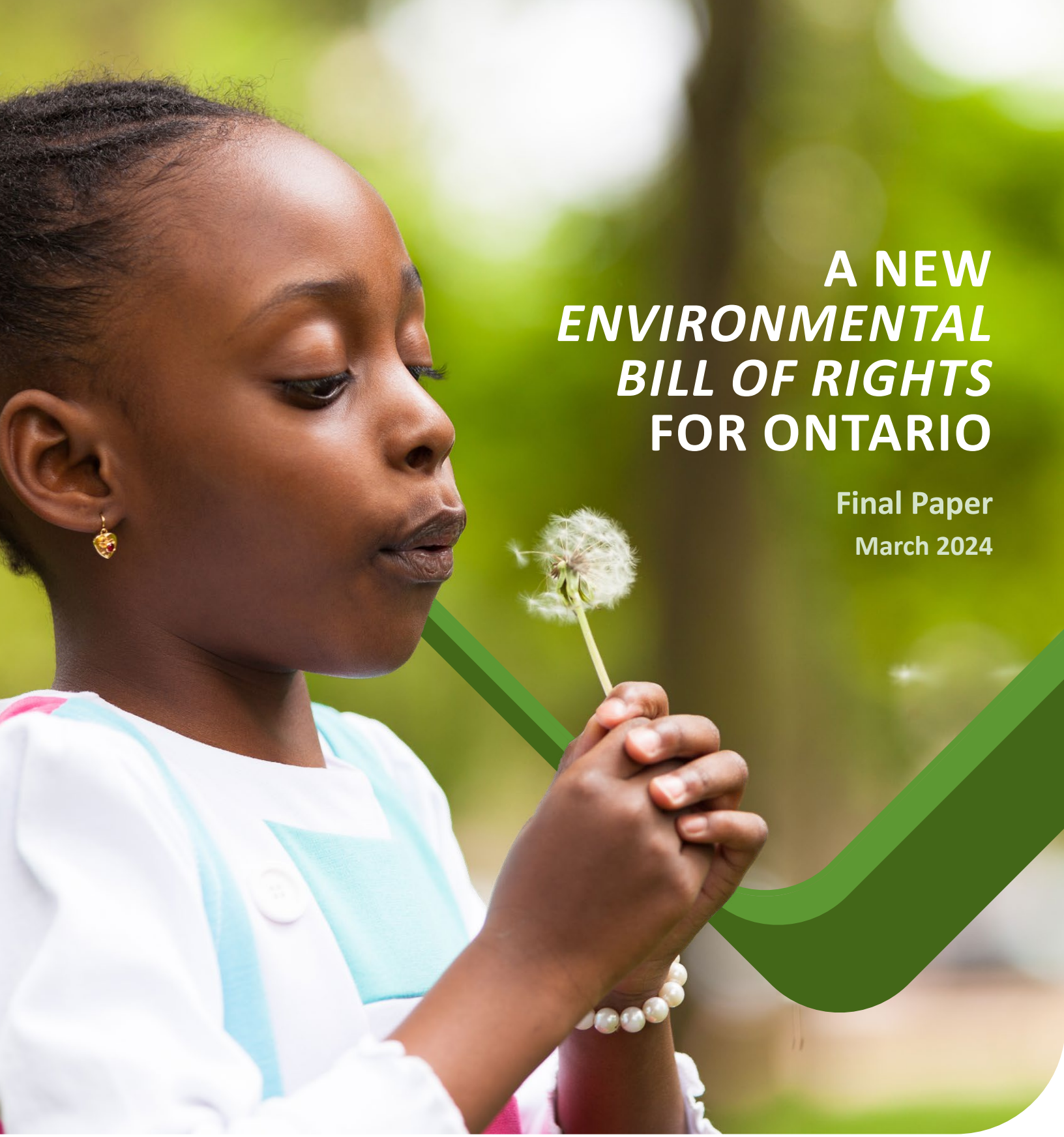

A NEW *ENVIRONMENTAL BILL OF RIGHTS* FOR ONTARIO

Final Paper

March 2024

LCO
CDO

LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

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The LCO is Ontario's leading law reform agency. The LCO provides independent, balanced, and authoritative advice on complex and important legal policy issues. Through this work, the LCO promotes access to justice, evidence-based law reform and public debate.

LCO reports are a practical and principled long-term resource for policymakers, stakeholders, academics and the general public. LCO's reports have led to legislative amendments and changes in policy and practice. They are also frequently cited in judicial decisions, academic articles, government reports and the media.

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Disclaimer

The opinions or points of view expressed in the LCO's research, findings and recommendations do not necessarily represent the views of LCO Advisory Committee members, funders (Law Foundation of Ontario, Osgoode Hall Law School, Law Society of Ontario) or supporters (Law Deans of Ontario, York University).

