the Act are contradictory to the purposes of the *EBR* and that “far from assisting residents to participate in environmental decision-making – one of the *EBR*’s stated purposes – the

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<sup>226</sup> *Looking Forward: The Environmental Bill of Rights* (2005), Recommendations 2-4

<sup>227</sup> Muldoon (1999) p.1

<sup>228</sup> Ma (2005) p.3

<sup>229</sup> Fritsch (2004) pp.16-17

<sup>230</sup> Walker (1995) p.24

law seems to have emerged as a tool that can be used by government to block challenges.”<sup>231</sup>

#### Figure 4.4

##### Recommendation 3: Improving Proactive Engagement by Government Officials

- Continued promotion of the value of the *EBR* to relevant government ministries by ECO.
- Take steps to ensure that public input and participation is valued; this could include further dialogue with relevant government offices.
- Encourage the use of SEVs and ensure the inclusion of participatory norms within them.

#### 4.3.4 High Degree of Knowledge

Interview respondents possessed a huge wealth of knowledge across a variety of relevant areas. They knew the ins and outs of the participatory processes; of the legislation; of the key players at local and provincial levels; of the science behind the issues; and of the history behind their campaigns which sometimes stretched over 20 years. Each respondent indicated that they had made efforts at passing along their knowledge to others, and all but one indicated that they had spent a significant amount of time doing research and reading on the issues.<sup>232</sup> Some expressed that their pursuit of knowledge was in order to be taken more seriously by the authorities, for example:

- “[We] strongly oppose [being labelled NIMBYs] because our goal in this campaign is to use technical data and facts, to fight for what’s right.”<sup>233</sup>

In a few cases, knowledge was gained through extensive self-study. McRae for example, has no formal post-secondary education; however, he has gained detailed knowledge of water regulations by reading hydro-geological reports and asking

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<sup>231</sup> *Legal Review of the EBR Leave to Appeal Process* (2004) p.54

<sup>232</sup> Note, Johnson was speaking as a key informant, and the experiences of those she was speaking on behalf of were different from the other interviewees who were directly involved in accessing *EBR* processes. This was because of the nature of Johnson’s organization; Environment Hamilton became involved with local residents and worked to educate them about how to write applications precisely because it was recognized that enabling factors were needed in order to help ‘average’ people to participate in the *EBR* processes. Working-class residents in the industrial neighbourhoods of Hamilton would doubtfully have gotten involved in *EBR* processes without Environment Hamilton, and it is unlikely that many (if any) would have gone to the same lengths which Leonard or McRae have in doing extensive scientific research, for example.

<sup>233</sup> Leonard (2006)

questions over the ten years he's been involved in environmental protection activities.<sup>234</sup> Leonard cited the intimate knowledge gained from living on the same land his entire life as having been essential:

- “Although I don't have any formal education in hydrogeology, I have been able to use my knowledge of the land I grew up on and relate it to the...documents, challenging those aspects which are contradictory using a more common sense approach.”<sup>235</sup>

A significant observation was that NGOs are being relied on for expertise in many areas. They were called upon to comment on proposals if the general public has not done so, and to participate in stakeholder groups and panels discussing any number of relevant environmental issues during decision-making processes.<sup>236</sup> The problem is that these NGOs are being stretched beyond their capacity and expertise to respond effectively in some instances, yet feel pressured to participate for fear that if they don't participate there won't be any other voices advocating for environmental protection. Respondents also noted that legal advice and other expert advice is often needed in order to make strong applications. The following quote illustrates this last issue:

- “We have a variety of experts - scientists, lawyer, activist, residents, labour council etc - on the board [of directors] as well as experts within the community [who] are always prepared to assist with different projects.”<sup>237</sup>

## Discussion and Recommendations

It seems contradictory that on one hand, members of the public feel they need to have equivalent to expert knowledge in order to be taken seriously, and on the other hand, NGOs are expected to provide expert knowledge for which, in some cases, they lack the expertise. In the former case, feasible public participation is being hindered, in the latter; expectations are too high as public groups are being expected to fill in the gaps which have emerged as a result of funding cuts to government departments

In his discussion of the desired outcomes of participatory processes Beierle points to the fact that if the public is significantly well-informed they may be able to carry out the role envisioned in environmental legislation (such as identifying

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<sup>234</sup> Ma (2005) p.3

<sup>235</sup> Leonard (2006)

<sup>236</sup> Webb (2006); Chiotti (2006); Johnson (2006b)

<sup>237</sup> Johnson (2006a)

violations, applying pressure, contributing to rule-making). However, he stresses that such knowledge requirements are clearly too ambitious for more than a handful of citizens and that even more moderate expectations of public understanding of the consequences for environmental decisions are too ambitious.<sup>238</sup> Skeptics of public participatory processes often cite concern over the public's lack of expertise,<sup>239</sup> or as Arnstein describes, non-genuine participation can result in the public not having asked the important questions as they had no technical advisors of their own to help them grasp some concepts.<sup>240</sup>

This barrier has significant links with other barriers, including the determination needed to gain a significant level of knowledge relating to a particular campaign; the time resources needed to undertake such an endeavour; and the adjustment in political will needed to take applications from the public seriously.

#### **Figure 4.5**

##### Recommendation 4: Enable Access to Experts

- Participant funding structures could provide a pool of financial resources so that individual members of the public, citizen groups, or NGOs could apply for to hire the experts needed to submit a strong application under the *EBR*.
- Environmental legal aid services be developed in conjunction with an Ontario law school to complement services already offered by the Canadian Environmental Law Association and Sierra Legal Defence Fund.

#### 4.3.5 Education About and Awareness of the EBR

The need for more education and awareness programmes was raised a number of times by participants. It was noted that determined individuals with a particular environmental problem find out about the *EBR* and *ECO*; however the concern was that the majority of Ontarians had never heard of either. Respondents cited the need for greater education and awareness around the *EBR*, and two of the respondents had taken the initiative to organized meetings to explain the *EBR* and how to use it, and had written articles and newsletters to raise awareness.<sup>241</sup> Respondents felt strongly that if

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<sup>238</sup> Beierle (1998) pp.5-6

<sup>239</sup> Kraft (1991) p.299

<sup>240</sup> Arnstein (1967) p.219

<sup>241</sup> Note: Johnson has been included in this tally, and some of these activities are key to fulfilling the key goals of Johnson's organization.



more people knew about the *EBR* a variety of benefits would result beyond the value of awareness itself, including more effective participation by enabling people to actually use the provisions and increased comments on Registry postings.

