



Ontario Ministries are Ignoring the Public's *EBR* Rights, says Environmental Commissioner

By Carolyn Shaw*

Every fall, the Environmental Commissioner of Ontario (ECO), Gord Miller, releases his Annual Report to the Ontario Legislature. The Annual Report includes, among other things, substantive reviews of decisions made by prescribed ministries on environmentally significant policies, acts, regulations and instruments, and describes how ministries complied with their obligations under the *Environmental Bill of Rights, 1993*¹ (*EBR*) in making those decisions.

This year, however, the Commissioner was so troubled by his observations of apparent disregard by some ministries for citizens' *EBR* rights that he decided to divide his 2011/2012 Annual Report into two parts. [Part 1: Losing Touch](#),² released on September 19, focuses exclusively on ministry compliance with the procedural requirements of the *EBR*. "Lately there has been a marked change in the behaviour of some ministries in respecting the rights of the citizens of Ontario under the *EBR*," says Miller. "This disregard for the rights of Ontarians has increased to a scope and degree such that I find it necessary to break out this portion of my statutory reporting requirements into its own part, so that Legislators can focus on the implications of the situation."³

The ECO points to a range of ways in which some ministries seem to be "losing touch" with their *EBR* roles and responsibilities:

Denying the public's right to comment. Ministries are making decisions about far-reaching environmental plans, policies and programs without properly notifying and consulting the public using the Environmental Registry (www.ebr.on.ca). For example, the Ministry of Energy (ENG) failed to post a proposal notice on the Environmental Registry to consult the public on its review of the Feed-in Tariff program for renewable energy. Instead, ENG only posted an "information notice," which deprives the public of the *EBR* right to have their comments considered by the ministry, or to be told what effect their comments may have had on the final decision.

The ECO is also particularly critical of the government for including proposed changes to nine environmental laws prescribed under the *EBR* in last spring's budget bill,⁴ effectively shielding those important and predominantly non-fiscal changes from public scrutiny normally afforded under the *EBR*.

Failing to meet statutory deadlines. In several instances, the Ministry of Natural Resources (MNR) failed to meet the legislated 60-day deadline to respond to applications for review submitted by members of the

¹ S.O. 1993, Chapter 28.

² Environmental Commissioner of Ontario, *Annual Report 2011/2012, Part 1: Losing Touch* (Toronto, Ontario: 2012).

³ *Ibid* at 3.

⁴ Bill 55, *Strong Action for Ontario Act (Budget Measures)*, 2012.

public under the *EBR*. The ECO points to two cases in particular, in which MNR took 133 days and 252 days to respond, referring to this failure as “an affront to the statutory instructions of the Legislature.”⁵

Systemically denying EBR applications. Since the *EBR* came into force, the Ministry of Municipal Affairs and Housing and the Ministry of Northern Development and Mines have denied every single *EBR* application for review or investigation that they have received. Likewise, MNR has denied every *EBR* application that it has received in the last five years. The ECO believes that this trend reflects a deliberate and entrenched disregard for both the will of the Ontario Legislature and the public’s *EBR* rights.

Refusing to consider SEVs for Instruments. Despite the 2008 Divisional Court ruling in *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*⁶ that ministries must consider their Statements of Environmental Values (SEVs) when making decisions on instruments (e.g., permits, approvals, licences) that are prescribed under the *EBR*, the Ministry of the Environment (MOE) and MNR are still resisting the ECO’s requests for proof of SEV consideration for some instruments, and inadequately documenting SEV consideration for others. To improve transparency and accountability for SEV consideration, the ECO recommends “that ministries provide links to their SEV consideration documents in decision notices for instruments posted on the Environmental Registry.”⁷

Failing to prescribe certain ministries under the EBR. The ECO has raised concerns for years about ministries that are responsible for environmentally significant legislation but refuse to be prescribed under the *EBR*, and therefore subject to *EBR* obligations. He is equally critical of the unreasonably long process for a new ministry to be prescribed once it agrees to do so, or for a prescribed ministry to have its prescribed status restored following a name change. In this report, the ECO singles out the Ministry of Infrastructure and the Ministry of Aboriginal Affairs for their resistance to being prescribed under the *EBR*. The ECO also laments the “interminable delays”⁸ in prescribing the Ministry of Education (EDU), during which time “the public lost out on opportunities to participate in EDU’s environmentally significant decisions.”⁹ EDU was finally prescribed in August 2012, seven years after MOE first recommended prescribing it.

While the ECO was critical of various ministries for their instances of *EBR* non-compliance, the ECO singled out MNR as a chronic offender, particularly in failing to give notice of proposals on the Environmental Registry: “in recent years, the ministry has increasingly evaded its obligations under the *EBR*, depriving the public of its established rights.”¹⁰ The ECO identifies systemic barriers within the ministry, and notes that “even in cases where the ECO has warned the ministry of non-compliance, MNR generally resists correcting its errors or finding a solution that serves the public interest and meets legal requirements.”¹¹

Astounded by his findings of widespread, repeated and open defiance of the *EBR*, the ECO concludes that “it appears that elements of the bureaucratic institution called the Ontario Public Service, which was created to support and implement the will of the people’s Legislative Assembly, are somehow losing touch with their role and responsibilities, at least with regard to the *Environmental Bill of Rights*.”¹²

⁵ *Supra* note 2 at 20.

⁶ [2008] O.J. No. 2460 (Div. Ct.).

⁷ *Supra* note 2 at 25.

⁸ *Ibid* at 17.

⁹ *Ibid*.

¹⁰ *Ibid* at 10.

¹¹ *Ibid* at 9-10.

¹² *Ibid* at 27.

Part 2 of the ECO's 2011/2012 Annual Report: Losing Our Touch,¹³ which includes substantive reviews of ministry decisions, ministry responses to applications for review and investigation, and other environmental issues was released on October 2, 2012.

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¹³ Environmental Commissioner of Ontario, *Annual Report 2011/2012, Part 2: Losing Our Touch* (Toronto, Ontario: 2012). Online: http://www.eco.on.ca/index.php/en_US/pubs/annual-reports-and-supplements/losing-touch-part-2.