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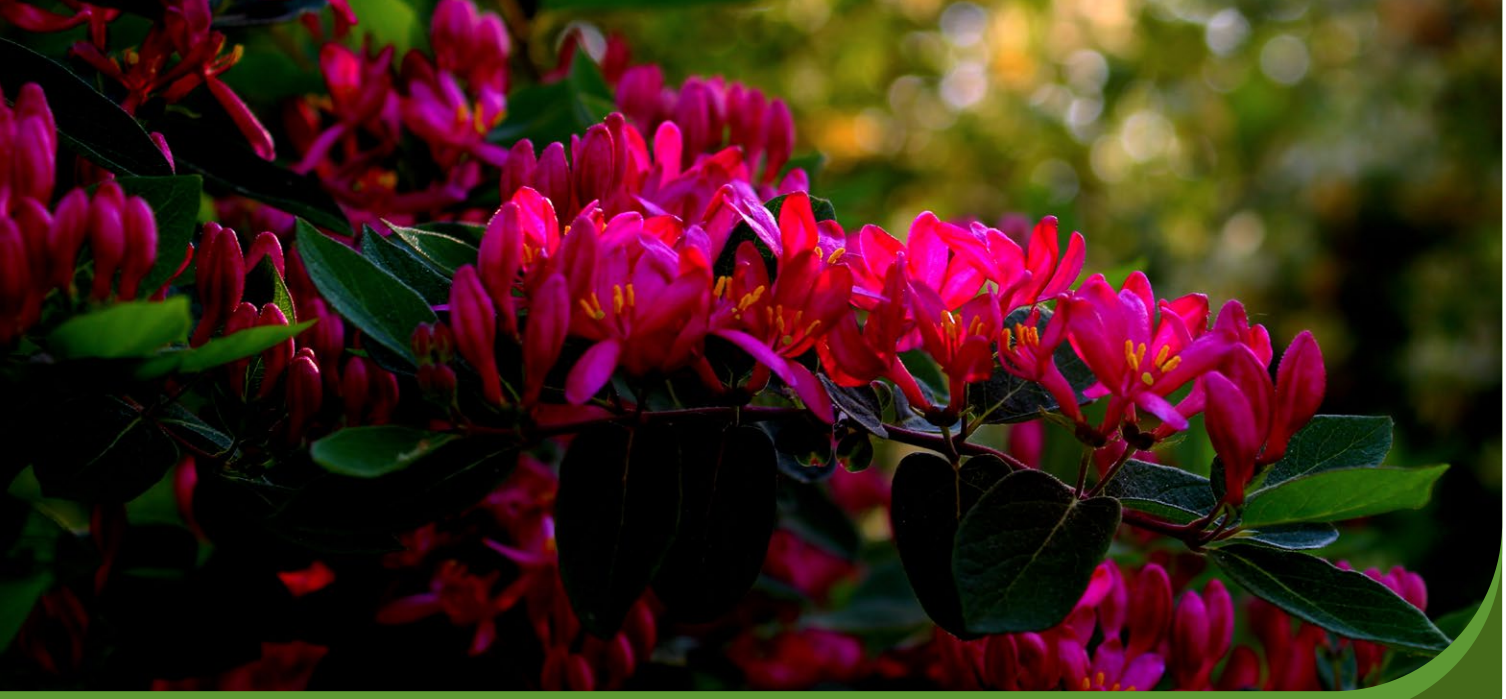

1. Introduction

A New Environmental Bill of Rights for Ontario

This is the Final Report of the Law Commission of Ontario's (LCO) Environmental Accountability Project. This project considers legal strategies and law reform options to improve environmental accountability in Ontario.

The starting point for our work is the *Environmental Bill of Rights, 1993* (*EBR*), a ground-breaking piece of legislation that transformed environmental accountability in Ontario.[1]

The *EBR* was proclaimed in February 1994 and was hailed as "one of the most comprehensive environmental access to justice laws in Canada."[2] It established a legal framework for environmental accountability that largely remains in place in Ontario. The Act established important mechanisms to improve public participation, transparency, and government accountability for environmental decision-making.

Several important and far-reaching choices underpin the *EBR*. Most notably, the *EBR* is based on a public participation or "political accountability" model that was ground-breaking when it was adopted. Experience and changing circumstances have challenged many of these assumptions and choices.

Broadly speaking, this project considers how well Ontario's *EBR* is working; whether the *EBR* should be updated to reflect contemporary environmental priorities, issues, and accountability strategies; and whether the *EBR* should be amended to improve its procedures and clarify its application. More specifically, this report considers the following issues:

- What are the catalysts suggesting the need for *EBR* reform?
- Has the *EBR* been effective in ensuring accountability for important environmental decisions by the provincial government?
- Does the *EBR* reflect contemporary environmental priorities and legal strategies?
- Is there a need to promote greater legal accountability for provincial environmental decision-making?
- Can public participation and accountability be improved?