- “...the problem is that a lot of people don’t know...there’s not a lot of education out there for people to use it. And that’s the missing part of the *EBR*. It’s great to have this legal tool for people to access, but there’s no-one there to walk them through it. It can be very intimidating at times...”<sup>242</sup>
- “What limits the effective participation [is] the fact that while the environmental community knows about it, most “average people” still don’t know about the *EBR* or the Registry and end up calling groups like [ours] only when it’s almost too late...”<sup>243</sup>
- “There is a strong need for greater public education about the [Registry] and the *EBR*. Many ‘decisions’ posted on the [Registry] indicate that no comments were received. It is my belief that this does not indicate a lack of public concern, but rather a lack of public awareness.”<sup>244</sup>

## Discussion and Recommendations

Considering that education programmes would serve to significantly increase the public’s knowledge about the *EBR* and would thus increase their ability to participate effectively in public policy making,<sup>245</sup> it seems obvious that continued efforts should be made to raise awareness. Education initiatives need to occur on a number of levels in order to be effective. First, they need to target three specific audiences, including (1) individuals and families, (2) interests groups, industry, and other organizations, and (3) government. Second, beyond mere awareness, education should explain the process by combining technical information and help.<sup>246</sup>

A paper published by the ECO in 1999 indicates that the ECO is well-aware of the value of public education in ensuring decision-making which reflects the values of Ontario residents.<sup>247</sup> The paper highlights the fact that during the first five years of the *EBR*, the ECO made presentations, visited communities, met with decision-makers at the provincial and municipal levels, published and distributed newsletters and

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<sup>242</sup> Johnson (2006b)

<sup>243</sup> Webb (2006)

<sup>244</sup> McRae (2006)

<sup>245</sup> Hahn (1990)

<sup>246</sup> *ibid.*

<sup>247</sup> *The Role of the ECO in Public Education* (1999) p.2

factsheets, developed the ECO homepage, and developed the Resource Centre located at the ECO.<sup>248</sup> The key challenges to increasing awareness which were identified revolve around staff and financial resources. The ECO indicated that it targeted its few resources allotted to public education to the groups and individuals which had the greatest interest.<sup>249</sup> The 2004-2005 *ECO Annual Report* indicates that presentations were made to over 11 000 people during the previous year, and 1 300 direct inquiries were handled by the Office.<sup>250</sup> The questionnaire distributed under the ECO 10-year review of the *EBR* determined that the ECO annual and special reports are useful for educational purposes and were used by respondents to educate students about environmental issues and the *EBR* respectively.<sup>251</sup>

Despite the fact that the ECO is targeting their education endeavours, based on respondent data, more education and awareness is needed. This in turn, indicates that the ECO needs to be allocated greater resources in order to effectively fulfil this part of its mandate. With respect to the audience types listed earlier; interviewees indicated that better education was needed at the first level (individuals and families) in order to raise general awareness. At the second level, some of the organizations I contacted while recruiting interview participants were either not familiar with the *EBR*, or were not aware of the rights held within the *EBR*. At the government-level, awareness should be on-going through the SEVs and ongoing contact with the ECO.

In considering the educational process, increased availability of technical help was identified by respondents as being needed in instances where members of the public are using the *EBR* for the first time. Resource limitations have prevented the ECO from completely fulfilling such a role even though they do respond to the inquiries of people who contact their office. Groups such as Environment Hamilton have stepped-in to ensure that residents get help in navigating the *EBR* processes. Ideally, the relevant ministries should also be involved in *EBR* education and awareness and be able and willing to provide members of the public help in navigating the processes and submitting their applications. Finally, the ECO Annual Reports should include more

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<sup>248</sup> *ibid.* pp.2-4

<sup>249</sup> *ibid.* p.4

<sup>250</sup> *Planning Our Landscape* (2004-2005)

<sup>251</sup> *Review of the EBR-Questionnaire* (2004) p.10,12

detailed mention of awareness and education initiatives which promote the *EBR* and *ECO*.

#### **Figure 4.6**

##### Recommendation 5: Increased Education and Awareness About the *EBR* and *ECO*

- The *ECO* should be allocated more resources for educational programmes.
- Relevant Ministries should broaden their educational programmes to include the *EBR* and offer support to individuals / groups submitting applications.
- *ECO* Annual Reports should place more focus on which education activities have been undertaken.

#### 4.3.6 Determination and Commitment

The great degree of determination and commitment needed to navigate the processes overarches and stems from all other barriers.<sup>252</sup> This barrier speaks to a person's individual perseverance that seems to characterize those who have successfully navigated the *EBR* processes - both in particular causes and across a number of issues and campaigns. Factors which illustrate the degree of determination exemplified by respondents include: the time and financial resources which they have allocated to the cause of environmental protection; extreme dedication to their cause; willingness to keep fighting year after year; perseverance in accessing the information needed; the extensive knowledge gained in particular areas of environmental protection in order to be taken more seriously; and even willingness to sacrifice hobbies and other activities. Determination is evident in the initial confidence and conviction needed to initiate one of the *EBR* processes. Individuals with low esteem, those who have not accessed formal procedures before, or those with lower levels of education could feel intimidated in even considering the process let alone proceeding to action.

Darrell Leonard indicates members of the public who get involved voluntarily are held to a high level of accountability and liability as a result of their involvement. He is a member of the Community Monitoring Committee which was established by Simcoe County as part of the requirements set-out by the MOE under a *Certificate of Approval*. The committee membership includes three voting community members, 3

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<sup>252</sup> This barrier was the aspect mentioned most often by respondents, it is mentioned last because of its links with other enablers and barriers.

voting council members, one non-voting county staff member, and one non-voting MOE member.<sup>253</sup> The committee serves as a body which collects, reviews, and exchanges information relevant to the development, operations, monitoring and care of the landfill site in question. Despite not having any decision-making ability the committee can be held liable if due diligence is not shown.<sup>254</sup> Commitment under such conditions is paramount.

The following quotes emphasize the commitment required:

- “Due to the long time span of this campaign, several previous [campaign] members are no longer involved for reasons such as frustration / emotional burn-out.”<sup>255</sup>
- “It took years for me to learn about [these] matters, and I’m still learning. Members of the public wanting to use the *EBR* and [Registry] for the first time would find their learning curve rather steep and somewhat daunting. They need fortitude to see it through.”<sup>256</sup>
- “If you use the *EBR* a few times, you become comfortable with the process and lingo. Due to circumstances, residents may only need to use the *EBR* once and never achieve that comfort level so they seem reluctant to attempt participation.”<sup>257</sup>
- “[The] citizen friendliness [of the process] is hit and miss. The issue is to make people comfortable with the process – but the basic right is important. It can be difficult and requires a certain type of person, the process is not straight forward, but it’s doable if the person is concerned – this is an ongoing problem that needs to be addressed.”<sup>258</sup>
- [Question: Why do you think the residents you’re involved with are so engaged?] “I like to say it’s because they have a lot of heart and they [are] spunky...I don’t know, I just think that ... maybe they’re just tired of people walking on them too many times.”<sup>259</sup>

In addition to the data collected from interviews, determination on the part of interveners can be seen by looking at the data published in the ECO annual reports and supplements. For example, the *Braeker* case (one of only two which have been initiated

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<sup>253</sup> Leonard (2006)

<sup>254</sup> *Site 41: Proposed Landfill Site* (2004) (website); Leonard (2006)

<sup>255</sup> Leonard (2006)

<sup>256</sup> McRae (2006)

<sup>257</sup> Johnson (2006b)

<sup>258</sup> Lukasik (2005); Lukasik (2006)

<sup>259</sup> Johnson (2006b); Lukasik (2006)

under the right to sue for harm to a public resource) was initiated in 1998 and in 2006 is still in discovery.<sup>260</sup>

## Discussion and Recommendations

The *EBR* rights should provide a feasible and reasonable process for members of the public who are concerned about environmental issues in their communities to engage. Illustrative comments, such as the one which observed that members of the public had suffered burn-out as a result of their involvement in these processes do not speak to a reasonable or feasible level of dedication. Engagement in an issue and a desire to affect change requires determination on the part of those involved, however, when the expectations provided for in an instrument such as the *EBR* are excessively daunting and demanding such processes no longer facilitate participation and instead can serve to discourage involvement. Complementary to these findings but with respect to the leave to appeal process, a review concluded that “overwhelmingly, the requirements imposed by the *EBR* upon residents concerned with a decision are more onerous than those imposed... [under the *EPA*].”<sup>261</sup> A specific recommendation will not be made for the alleviation of this particular barrier since, as indicated earlier; improvements to relieve other barriers will hopefully result in assuagements in this particular barrier.