- Can *EBR* procedures and rules be clarified and streamlined?

The *EBR* has a long track record against which Ontarians can assess its strengths, weaknesses, and limitations.

The LCO has concluded that the *EBR*, despite its many successes, has fallen short of its potential in meeting its stated objectives:

> *(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.*
>
> *(c) to protect the right to a healthful environment by the means provided in this Act*.[3]

The LCO has also concluded that major law reforms are needed to ensure environmental accountability in Ontario, meet the challenge of climate change, and improve the functioning of the *EBR* for all Ontarians. Accordingly, the LCO is recommending a three-part law reform strategy that would:

- Update the *EBR* to reflect contemporary environmental accountability principles and priorities by:
    - Incorporating a right to a healthy environment into the *EBR.*
    - Establishing a right for residents to commence environmental protection actions.
    - Incorporating environmental justice principles and practices into the *EBR*.
    - Updating the purposes of the *EBR.*
- Improve public participation in provincial environmental decision-making by:
    - Improving Statements of Environmental Values.
    - Enhancing the role of the Commissioner of the Environment.
    - Improving Ontarian's access to environmental information.
    - Improving environmental data collection and transparency.
- Update and clarify *EBR* procedures by:
    - Updating rules for standing and judicial review.
    - Clarifying *EBR* exceptions.
    - Deleting the *EBR* statutory cause of action for harm to a public resource.

Finally, the LCO is recommending that provincial environmental policymakers and stakeholders continue to study and monitor several new and evolving strategies to improve environmental accountability, such as the public trust doctrine and the rights of nature.

The LCO does not make these recommendations lightly. Environmental accountability law reforms raise difficult and far-reaching legal, operational, and practical choices that will affect the provincial government, businesses, municipalities, communities and Ontarians across the province. Nevertheless, the LCO believes far-reaching reforms are not just necessary but urgent.

Importantly, the great majority of our 55 recommendations are based on existing precedents, practices, and legal accountability strategies. For example, our recommendation that Ontario adopt a statutory "right to a healthy environment "(RTHE) is grounded in both the current *EBR* and the widespread adoption of the right across the globe. Adopting a legally enforceable RTHE would be a structural and far-reaching reform to the *EBR*. Most of our recommendations are more modest in scope and are designed to improve the operation of the *EBR* for the benefit of all parties.

A complete list of our recommendations is included in Appendix A.

Before beginning, readers should note two important qualifications:

First, the LCO's project and our Final Report are focused exclusively on potential reforms to the *EBR*. The report does not address potential reforms to other provincial environmental statutes, policies, or practices.

Second, this Report does not address Indigenous environmental accountability issues. Notably, the main

legislation being considered in the project, the *EBR*, was developed thirty years ago without Indigenous representation on its Task Force. Nor does the *EBR* explicitly identify Indigenous issues as a factor to be considered or the need to consult with Ontario's Indigenous communities. This is obviously a major gap that must be addressed in any contemporary assessment of environmental accountability in Ontario. To that end, the LCO has established a dedicated Indigenous Environmental Accountability Project to explore Indigenous rights, perspectives, and traditions as a possible source of environmental rights, and the impact of environmental harm on Indigenous peoples in Ontario. Details about this project will be posted on the LCO's website.

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Consultations and Research

The LCO's Environmental Accountability Consultation Paper asked two sets of questions. First, the paper asked about potential reforms to the *EBR.* Second, the paper asked potentially more far-reaching and challenging questions about emerging legal concepts of "environmental justice," the "right to a healthy environment," and how to account for Indigenous issues and legal orders in Ontario's environmental accountability framework.

The Consultation Paper and Final Report were prepared by the LCO following extensive consultations with our project Advisory Committee and many other individuals and groups representing a broad cross-section of perspectives. In addition to stakeholder consultations, the LCO completed an extensive program of legal and public policy research in Canada and internationally.

Environmental accountability discussions are often controversial and influenced by stakeholder interests and perspectives. This project is unique in that the LCO is independent of those interests and committed to an impartial, public interest analysis of environmental accountability issues.

Staffing, Support, and Funding

The LCO's Environmental Accountability Project Lead was **Ramani Nadarajah**.

The LCO's established an Advisory Committee to assist our work. The Advisory Committee included:

- **Julie Abouchar**, Partner at Willms & Shier Environmental Lawyers LLP (Certified Specialist in Environmental Law and Indigenous Legal issues)
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- **Lisa DeMarco**, CEO & Senior Partner at Resilient LLP
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The analysis and recommendations in this report do not necessarily represent the views of the LCO's Advisory Committee, its funders (Law Foundation of Ontario, Law Society of Ontario, Osgoode Hall Law School) or supporters (Law Deans of Ontario, Ministry of the Attorney General).