### 4.3.7 Discussion

As discussed in chapter two, theories of participation highlight various aspects which need to be fulfilled for participation to be effective. Annex 11 provides a comparison between the primary findings and the literature and reveals that all but two of the identified barriers and enablers appear as important aspects of participation. When the barriers are measured against participatory theory (Annex 11), the majority of barriers parallel aspects of participation which are identified as being necessary. These include limited resources, access to information, engagement by government officials, knowledge, education and awareness. It can thus be concluded that full and effective participation under the *EBR* is being hindered by the fact that those aspects emerged as barriers instead of as enablers. In order for the *EBR* to be fully-effective from a

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<sup>260</sup> *Planning Our Landscape* (2004-2005) p.161; McRobert (2005)

<sup>261</sup> *Legal Review of the EBR Leave to Appeal Process* (2004) pp.54-55.

participatory perspective, improvements are thus needed to address the barriers. Throughout this chapter a number of recommendations have been suggestions to address the barriers. In addition, analysis and recommendations proposed under the ECO 10-year review of the *EBR* provide further suggestions which could be implemented to such an end.<sup>262</sup> The allotment of additional resources is mentioned under some of the recommendations; I realize that procurement of resources is not an easy task. However, I am of the belief that additional resources may in some cases be key to lifting specific aspects of the *EBR* to a higher level of effectiveness.

From an international perspective, the *EBR* parallels many of the provisions held within the *Aarhus Convention*. Both documents reflect the importance of access to information, public participation in decision-making, and access to justice; and hold similar requirements and obligations relevant to those rights. A guidance document on the implementation of the *Aarhus Convention* suggests a number of methods for implementing obligations under the convention.<sup>263</sup> Many of the processes developed to administer the *EBR* are similar to those suggested for the implementation of the *Aarhus Convention*, for example, the use of electronic databases and the internet, supervision of how the public authorities take comments into account, and establishing clear procedures for submitting comments in writing, to name a few.<sup>264</sup> There are also implementation suggestions for the *Aarhus Convention* which could help to improve some of the barriers to the *EBR* that have been identified in this thesis. For example, a system to help the public formulate requests, incentives for proponents to engage in early dialogue, and flexibility in setting time-frames.<sup>265</sup> One provision of the *Aarhus Convention* which differs greatly from the *EBR* is the requirement that states prepare a state-of-the-environment report at regular intervals,<sup>266</sup> although ECO annual reports serve this function to a degree.

With respect to the ultimate effectiveness of the *EBR* McRobert and McAteer point to the fact that the *EBR* was designed to ensure the accountability of government

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<sup>262</sup> Although not part of the 10-year review, Muldoon (1999) also provides relevant recommendations

<sup>263</sup> Stec (2000)

<sup>264</sup> *ibid.* p.51,88,89

<sup>265</sup> *ibid.* p.51,88,89

<sup>266</sup> *Aarhus Convention* (1998), §5(4)

officials, and it has succeeded in increasing transparency in government decision-making. They conclude that:

“Transparent environment decision-making and adequate opportunity for public input into environmental decisions can help ensure that environmental quality is safeguarded. The EBR provides ministries in the Ontario government with some tools to achieve these goals and to demonstrate their commitment to environmental protection. Conversely, failure to provide the public with adequate information and opportunities to review and comment on changes to environmental protection will produce poorer results and will damage public confidence in the government’s commitment to protecting the environment.”<sup>267</sup>

According to Beierle one should look for evidence that public participation added substantive knowledge or ideas that would not have been otherwise available (especially in circumstances when it is difficult to evaluate protection outcomes).<sup>268</sup>

Despite the fact that there is room for improvement to the existing processes in order to facilitate more feasible participation for the public, I believe that the *EBR* rights provide opportunities for such knowledge to emerge from the public, as was illustrated by the experiences of Leonard, Johnson, and McRae.

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<sup>267</sup> McRobert (2001b)

<sup>268</sup> Beierle (1998) p.7

## **5 Environmental Bill of Rights: Protection Outcomes**

When designing the interview questions, I focussed on two main types of questions, (1) the factors which respondents identified as having affected the exercise of the rights held within the *EBR*, combined with (2) whether environmental protection was achieved. I originally anticipated that the interviewees would speak equally to (1) the processes they engaged in, and (2) their perceptions of whether environmental protection was achieved. It was my belief that if respondents felt the participatory processes were feasible, and that they also believed that the goals of environmental protection were being achieved, that the *EBR* could be considered as having been effective. This presumption was based on the relationship outlined in the purposes of the Act as set out in Articles 2(1) and 2(3). Article 2 indicates that the substantive purpose of the act is to ensure protection and sustainability of a healthful environment, to be achieved through participatory guarantees and increased governmental accountability.

Despite recognizing the value of both areas of questioning some interesting themes emerged from the data with respect to the latter which required serious consideration and a shift in focus. I believed that respondents would be forthcoming with a wealth of information with respect to both question areas; however, the data which emerged from the interviews indicated that respondents were preoccupied to such a degree with the processes that the issue of protection outcomes was barely touched upon in comparison.

Some respondents did not comment on protection outcomes and there was no consensus among those who did. The opinions ranged from strong statements that the *EBR* rights lead to greater environmental protection, to strong statements indicating that although participatory norms are supported, actual protection outcomes have not been achieved. Other respondents sat on the fence with yes/no answers, and even commented that it's difficult to make such an evaluation. Some of these various comments can be seen in the following quotes:



- “Participation rights through the *EBR* have not helped the goal of environmental protection. Despite the Environmental Commissioner providing recommendations about performing a complete review, these are recommendations only, and no one is forced to follow them. Basically, the Commissioner has ‘no teeth’.”<sup>269</sup>
- “To answer your question [does the process ensure environmentally conscious decisions are made] I would have to answer the proverbial “yes and no”....I don’t believe that there is any mechanism in place anywhere in the world that can ensure 100% that environmentally conscious decisions are made. As to the degree that the *EBR* ensure this to happen...I don’t think that we have had sufficient amount of time or experience to answer this question with a high degree of confidence, but the preliminary results suggest that it is certainly a step forward.”<sup>270</sup>
- “I think it’s who you talk to, and how successful it’s been for them, if a person is successful accessing the *EBR*, he will have praise for the *EBR*. Conversely if that same person was unsuccessful then he would not have praise for the *EBR*.”<sup>271</sup>
- “[The degree of success] depends on how one defines environmental protection. The *EBR* has certainly helped make a lot of the decision-making more accessible to the public. I am unsure, however, the extent to which ministries follow guidance received through the *EBR*, especially since much of it will be conflicting (eg. Where industry and the conservation community comments on the same issue). What I think has really made a positive contribution is the establishment of the Environmental Commissioner’s Office.”<sup>272</sup>

The literature is also contradictory in concluding whether increased public participation leads to better regulation or environmental decision-making. Green for example states that there is no such guarantee and that “public participation rights risk overregulating when public demand for control is high without reducing the possibility of underregulation when public interest is low”.<sup>273</sup> Conversely, Petkova et al claim that evidence suggests that public participation succeeds in both improving the acceptance and quality of decisions.<sup>274</sup> In an article published soon after the *EBR* was established, the claim was made that this instrument “does not guarantee public participation in all decisions affecting the environment nor does it ensure that legal action to protect the

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<sup>269</sup> Leonard (2006)

<sup>270</sup> Chiotti (2006)

<sup>271</sup> Johnson (2006b)

<sup>272</sup> Webb (2006)

<sup>273</sup> Green (1997) pp.435-436

<sup>274</sup> Petkova (2002) p.1

environment will always be taken where necessary. The Act is clearly the product of compromise...<sup>275</sup> In addition, a review of the leave to appeal process under the *EBR* conducted as part of the 10-year review references two independent studies which suggest that there has been inadequate protection of environmental quality in some areas.<sup>276</sup>

Despite the fact that my ambition was to address both the accessibility of the process and the protection outcomes, the interview respondents were either preoccupied with the former or in some cases did not feel confident answering the latter. I do not feel I acquired adequate data with respect to the protection outcomes to draw conclusions about whether protection is being achieved. I made the decision not to go back to the interviewees in order to elicit more information about protection outcomes for two reasons: first, I believe that their lack of answers is significant and worthy of discussion, and (2) limitations imposed by this master's-level thesis were a preventative factor in conducting further interviews.

My initial reaction while conducting the interviews and re-reading the transcripts, was with so many processes at play within any particular campaign and so much attention being focussed on the detail and politics behind a particular issue, the goal of environmental protection seemed to have gotten lost along the way. This is an observation based on the respondent's preoccupation with the processes, and the great time and effort which was spent participating in these processes, and did not emerge based on interview data.

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<sup>275</sup> Walker (1995) p.21

<sup>276</sup> *Legal Review of the EBR Leave to Appeal Process* (2004) p.54

## 6 Summary and Conclusions

This chapter begins by discussing how the findings address the original research question. This includes comparing the primary research of this thesis within participation theory. Next, questions which could guide further investigation will be considered. Finally, conclusions will be drawn as to whether a singular participatory rights approach is an appropriate method of addressing environmental protection.

### 6.1 Research Summary

The research of this study sought to draw lessons from individual experiences with the *EBR* in order to identify factors that facilitated or impeded the exercise of participatory processes.

The purpose of the research was to determine whether the environmental protection goals of the *EBR* were being achieved through participatory processes by examining the factors which respondents identified as having affected the exercise of the rights held within the *EBR*, combined with determinations of whether environmental protection was achieved. The factors which emerged from respondents as having enabled the participatory process or having served as barriers, for the most part parallel the various criteria and aims of public participation as identified in the literature.

Annex 11 compares the research findings of this thesis with participatory theory. This comparison shows that respondents' participatory experiences with the *EBR* fall directly in line with recommended aspects of an effective participatory model. However, as highlighted in Annex 11, the barriers indicate that further improvements to the *EBR* process are needed in order to truly fulfil the aims of participation discussed in the literature. Further steps to facilitate participation under the *EBR* are needed to ensure that there is feasible access to the public.

In addition, the barriers which were identified speak to how people feel within the processes. This is important because processes based on democracy should include an element of equity and fairness – research shows that people seldom complain about

unfair allocations, but instead focus on being treated with consideration.<sup>277</sup> Similarly, respondents accessing *EBR* processes did not expect compensation for their many hours of volunteer work, but rather expressed frustration at the fact that they felt they were given the run-around or that their contributions were not always seriously considered.

This study found that there were significant barriers to an accessible participatory process in practice. This study could not draw conclusions with respect to the environmental protection outcomes. What seems to have emerged from the data is the fact that some aspects of the process are so tedious that the average person would have difficulty using the rights held within the *EBR*. Accessibility of a process is key to its success, and if the *EBR* processes are not feasibly accessible because of various barriers, then the process is not equitable since the average person would not be able to easily participate. Having identified these barriers from the data, I attempted to offer a series of recommendations which could work to facilitate increased feasibility of participation.

Recommendations were suggested throughout Chapter 4 (Annex 10) which could potentially be used to improve the participatory processes under the *EBR*. One can also look to the ECO 10-year review, and the *Aarhus Convention* implementation guidelines for further ideas on how the identified barriers could be addressed. The *EBR* provides unprecedented opportunity and rights toward the goal of environmental protection. These rights are participatory in nature; an approach which is valuable in that it is based in democratic norms. Although it was not possible to determine whether such an approach facilitates decisions which improve environmental protection, barriers and enabling factors within the processes themselves were uncovered in interviews with individuals who access rights under the *EBR* and such findings are relevant to ensuring the process is at least achieving its democratic goals.

## 6.2 Suggestions for Further Investigation

Over the course of this study, a number of questions have arisen which could direct future research in this area. First, examination to determine whether public participation under the *EBR* is achieving increased environmental protection is needed. This could include comparing case studies from jurisdictions taking a participatory

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<sup>277</sup> Tyler (2000) p.118

rights approach and jurisdictions taking a substantive rights approach and measuring the respective levels of environmental protection. Such a study could also survey those who have used the *EBR* to evaluate the impact of their participation through one or all of the processes available under the instrument.

Second, research focussing on the provincial ministries' experiences with the *EBR* could also be undertaken. Evaluation of ministry employees' experiences incorporating public participation provisions into their decision-making could be valuable to understanding the full spectrum of experiences with the instrument. This could be achieved by evaluating their perceptions of the participatory aspects and/or of the protection outcomes achieved. Complementary to this, a parallel evaluation of proponents' experiences would also shed light on the processes and protection outcomes in practice.<sup>278</sup>

Third, it has been suggested that the Canadian federal government should take a leading role in environmental authority.<sup>279</sup> Environmental harm does not recognize political borders; therefore, further research could consider how a federal environmental bill of rights might be drafted and consider how such a document might complement the existing environmental regime in Canada and across the provinces and territories. A research question could include the following aspects: (1) what added benefit could a federal environmental bill of rights provide; (2) how should a federal bill of rights complement existing federal and provincial legislation; (3) could such provisions be integrated into the *Charter of Rights and Freedoms*;<sup>280</sup> (4) should such a document take a participatory or substantive rights approach?

Fourth, considering that "people's values and ways of life shape the priority they accord to protecting different aspects of the environment" the question arises as to how public participation can develop environmental policies which are not subject to such determinations and instead are focussed on the broader goals of environmental protection.<sup>281</sup> Research could examine what checks and balances could be developed to ensure attention is focused on environmental protection, conservation, and regeneration.

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<sup>278</sup> This was done to a degree by inviting ministry officials and industry representatives to the *EBR* 10-year review. (*EBR Law Reform Workshop* (2004))

<sup>279</sup> Paehlke as cited in Parson (2000) pp.131-132

<sup>280</sup> This question was considered to a degree by Stevenson (1983) after the creation of the *Charter*.

<sup>281</sup> Parson (2000) p.s124

Finally, one question which has repeatedly struck me is whether the involvement of vulnerable groups has been secured by *EBR* processes. I question whether elderly people, people of various socio-economic circumstances, people with disabilities, minority and immigrant populations, aboriginal people, and children have a voice in these participatory processes. All of these groups play significant roles in our society and may face different environmental problems. Study is needed in order to determine whether their participation is guaranteed and whether they have a voice in the processes. Subsequently, processes which are accessible to children have not been apparent during this research, a fact which is striking considering that children in particular should be provided the opportunity to participate since they represent the future generations. The *EBR* preamble states that “the people of Ontario have as a common goal the protection, conservation, and restoration of the natural environment for the benefit of present and future generations.” Therefore research could be undertaken to determine what types of processes could be implemented in order to provide children the opportunity to participate in environmental decision-making. Especially since the *Convention on the Rights of the Child*, to which Canada is a signatory, states that children should have a say in decisions which affect them.<sup>282</sup>

### 6.3 Conclusion

I conclude the *EBR* successfully provides the basis for a system of participatory rights in environmental decision-making despite the barriers identified by this research study. A number of recommendations have been made to reduce these barriers. It was not possible to conclude, from this study, whether or not the *EBR* has led to positive environmental protection outcomes.