Next Steps and How to Get Involved

The LCO believes that successful law reform depends on broad and accessible consultations with individuals, communities, and organizations across Ontario. As a result, the LCO is seeking comments and advice on this report. There are many ways to get involved. Ontarians can:

- Learn about the project and sign up for project updates on our project website.
- Contact us to ask about the project.
- Provide written submissions or comments on the final report.

The LCO can be contacted at:

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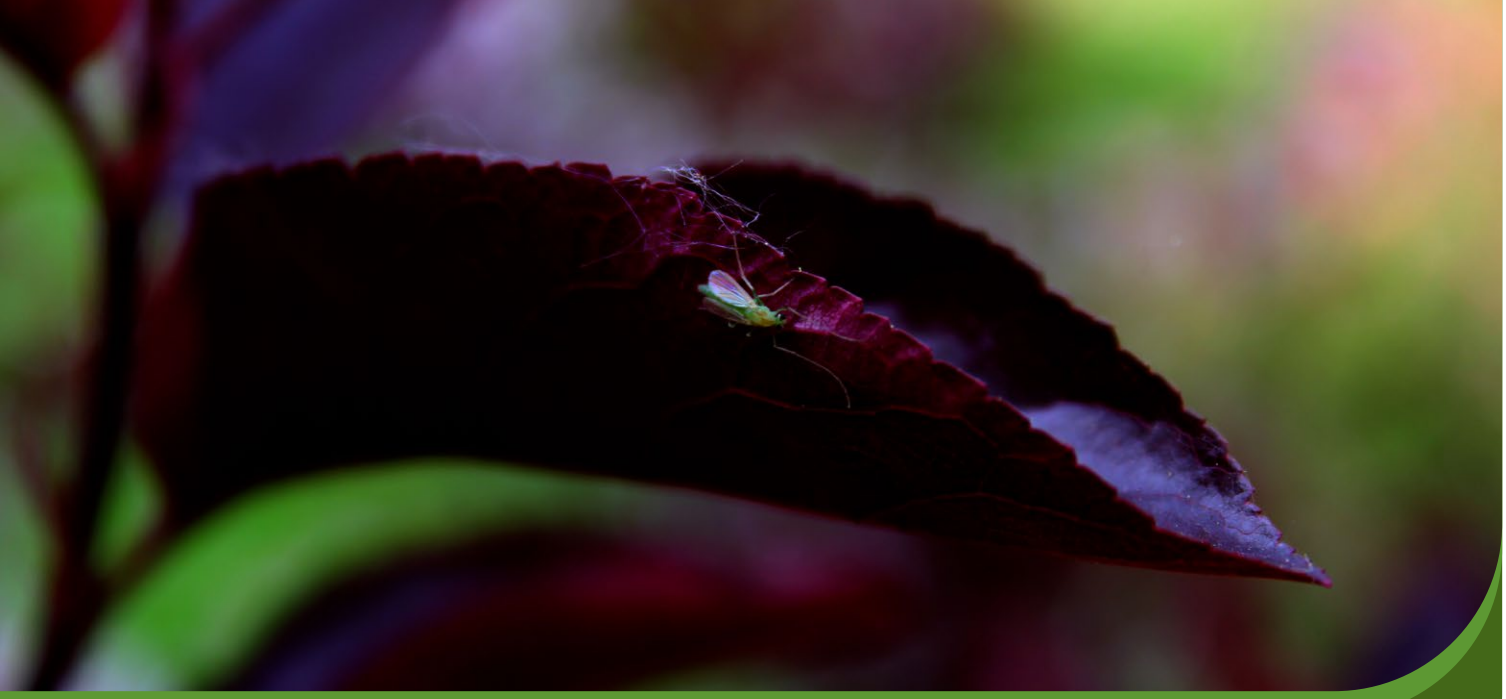


2. Catalysts for Law Reform

The LCO believes the time is right for an independent, multidisciplinary, and balanced review of the *EBR* and environmental accountability strategies generally.

The environmental, policy, and legal landscape in Ontario has changed considerably since the *EBR* was proclaimed in 1994. These developments underscore the need to re-examine the substantive and procedural requirements of the *EBR* to ensure it reflects, and is responsive to, current realities.

This section summarizes the major catalysts driving *EBR* reform in Ontario.

Eroding *EBR* Protections and Growing Accountability Gaps

Over time, the legislative, institutional, and procedurals protections created by the *EBR* have been eroded. Many reports, court decisions, and analyses have documented this erosion, and noted consistent EBR non-compliance by government ministries, erosion of *EBR* public participation rights, downgrading the role of the Environmental Commissioner, and other factors which suggest that the *EBR* has failed to fully meet its objectives. As recently as December 2022, the Auditor General of Ontario (Auditor General) remarked that "[a]n enduring problem is that the Environment Ministry – the ministry responsible for administering the *EBR* Act – has still not made the *EBR* Act a priority."[4]

These and other factors have resulted in wide and deep environmental accountability gaps that suggest fundamental reforms are necessary.