The *EBR* was intended as a document delineating minimum standards for public consultation and the *EBR* 10-year Review workshop came to the conclusion that some law reform is needed to improve these processes.<sup>283</sup> But, reform is also needed to improve the *de facto* situation for improved ease of use. According to Douglas-Scott, the advantage to a participatory rights regime is that even if the desired protection result is not achieved, there may be other legal effects such as shifting the burden of proof onto those whose action damage the environment, or result in a ripple effect stimulating

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<sup>282</sup> CRC (1989), §12

<sup>283</sup> McRobert (2001b); *EBR Law Reform Workshop (2004)* p.41

political debate and action on environmental issues.<sup>284</sup> He also states that “in the absence of a substantive right, participatory rights are an important feature of environmental protection...[and] people contribute to environmental decline, therefore their active participation must be required to prevent it. It is only in this way that the interests of all, including future generations, can be safeguarded”<sup>285</sup> The *EBR* is valuable in that it is an improvement over what had previously existed. However, improvements can still be made to the processes, and I can’t help but continue to question whether an eventual complementary guarantee of a substantive right to environmental protection might make the processes stronger. Finally, the first part of research the equation was determined as having not been fulfilled as a result of lack of accessibility. One could conclude that even if protection outcomes had been achieved, the full effectiveness of the *EBR* would not have been possible considering both aspects need to be fulfilled

Although it is not certain how far participatory rights go towards achieving environmental protection outcomes, the participatory regime (to paraphrase Lukasik) puts citizens in a situation where they can have influence. These opportunities didn’t exist prior to the *EBR*. Although the framework may need to be strengthened, community members should always be involved and it’s better to have the rights than not.<sup>286</sup> To my knowledge, a method of guaranteeing substantive environmental rights has not yet been developed. Perhaps the environmental area can learn from the human rights or international economic regimes and develop an international institution with environmental expertise based on structural aspects of the UN treaty body mechanisms and the World Bank, while also drawing on lessons already learned in the environmental area itself by involving NGOs to a great degree.<sup>287</sup> In the meantime work should be continued to further strengthen participatory rights in environmental decision-making under the *EBR* to make *de facto* access to such processes more feasible for the public.

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<sup>284</sup> Douglas-Scott (1996) p.112-113

<sup>285</sup> *ibid.* p.120

<sup>286</sup> Lukasik (2005)

<sup>287</sup> Parson (2000) p.s134; Alston (1992)

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## **Annexes**

Annex 1: Environmental Bill of Rights, (SO 1993, Chapter 28), Province of Ontario

### **Preamble**

The people of Ontario recognize the inherent value of the natural environment.

The people of Ontario have a right to a healthful environment.

The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations. While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

...

### **Purposes of Act**

2. (1) The purposes of this Act are,

(a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act;

(b) to provide sustainability of the environment by the means provided in this Act; and

(c) to protect the right to a healthful environment by the means provided in this Act.

Same

(2) The purposes set out in subsection (1) include the following:

1. The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.

2. The protection and conservation of biological, ecological and genetic diversity.

3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.

4. The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.

5. The identification, protection and conservation of ecologically sensitive areas or processes.

Same

(3) In order to fulfil the purposes set out in subsections (1) and (2), this Act provides,

(a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;

(b) increased accountability of the Government of Ontario for its environmental decision-making;

(c) increased access to the courts by residents of Ontario for the protection of the environment; and

(d) enhanced protection for employees who take action in respect of environmental harm.

...

## **PART II**

### **PUBLIC PARTICIPATION IN GOVERNMENT DECISION-MAKING**

#### **Purpose of Part II**

3. (1) This Part sets out minimum levels of public participation that must be met before the Government of Ontario makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments.

Same

(2) This Part shall not be interpreted to limit any rights of public participation otherwise available.

...

#### **The Environmental Registry**

##### **Registry**

5. (1) An environmental registry shall be established as prescribed.

##### **Cost of registry**

(2) The cost of establishing and operating the registry shall not be imposed on a municipality.

##### **Purpose of registry**

6. (1) The purpose of the registry is to provide a means of giving information about the environment to the public.

Same

(2) For the purposes of subsection (1), information about the environment includes, but is not limited to, information about,

(a) proposals, decisions and events that could affect the environment;

(b) actions brought under Part VI; and

(c) things done under this Act.

...

## **PART III**

### **THE ENVIRONMENTAL COMMISSIONER**

#### **Environmental Commissioner**

49. (1) There shall be an Environmental Commissioner who is an officer of the Assembly. 1993, c. 28, s. 49 (1).

## Appointment

(2) The Lieutenant Governor in Council shall appoint the Environmental Commissioner on the address of the Assembly.

## Term of office

(3) The Environmental Commissioner shall hold office for a term of five years and may be reappointed for a further term or terms.

...

## Oath of office

52. Before commencing the duties of his or her office, the Environmental Commissioner shall take an oath, to be administered by the Speaker of the Assembly, that he or she will faithfully and impartially exercise the functions of his or her office.

...

## Staff

54. (1) Subject to the approval of the Board of Internal Economy, the Environmental Commissioner may employ such employees as the Commissioner considers necessary for the efficient operation of his or her office and may determine their remuneration, which shall be comparable to the remuneration for similar positions or classifications in the public service of Ontario, and their terms of employment.

...

## Functions

57. In addition to fulfilling his or her other duties under this Act, it is the function of the Environmental Commissioner to,

(a) review the implementation of this Act and compliance in ministries with the requirements of this Act;

(b) at the request of a minister, provide guidance to the ministry on how to comply with the requirements of this Act, including guidance on,

(i) how to develop a ministry statement of environmental values that complies with the requirements of this Act and is consistent with other ministry statements of environmental values, and

(ii) how to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry;

(c) at the request of a minister, assist the ministry in providing educational programs about this Act;

(d) provide educational programs about this Act to the public;

(e) provide advice and assistance to members of the public who wish to participate in decision-making about a proposal as provided in this Act;

(f) review the use of the registry;

(g) review the exercise of discretion by ministers under this Act;

(h) review recourse to the rights provided in sections 38 to 47;

- (i) review the receipt, handling and disposition of applications for review under Part IV and applications for investigation under Part V;
- (j) review ministry plans and priorities for conducting reviews under Part IV;
- (k) review the use of the right of action set out in section 84, the use of defences set out in section 85, and reliance on section 103 respecting public nuisance actions; and
- (l) review recourse to the procedure under Part VII for complaints about employer reprisals.

#### Reports

58. (1) The Environmental Commissioner shall report annually to the Speaker of the Assembly who shall lay the report before the Assembly as soon as reasonably possible.

#### Same

(2) The annual report shall include,

- (a) a report on the work of the Environmental Commissioner and on whether the ministries affected by this Act have co-operated with requests by the Commissioner for information;
- (b) a summary of the information gathered by the Environmental Commissioner as a result of performing the functions set out in section 57 including, for greater certainty, a summary of information about compliance with ministry statements of environmental values gathered as a result of the review carried out under clause 57 (a);
- (c) a list of all proposals of which notice has been given under section 15, 16 or 22 during the period covered by the report but not under section 36 in the same period;
- (d) any information prescribed by the regulations under this Act; and
- (e) any information that the Environmental Commissioner considers appropriate.

#### Same

(3) The first report under subsection (1) shall be submitted in the first half of 1996 and shall cover the period beginning on the day this Act receives Royal Assent and ending on December 31st, 1995.

#### Special reports

(4) The Environmental Commissioner may make a special report to the Speaker of the Assembly at any time on any matter related to this Act that, in the opinion of the Commissioner, should not be deferred until the annual report, and the Speaker shall lay the report before the Assembly as soon as reasonably possible.

#### Report on ministry statement of environmental values

(5) If the Environmental Commissioner considers that a minister has failed to comply with section 7, 8 or 9 respecting a ministry statement of environmental values, the Commissioner shall, as soon as reasonably possible, report to the Speaker of the Assembly who shall lay the report before the Assembly as soon as reasonably possible.

#### Special assignments

The Environmental Commissioner shall perform special assignments as required by the Assembly, but such assignments shall not take precedence over the other duties of the Commissioner under this Act.



## Annex 2: Interview Questions for Interviewees who Access *EBR* Rights

### *Part 1: Background Questions*

1. What was your role with respect to [name of environmental campaign]?
2. What are the goals of the campaign?
3. What have been a few of the major events in the campaign?
4. What have been the obstacles to change?
5. Who are the important participants?
6. How have they participated in the campaign?
7. What are the anticipated outcomes of the campaign?
8. How are you funded?

### *Part 2: Experience Questions*

1. What types of participatory rights have been exercised in the campaign? (if exercised, please provide a brief comment on how useful each has been in achieving your goals)
  - a. Access to Information
  - b. Participation in Decision-Making
  - c. Access to Justice
  - d. Right to Hold and Express Opinions
  - e. Freedom of Association
2. Are you familiar with Ontario's Environmental Bill of Rights (*EBR*)?
  - a. If yes, have you accessed any of the provisions within the *EBR*? (for example, opportunity to comment, leave to appeal, the Environmental Registry, the Environmental Commissioner's Office)
  - b. If yes, do you feel that the participation rights in the *EBR* have helped achieve the goal of environmental protection? Why?
3. Have there been any other influential methods of participation? If yes, what?
4. Have there been any other influential factors? If yes, what?

### *Part 3: Opinion / Evaluative Questions*

1. Have you achieve the desired results?
2. Is environmental protection being achieved?
3. How accessible are these rights? Would anyone with a legitimate concern be able to effectively comment or file leave to appeal?
4. Are there any vulnerable groups of people who may be underrepresented by these processes?
5. What were your personal motivating factors for getting involved?
6. What has been your overall impression of having been involved in this environmental campaign? Are you making a difference? Is it worth it?
7. In an ideal world, what type of rights would you like to see for environmental protection?
8. Is there anything else you think is important to mention which has not been covered?

### Annex 3: Participant Criteria and Overview

<b>Participant<sup>+</sup></b>	<b>Affiliation</b>	<b>Engage <i>EBR</i> Process in Role</b>	<b>Profession- al Expertise with <i>EBR</i></b>	<b>Geogra- phic Region</b>	<b>Willingness to Participate</b>
David McRobert	<i>Environmental Commissioner of Ontario</i> (employed by the ECO) >Monitoring body for operation, implementation and compliance with the <i>EBR</i>	No	Yes	General	Yes
Lynda Lukasik	<i>Environmental Commissioner of Ontario</i> (employed by the ECO)	No	Yes	General	Yes
Brenda Johnson*	<i>Environment Hamilton</i> (employed by EH) > Empowering the working-poor to help protect the environment in an urban-industrial area	Yes	No	South-western Ontario	Yes
Heather Webb*	<i>Ontario Nature</i> (formerly employed by ON) > Conservation and restoration of natural habitat	Yes	No	General	Yes
Darrell Leonard*	<i>Stop Dump Site 41</i> (voluntary involvement) > Halting a dump site proposed on aquifers and floodplain (voluntary involvement)	Yes	No	Central Ontario	Yes
Ken McRae*	> Involved in many projects including wetland protection, permission to take water, industrial sewage works among others	Yes	No	Eastern Ontario	Yes

<b>Participant<sup>+</sup></b>	<b>Affiliation</b>	<b>Engage <i>EBR</i> Process in Role</b>	<b>Professional Expertise with <i>EBR</i></b>	<b>Geogra- phic Region</b>	<b>Willingness to Participate</b>
Charlie Angus	<i>Public Concern Temiskaming</i> (voluntary involvement, and elected MP) > Fought against a proposed landfill sight in a lake formed from a closed mine pit.	No	No	North- eastern Ontario	Not beyond initial email
Quentin Chiotti	<i>Pollution Probe</i> (employed by PP) > Research-based organization, programme areas include air, water, climate change, energy	No	No	General	Not beyond initial email
Aaron Isherwood	<i>Sierra Club</i> (employed by Sierra Club) > Advocacy in the following programme areas: Health & Environment, Protecting Biodiversity, Atmosphere and Energy, and Transition to a Sustainable Economy	No	No	General	Not beyond initial email
Kevin Gamble	<i>Greenpeace Canada</i> (employed by Greenpeace) > Environmental protection through negotiation, research, proposing alternatives, civil disobedience	No	No	General	Not beyond initial email

<sup>+</sup> Contact, or attempted contact also made to individuals at the following in addition to those mentioned above: Chiefs of Ontario, Deputy Minister of the Environment, Earth Justice, Environment North, Environmental Defence, Minister of the Environment, National Resources Defence Council, Ontario Nature, Public Concern Temiskaming, Sierra Club, World Watch

\*Indicates that interview questions contained in Annex 2 were asked of these respondents.

#### Annex 4: International Basis for Participation in Environmental Decision-Making

Instrument	Content
Universal Declaration of Human Rights	<p><i>Article 21</i></p> <p>(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.</p> <p>(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.</p>
Rio Declaration	<p><i>Principle 10</i></p> <p>Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided</p> <p><i>Principle 20</i></p> <p>Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.</p> <p><i>Principle 21</i></p> <p>The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.</p> <p><i>Principle 22</i></p> <p>Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.</p>
Draft Principles on Human Rights and the Environment	<p><i>Principle 18</i></p> <p>All persons have the right to active, free, and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development. This includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions.</p>

World Charter for Nature	<p><i>Principle 23</i> All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.</p>
Agenda 21	<p><i>Preamble to Chapter 23</i> 23.1 Critical to the effective implementation of the objectives, policies and mechanisms agreed to by Governments in all programme areas of Agenda 21 will be the commitment and genuine involvement of all social groups. 23.2 One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures. 23.3 Any policies, definitions or rules affecting access to and participation by non-governmental organizations in the work of United Nations institutions or agencies associated with the implementation of Agenda 21 must apply equally to all major groups. 23.4 The programme areas set out below address the means for moving towards real social partnership in support of common efforts for sustainable development.</p>
Climate Change Convention	<p><i>Article 6</i> In carrying out their commitments under Article 4 , paragraph 1(i), the Parties shall:</p> <p>(a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:</p> <ul style="list-style-type: none"> <li>(i) the development and implementation of educational and public awareness programmes on climate change and its effects;</li> <li>(ii) public access to information on climate change and its effects;</li> <li>(iii) public participation in addressing climate change and its effects and developing adequate responses; and</li> <li>(iv) training of scientific, technical and managerial personnel.</li> </ul> <p>(b) Cooperate in and promote, at the international level, and, where appropriate, using existing bodies:</p> <ul style="list-style-type: none"> <li>(i) the development and exchange of educational and public awareness material on climate change and its effects; and</li> <li>(ii) the development and implementation of education and training</li> </ul>