Urgent Need to Reduce Risk and Impact of Climate Change

The 2023 Ontario Provincial Climate Change Impact Assessment (PCCIA) highlighted the urgent need for the province to address climate change. This report is a comprehensive and multi-sectoral assessment of potential climate change-related impacts on Ontario's economy, infrastructure, communities, public health and safety, and ecosystems.[5] More than 3,400 risk scenarios were developed and analyzed as part of the PCCIA.[6]

The PCCIA report unequivocally states that:

> *Climate change is one of the greatest challenges of our time…These changes are causing unprecedented impacts, transforming ecosystem structure and function, damaging infrastructure, disrupting business operations, and imposing harm to human health and well-being.*
>
> *Physical climate impacts and risks to human, natural and built systems in Ontario are driven by average annual warming temperature and extreme heat, drought, changes to intensity and frequency of precipitation and other climate variables. Avoiding or reducing the worst impacts of human-induced climate change requires action on parallel fronts: rapid and deep reductions in greenhouse gas emissions and proactive and planned measures to adapt to current and imminent future changes. While there are adaptation efforts underway to address these impacts, the rapid pace of climate change requires large scale, accelerated action in all facets of our society and economy.*[7]

This report will consider whether the *EBR* meets the challenge of climate change and other pressing environmental issues.

The Right to a Healthy Environment and Other Contemporary Environmental Accountability Strategies

In 1994, the *EBR*'s political accountability model was ground-breaking. Since then, many new and more far-reaching environmental accountability strategies have emerged, including the "right to a healthy environment", environmental justice, and the rights of nature. In most cases, these strategies represent fundamental shifts away from the *EBR*'s political accountability model towards more robust forms of legal accountability.

Jurisdictions in Canada and around the world are adopting these strategies to address climate change and prevent environmental harms. The LCO believes it is time to consider whether any of these strategies should be incorporated into the *EBR*.

Reconciliation, Indigenous Legal Orders, and the Disproportionate Impact of Climate Change on Indigenous Communities

The Task Force that developed the *EBR* did not have Indigenous representation. Nor does the *EBR* explicitly identify Indigenous issues as a factor to be considered in environmental decision-making or the need to engage with Ontario's Indigenous communities.

The *EBR* also predates important development in the relationship between the Crown and Canada's Indigenous peoples, including but not limited to the Truth and Reconciliation Commission and the Government of Canada's 2021 enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act*.[8]

Finally, it is now widely acknowledged that climate change and environmental degradation have had a disproportionate impact on Ontario's Indigenous communities.[9]

New Standards of Public Administration and Evidence-Based Policymaking

The expectations of public administration and public accountability are much higher in 2023 than in 1994. For example, Ontario's environmental data collection and data transparency lags behind other jurisdictions, particularly the United States.[10] As a result, there is a need to consider whether initiatives are needed to better support evidence-based policymaking on environmental initiatives.

Climate Change

A report released last year by the United Nations Intergovernmental Panel on Climate Change (IPCC) delivered a stark warning that time was running out to address the irreversible impacts of climate change. The IPCC report states:

> *Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts on food and water security, human health and on economies and society and related losses and damages to nature and people.*[11]

The report cautions that "[v]ulnerable communities who have historically contributed the least to current climate change are disproportionally impacted."[12]

Canadian courts have also remarked on the environmental and human health implications of climate change. In the 2021 decision, *References re Greenhouse Gas Pollution Pricing Act*, which upheld a federal law establishing minimum national standards for carbon pricing, the Supreme Court of Canada stated:

> *Global climate change is real, and it is clear that human activities are the primary cause.*[13]

> *The effects of climate change have been and will be particularly severe and devastating in Canada. Temperatures in this country have risen by 1.7 °C since 1948, roughly double the global average rate of increase, and are expected to continue to rise faster than that rate. Canada is also expected to continue to be affected by extreme weather events like floods and forest fires, changes in precipitation levels, degradation of soil and water resources, increased frequency and severity of heat waves, sea level rise, and the spread of potentially life-threatening vector-borne disease like Lyme disease and West Nile virus.* [14]

In *Mathur v. His Majesty the King in Right of Ontario,* the Applicants, a group of young Ontarians, challenged the weakening of the province's greenhouse gas emissions reduction target on grounds that it violated the *Canadian Charter of Rights and Freedoms.* In 2021, the Ontario Superior Court of Justice determined that the *Charter* issues raised by the Applicants were justiciable, but dismissed the application. Nevertheless, the court concluded that the evidence was "indisputable that, as a result of climate change, the Applicants and Ontarians in general are experiencing an increased risk of death and an increased risk to the security of the person."[15] The Applicants have filed an appeal of the dismissal of their case to the Court of Appeal for Ontario. The decision marks the first time in Canada that climate change was considered in a *Charter* context.

Subsequently, in 2023, the Federal Court of Appeal in *La Rose v. His Majesty the King*, reversed a lower court ruling and held that a climate change lawsuit under s. 7 of the *Charter* was justiciable and should proceed to trial.[16]

In Ontario, climate change is causing extreme weather and has cost millions of dollars in property damage. [17] Temperature variability has caused damage to the boreal forests in Northern Ontario and made evergreen trees lose their "cold hardiness."[18] Climate change has impacted the province's crop production and is expected to alter the types of crops that can be grown in future.[19] This, in turn, will affect Ontario's food security, including risks to production, access, and price.[20] The rising water temperature in provincial lakes and streams will affect coldwater fish potentially causing significant loss of lake trout and brook trout.[21] According to Ontario's Environment Ministry,

> *…milder winters, hotter summers, and moisture stress creates favorable conditions for insect and plant diseases to spread. Mosquito and tick-borne diseases, such as Lyme disease and West Nile virus are spreading northward in a warmer climate.*[22]

Ontarians' health will also be affected by the increase in temperature with "extreme heat causing a variety of health effects that can range from breathing problems to cardiovascular issues."[23] Ontario's Environment Ministry has noted Indigenous communities will be particularly impacted given that the "pace of climate change in the Far North of Ontario is expected to be faster than in the south."[24]

The province is also facing other pressing environmental challenges. The Auditor General, for example, concluded in recent reports that the province is failing to protect species at risk,[25] was not taking sufficient action to prevent and reduce the adverse impacts of hazardous spills,[26] and had not taken concrete action to reduce waste generation in the industrial, commercial, and institutional sectors.[27]

While there have been significant gains on the environmental front in the past several decades, serious problems remain. A 2023 Auditor General report concluded that Ontario's overall air quality has seen dramatic improvement because of the phase-out of coal-fired electricity plants, fewer industrial sources of air pollution, and improved pollution control equipment for vehicles and industrial facilities.[28] Nevertheless, air pollution is still estimated to be the cause of 7% of deaths in Ontario and over 4,000 hospital admissions and emergency visits per year.[29] Ground-level ozone, which can cause asthma and breathing problems, has been increasing in the province[30] and the long-term trend shows a clear increase in Ontario's surface air temperature.[31] Furthermore, certain parts of the province, such as Windsor, Chatham-Kent, Niagara and Sarnia, face elevated levels of air pollution in comparison to the rest of the province.[32]

Most recently, Canada has faced an unprecedented number of wildfires impacting virtually all the provinces and the territories. The federal government has stated that "[f]ire-prone conditions are predicted to increase across Canada. This could potentially result in a doubling of the amount of area burned by the end of this century, compared with amounts burned in recent decades."[33] According to experts, the occurrence, frequency, and severity of wildfires that are happening in Canada are linked to climate change.[34]

Polling data reveals that Canadians and Ontarians are concerned about climate change and want to see governments do more.[35] A majority of Ontarians believe temperatures are hotter due to climate change and 67% say that the stories about forest fires have made them feel that climate change is a more urgent issue that needs to be addressed.[36] A poll undertaken in June 2022 indicates that a majority of Canadians believe that this is the best time to be addressing climate change even if there are costs to the economy.[37]

The Ontario Provincial Climate Change Impact Assessment

The 2023 Ontario Provincial Climate Change Impact Assessment (PCCIA) provides a comprehensive and multi-sectoral assessment of potential climate change-related impacts in Ontario.[38] The PCCIA report unequivocally states that:

> *Climate change is one of the greatest challenges of our time. Rising atmospheric concentrations of greenhouse gases are altering the earth's climate, driving increases in global average temperatures and variability and extremes of weather. These changes are causing unprecedented impacts, transforming ecosystem structure and function, damaging infrastructure, disrupting business operations, and imposing harm to human health and well-being.*
>
> *Physical climate impacts and risks to human, natural and built systems in Ontario are driven by average annual warming temperature and extreme heat, drought, changes to intensity and frequency of precipitation and other climate variables. Avoiding or reducing the worst impacts of human-induced climate change requires action on parallel fronts: rapid and deep reductions in greenhouse gas emissions and proactive and planned measures to adapt to current and imminent future changes. While there are adaptation efforts underway to address these impacts, the rapid pace of climate change requires large scale, accelerated action in all facets of our society and economy.*[39]

The report provides a comprehensive assessment of the impact of climate change across multiple sectors of Ontario's economy, natural environment, and population. The report's findings include:

Food and Agriculture

While changes in particular climate conditions (e.g., low temperature) may present stable or even declining risk scores for specific commodities and regions, any potential opportunities are likely to be offset by negative impacts, resulting in declining productivity, crop failure, and livestock fatalities…

Infrastructure

Existing infrastructure condition pressures combined with a changing climate will drive mid- to long-term challenges in managing Ontario's infrastructure. Not a single asset included in this assessment is considered to have a risk profile less than "medium" under current climate conditions. Across most regions and asset types, this risk is expected to rise in the future…

Natural Environment

Climate change is already causing significant changes to Ontario's natural environment, and risks to species, habitats, and ecosystems, will continue to rise into the future. The impact assessment finds that risk profiles across almost all natural systems and species assessed are rising to 'high' by mid-century. By the end of century, one quarter of these are expected to be 'very high'...

Business and Economy

Climate impacts, and the associated economic shocks will not be uniform across Ontario. The impact assessment finds that most Ontario businesses will face increased risks due to climate change, with the largest increases in risk expected for businesses dependent on natural resource systems and where historical infrastructure deficits exist...[40]

Some of the report's most urgent conclusions address the impact of climate change on Ontario's residents and communities:

Ontario's rapidly changing climate both directly and indirectly threatens the health and well-being, livelihoods, access to services, cultural practices, and ways of being for people and communities in a myriad of ways. In the recent past, the most acute climate events have garnered the widest coverage and attention, with flooding, heat waves and ice storms that have suspended societal activities and caused electrical and other critical infrastructure interruptions. While the physical impacts to property and infrastructure often receive the greatest focus and have consequential impacts for people, the direct impacts on human health and the systems that people rely on for their well-being have been significant.[41]

There are significant segments of the Ontario population that are and will continue to be disproportionately impacted by climate change…The effects of climate change will not be felt uniformly across sub-populations, with certain groups anticipated to be disproportionately impacted. Examples of these groups include:
- Seniors
- Infants and children
- Socially disadvantaged people, including low-income populations
- People with disabilities, including pre-existing illnesses or otherwise compromised health
- People living in Northern communities
- Emergency response workers

Finally, the report emphasizes the impact of climate change on Ontario's Indigenous communities:

There is significant research to indicate that Indigenous Communities are disproportionately impacted by climate change, due to impacts that affect the natural environment, existing socio-economic disparities, remoteness of many community reserves, and lack of adequate infrastructure (water, wastewater, roads, etc.).[42]

3. The *EBR*: Background

History

Before the enactment of the *EBR*, environmental decision-making in Ontario had been largely limited to "bipartite bargaining" between government agencies and private proponents, or amongst various levels of government.[43] The public was not afforded any opportunity to provide input into the government's decision to issue permits, licenses, or orders.[44] This allowed government ministries to issue approvals to industries authorizing the discharge of contaminants into the natural environment, without providing notice or an opportunity for comment by the residents who may be impacted.[45] Formal consultation on regulations and policies was rare and occurred on an ad-hoc basis at the discretion of the responsible minister.[46]

This approach increasingly came to be viewed by Ontarians as lacking in political legitimacy.[47] Public awareness about the negative impacts of pollution and concerns about governments' inability to manage and resolve complex environmental issues were also factors that fuelled the public's demand for comprehensive environmental law reform.[48] Furthermore, there was a growing recognition that the public's knowledge and awareness of local conditions, which had previously been regarded as irrelevant, was as essential to environmental decision-making as scientific expertise.[49] Moreover, legal commentators and academics have noted that

> *…the process of making a decision can be just as important as the decision itself. Democracies are not particularly cost-effective, but we are willing to pay the price to have our voices heard. Public participation is essential for ensuring that a wide spectrum of interests and concerns are considered, and to ensure that decisions have an air of legitimacy and are therefore respected by the public, even by those who are in disagreement with the result.*[50]

The need for an Ontario "Bill of Rights" was first comprehensively articulated by David Estrin and John Swaigen, lawyers with the Canadian Environmental Law Association, in their 1974 edition of *Environment on Trial*. Estrin and Swaigen laid out a strategic blueprint for the bill and recommended it explicitly state that the public have the right to a healthy environment and that governments have a corresponding duty to protect the environment from degradation.[51]

These provisions were to be supported by other mechanisms, including:

- Access to government information.
- An environmental ombudsman.
- Liberal standing rules.
- Restrictions of costs awards against plaintiffs for environmental cases.
- Shifting the burden of proof in environmental litigation.
- Expanded rights to seek judicial review.[52]

During the late 1980s and early 1990s, public participation in environmental decision-making had begun to improve as the Ontario government undertook informal public consultations on major policy and regulatory initiatives.[53] These included the 1986 Municipal Industrial Strategy for Abatement, the 1987 Clean Air Program, and the 1991 Waste Reduction Action Plan.[54] However, prior to the *EBR* mandatory requirements for public consultation in environmental decision-making were the exception in Ontario.[55]

The concept of an environmental bill of rights gained increasing traction in Ontario through numerous private members' bills which were introduced by Liberal and New Democratic members over the course of a decade, commencing in 1979. Only one bill passed second reading and none were enacted.