	<p>programmes, including the strengthening of national institutions and the exchange or secondment of personnel to train experts in this field, in particular for developing countries.</p>
<p>Convention on Biological Diversity</p>	<p><i>Article 14</i>  1. Each Contracting Party, as far as possible and as appropriate, shall:  (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;</p>

## Annex 5: SWOT Analysis of Public Participation<sup>288</sup>

<p><b>Strengths</b></p> <p>Public participation can...</p> <ul style="list-style-type: none"> <li>Bring out technical knowledge from the public and others</li> <li>Use local knowledge not known to the authority</li> <li>Encourage diverse perspectives (and so identify issues not thought of)</li> <li>Allow the public to understand the system better</li> <li>Use the public's passion and enthusiasm</li> <li>Enable a better evaluation of the issues</li> </ul>	<p><b>Weaknesses</b></p> <p>Public participation can be weakened by...</p> <ul style="list-style-type: none"> <li>A lack of resources (time, money staff)</li> <li>An inadequate legal framework</li> <li>A lack of awareness/experience of participation</li> <li>Difficulties in gaining access to information</li> <li>A lack of technical support for the public</li> <li>Limited consideration of the results of participation</li> <li>Not enough public participation is a weakness</li> </ul>
<p><b>Opportunities</b></p> <p>Public participation offers the opportunity to ...</p> <ul style="list-style-type: none"> <li>Build trust and capacity</li> <li>Improve the environment, build a community and avoid wasting resources</li> <li>Empower people by starting a dialogue and improving openness</li> <li>Expand the limits of understanding (working together to solve problems)</li> <li>Prevent conflicts by early involvement of the public</li> <li>Save time in the overall decision process by reduction of opposition</li> </ul>	<p><b>Threats</b></p> <p>Public participation processes can be threatened if ...</p> <ul style="list-style-type: none"> <li>The public thinks that the process is a formality (that minds are already made up)</li> <li>A vocal minority dominate public meetings</li> <li>Not enough time is allowed to make a decision or discuss the proposals</li> <li>The long term implications are not understood (e.g. if 'planning gain' wins over the long-term interests)</li> <li>EIA submissions are not good quality and do not cover all the issues</li> </ul>

<sup>288</sup> Developed at a workshop on the progress of implementing the Aarhus Convention, *as cited in* Petts (2000) p.17

## Annex 6: Ontario Ministries Prescribed under the *EBR*

- Ministry of Agriculture, Food and Rural Affairs;
- Ministry of Culture;
- Ministry of Economic Development and Trade;
- Ministry of the Environment;
- Ministry of Health and Long-Term Care;
- Ministry of Labour;
- Ministry of Government Services;
- Ministry of Municipal Affairs and Housing; Ministry of Natural Resources;
- Ministry of Northern Development and Mines;
- Ministry of Tourism;
- Ministry of Transportation.



## Annex 7: Example – Public Comments on a Ministry Proposal<sup>289</sup>

### **Bronte Creek Provincial Park**

#### **Management Plan Review**

Registry # PB7E3002

**Description:** Bronte Creek is a small provincial park located in the City of Oakville. The area south of the creek, which bisects the park, already contained picnic areas, parking lots, sports facilities, a working farm and a museum. Proposed changes by the Ministry of Natural Resources (MNR) to the existing Bronte Creek park plan included still more development — an amphitheatre, education centre, natural history museum, Ontario Parks store, roofed accommodations, 500-site campground and a welcome centre, possibly housing a conference centre, restaurant, and an IMAX theatre with virtual reality rooms. Part of the new development, including the campground, was being proposed for the undeveloped lands north of the creek.

**Public Comment:** Many commenters were opposed to the proposed scale of development, to the number of campsites, to plans to build a bridge over Bronte Creek and to put cabins and permanent tents in an undisturbed woodlot. Several people were concerned about MNR's plans to reduce the nature reserve zoning that protected the creek valley and the adjacent lands. Other commenters wanted the northern part of the park to remain undeveloped.

**Decision:** In response to public comments, MNR reduced the park's proposed development zone from 60 per cent of the parklands to 50 per cent, and increased the nature reserve zone from 18 per cent to 25 per cent. The area set aside for natural restoration in the northern part of the park was more than doubled in size, and the proposed campground was reduced from 500 sites to 400.

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<sup>289</sup>

This example was taken from Ontario's EBR and You (2005) p.12

## Annex 8: Example – Seeking Leave to Appeal a Ministry Decision<sup>290</sup>

In February 1999, the Soyers Lake Ratepayers Association (SLRA) applied to the Environmental Appeal Board for leave to appeal a decision by the Ministry of the Environment (MOE) to permit a local golf course in Haliburton to take water for irrigation from Little Soyers Lake, which is the principal source of water for Soyers Lake. The ministry's decision would have allowed the golf course to take up to 4,450 litres of water from the lake per minute during the summer months — 2,724,000 litres per day — for 25 years.

In their application seeking leave to appeal MOE's decision, the SLRA pointed out that its members lived on Soyers Lake and thus had an "interest" in the decision. The SLRA listed a number of reasons why no "reasonable" person would have made the decision to allow the golf course to take up so much water from Little Soyers Lake:

- Since there had been almost no rainfall in summer 1998, the permit would lower the level of Little Soyers Lake by more than 50 cm, eliminating the outflow from Little Soyers Lake and thus virtually extinguishing the flow of water into Soyers Lake.
- Because of the run off from the golf course, the reduced water levels would increase the concentration of fertilizers, herbicides and pesticides in the lakes and related wetlands.

SLRA recommended that the rate of water taking be reduced under dry conditions, that the amounts withdrawn be validated by an independent third party, and that annual reports be submitted to nearby municipalities and to the SLRA. They also recommended that the permit to take water be issued for five years only.

In its own submission to the Board, MOE decided to support some of the SLRA's suggestions, and in March 1999, the Environmental Appeal Board granted the ratepayers association leave to appeal. After negotiations, the SLRA withdrew its appeal, since most of its concerns had been addressed by the golf course and by MOE, and new conditions were included in the permit to take water.

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<sup>290</sup> This example was taken from *ibid.* p.17

Annex 9: Sample *EBR* Registry Notice<sup>291</sup>

**EBR Registry Number:** IA9E0781 **Ministry Reference Number:** 8320399

**Type of Posting:** Instrument **Status of Posting:** Proposal

**Ministry:** Environment

**Date Proposal Loaded:** 1999/06/29 **Comment Period:** 30 day(s)

Written submissions may be made between June 29, 1999 and July 29, 1999.

**NOTICE OF PROPOSAL FOR AN INSTRUMENT:**

**Instrument Type:**

EPA s. 9 - Approval for discharge into the natural environment other than water (i.e. Air)

**Proponent:**

West-End Chrysler Dodge (1971) Limited, 1865 Weston Road, Toronto, Ontario, M9N 1V9

**Location of Activity:**

City of Toronto

**County/District/Region:**

Municipality of Metropolitan Toronto

**Other Activity Location Identifiers:**

1865 Weston Road

**Description:**

This application is for a certificate of approval (air) for the installation of a down-draft, filtertype, automotive paint spray booth.

**Comments should be directed to the following Contact Person:**

Information Officer, Industrial & Municipal

Approvals Branch

3rd Floor, 250 Davisville Ave.

Toronto, Ontario, M4S 1H2

PHONE: (416) 314-8079 FAX: (416) 314-8452

Some government offices may have copies of this proposal for viewing.

**These are listed below:**

Env. Assessment & Approvals Branch

250 Davisville Avenue

3rd Floor, Toronto, Ontario M4S 1H2

PHONE: (416) 314-8001 FAX: (416) 314-8452

Toronto District Office

5775 Yonge Street

8th Floor, Toronto, Ontario M2M 4J1

PHONE: (416) 326-6700 FAX: (416) 325-6346

**All comments will be considered as part of the decision-making by the ministry if they:**

- (a) are submitted in writing;
- (b) reference the EBR Registry number; and
- (c) are received by the Contact Person within the specified comment period.

\*\* No acknowledgement or individual response will be provided to those who comment.

All comments & submissions received will become part of the public record. \*\*

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<sup>291</sup> This sample was taken from *ibid.* p. 33

## Annex 10: Summary of Recommendations for Improving *EBR* Barriers

### **Recommendation 1:** Improving Access for Individuals with Resource Constraints

- The ECO should be able to initiate a comment, leave to appeal, investigation or review on behalf of the public if there is indication that such measures would not otherwise be taken due to resource constraints.
- In order to fulfil such a broadened mandate, the ECO would need additional funding and staff.
- A legal funding programme be established.<sup>292</sup>

Also see Recommendation 4

### **Recommendation 2:** Improved Access to Information

- All information relevant to a posting should be included on the Registry.
- Deadlines for submitting applications should be adopted as minimums, and deadlines be extended when circumstances have prevented public access to information.
- Upon updating the Registry website, a function should be built-in to sign-up for email notification for postings relevant by geographic region or keyword.

### **Recommendation 3:** Improving Proactive Engagement by Government Officials

- Continued promotion of the value of the *EBR* to relevant government ministries by ECO.
- Take steps to ensure that public input and participation is valued; this could include further dialogue with relevant government offices.
- Encourage the use of SEVs and ensure the inclusion of participatory norms within them.

### **Recommendation 4:** Enable Access to Experts

- Participant funding structures could provide a pool of financial resources so that individual members of the public, citizen groups, or NGOs could apply for to hire the experts needed to submit a strong application under the *EBR*.
- Environmental legal aid services be developed in conjunction with an Ontario law school to complement services already offered by the Canadian Environmental Law Association and Sierra Legal Defence Fund.

### **Recommendation 5:** Increased Education and Awareness About the *EBR* and ECO

- The ECO should be allocated more resources for educational programmes.
- Relevant Ministries should broaden their educational programmes to include the *EBR* and offer support to individuals / groups submitting applications.
- ECO Annual Reports should place more focus on which education activities have been undertaken.

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<sup>292</sup> This has been discussed under the ECO 10-year review of the *EBR*. In addition, there was an *Intervenor Funding Project Act* (1989) which is no longer in existence which could serve as a model.

## Annex 11: Comparison of Primary Findings with Literature

<b>Primary Research Findings of this Thesis</b>	<b>Wilcox<sup>293</sup>: Stances of Participation</b>	<b>IAP2<sup>294</sup>: Public Participation Spectrum</b>	<b>Popovic<sup>295</sup>: Criteria for Effective Environmental Participation</b>	<b>Beierle<sup>296</sup>: Social Goals in Environmental Decisions</b>	<b>Petts and Leach<sup>297</sup>: Aims of Public Participation</b>
<ul style="list-style-type: none"> <li>• <u>Education and awareness</u></li> <li>• <u>Knowledge</u></li> </ul>			<ul style="list-style-type: none"> <li>• Education about the environment and the things that might affect it</li> </ul>	<ul style="list-style-type: none"> <li>• Inform and Educate the Public</li> </ul>	<ul style="list-style-type: none"> <li>• Change peoples views about the issue through education</li> <li>• Improve social learning</li> </ul>
<ul style="list-style-type: none"> <li>• <u>Access to information</u></li> </ul>	<ul style="list-style-type: none"> <li>• Information (presentation and promotion)</li> </ul>	<ul style="list-style-type: none"> <li>• Inform (balanced and objective information)</li> </ul>	<ul style="list-style-type: none"> <li>• Access to information</li> </ul>		
<ul style="list-style-type: none"> <li>• Intrinsic value in opportunity to participate</li> </ul>	<ul style="list-style-type: none"> <li>• Consultation (communication and feedback)</li> <li>• Deciding Together (consensus building)</li> </ul>	<ul style="list-style-type: none"> <li>• Consult (obtain feedback)</li> <li>• Involve (ensure public concerns considered)</li> </ul>	<ul style="list-style-type: none"> <li>• A voice in decision-making</li> </ul>	<ul style="list-style-type: none"> <li>• Incorporate public values assumptions and preferences into decision-making</li> </ul>	<ul style="list-style-type: none"> <li>• Satisfy statutory requirement to consult</li> <li>• Determine needs and desires</li> </ul>
<ul style="list-style-type: none"> <li>• Good relationships across the community</li> </ul>	<ul style="list-style-type: none"> <li>• Acting together (partnership building)</li> <li>• Supporting (community development)</li> </ul>	<ul style="list-style-type: none"> <li>• Collaborate (partner with the public)</li> </ul>		<ul style="list-style-type: none"> <li>• Reduce conflict among stakeholders</li> </ul>	<ul style="list-style-type: none"> <li>• Improve services</li> <li>• Resolve conflicting views</li> </ul>

(...continued on following page)

Underline: Indicates that this area was identified as a barrier needing improvement based on interview findings.

<sup>293</sup> Wilcox (1994) is based on Arnstein (1967) and was chosen because it focuses on the participatory aspects and does not include non-participation.

<sup>294</sup> IAP2 Public Participation Spectrum (Website)

<sup>295</sup> Popović (1993) p.691

<sup>296</sup> Beierle (1998)

<sup>297</sup> Petts (2000) p.20

Primary Research Findings of this thesis	Wilcox <sup>298</sup> : Stances of Participation	IAP2 <sup>299</sup> : Public Participation Spectrum	Popovic <sup>300</sup> : Criteria for Effective Environmental Participation	Beierle <sup>301</sup> : Social Goals in Environmental Decisions	Petts and Leach <sup>302</sup> : Aims of Public Participation
<ul style="list-style-type: none"> <li>• <u>Engagement by Government Officials</u></li> </ul>			<ul style="list-style-type: none"> <li>• Transparency of decisional processes</li> <li>• Post-project analysis and monitoring</li> <li>• Enforcement structures</li> <li>• Recourse to independent tribunals for redress.</li> </ul>	<ul style="list-style-type: none"> <li>• Foster trust in institutions</li> </ul>	<ul style="list-style-type: none"> <li>• Increase transparency</li> </ul>
		<ul style="list-style-type: none"> <li>• Empower (decision-making by public)</li> </ul>			<ul style="list-style-type: none"> <li>• Empower citizens</li> </ul>
				<ul style="list-style-type: none"> <li>• Increase the substantive quality of decisions</li> </ul>	<ul style="list-style-type: none"> <li>• Increase defensibility</li> </ul>
<ul style="list-style-type: none"> <li>• <u>Limited resources</u></li> </ul>				<ul style="list-style-type: none"> <li>• Cost-effectiveness</li> </ul>	
<ul style="list-style-type: none"> <li>• <u>Determination and Commitment</u></li> </ul>					
<ul style="list-style-type: none"> <li>• Employing a variety of activities</li> </ul>					

Underline: Indicates that this area was identified as a barrier needing improvement based on interview findings.

<sup>298</sup> Wilcox (1994) is based on Arnstein (1967) and was chosen because it focuses on the participatory aspects and does not include non-participation.

<sup>299</sup> IAP2 Public Participation Spectrum (Website)

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<sup>302</sup> Petts (2000) p.20