The Task Force on the Environmental Bill of Rights

In December 1990, the-then Minister of the Environment, Ruth Grier, announced the establishment of an Advisory Committee on the Environmental Bill of Rights to help the provincial government develop a bill. The Advisory Committee included stakeholders from labour, business, environmental groups, First Nations, municipalities, agriculture, and government officials. The Advisory Group was asked to examine the basic principles of an Environmental Bill of Rights and how they could be applied in Ontario.[56]

The following year, in October 1991, after the completion of the Advisory Committee's work, Minister Grier established the Task Force on the Ontario Environmental Bill of Rights (Task Force). The Task Force, which was composed of representatives from business, government, and environmental groups, was directed by its terms of reference to achieve a unanimous consensus on an Environmental Bill of Rights for Ontario.[57] Subsequently, the Environment Ministry sought public comments on the draft bill over a four-month period. The Task Force reviewed the public comments and provided supplementary recommendations.[58]

The Task Force was emphatic that it did not want to merely add public participation requirements in the *EBR* as another procedural step in the decision-making process. Rather, the Task Force anticipated that the new procedures would "infuse" government decision-making with the Act's purposes.[59] In other words, the Task Force assumed that enhancing public participation would increase government accountability which, in turn, would improve the environmental decision-making process and lead to better environmental outcomes.[60]

The Act did not establish a substantive right to a healthy environment but instead emphasized procedural rights for public participation. The legislation also included several innovative mechanisms for environmental accountability, most notably the establishment of the Office of the Environmental Commissioner of Ontario, and a requirement that government ministries develop and implement Statements of Environmental Values (SEVs), discussed below.

The Environmental Bill of Rights – Overview

The *EBR* is a complex statute that imposes certain governmental obligations and confers certain environmental rights for Ontarians.[61]

Purpose

The *EBR* purposes section outlines the following ambitious set of objectives:

> *(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.*[62]

In addition, the *EBR's* purposes also include:

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.*[63]

Application and Responsibilities

The *EBR* only applies to government ministries and statutes that are prescribed by regulation.[64] There are currently 18 prescribed ministries under the *EBR* which have the following responsibilities under the Act:[65]

- Developing and implementing a SEV that explains how the purposes of the *EBR* will be considered when making decisions that may significantly affect the environment.
- Notifying and consulting the public through a website known as the Environmental Registry of Ontario (Registry) when developing or changing policies, statutes, regulations, and issuing instruments (i.e., permits, licenses, approvals and orders) that may have a significant effect on the environment.
- Responding to applications from Ontarians asking for the review of laws, policies, regulations, or instruments.
- Investigating alleged contraventions of environmental laws, regulations, or approvals.

Significantly, the *EBR* established new environmental rights for Ontarians and removed several pre-*EBR* barriers for individuals seeking redress for environmental harm. These include:

- Establishing the right for individuals to seek leave to appeal decisions of certain instruments which are posted on the Registry.[66]
- Removing some restrictions for bringing a public nuisance action.[67]
- Establishing a "whistleblower" provision that protects employees from reprisals by employers for complying or seeking to enforce environmental statutes.[68]

Environmental Commissioner of Ontario

The *EBR* established the Office of the Environmental Commissioner of Ontario to serve as a "watchdog" with responsibility for oversight of the operation and implementation of the *EBR*.[69] To ensure independence and neutrality, the Environmental Commissioner was to be appointed as an Officer of the Ontario Legislative Assembly and to report directly to the Ontario legislature.[70]

The *EBR* specified that the Environmental Commissioner was to provide annual reports to the legislature on the operation of the *EBR*.[71] The Environmental Commissioner was also given the authority to provide special reports to the legislature at any time, on any matter, related to the *EBR*.[72] Another major role of the Environmental Commissioner was to provide educational programs to the public about the *EBR* and give advice and guidance to individuals who wanted to participate in the environmental decision-making process.[73] Notably, while the Environmental Commissioner had the authority to examine a person under oath and require the production of documents in the course of the examination, the Commissioner lacked the authority to require ministries to provide information and produce documents for matters under review under the *EBR*.[74]

Public Comments

Importantly, the participatory rights established by the *EBR* do not guarantee that public comments will necessarily be accepted and accommodated in government decisions.[75] Rather, the *EBR* requires government ministries to consider relevant comments in their decision-making process.[76] The *EBR* also requires government ministries to report back to the public, by placing a notice of decision on the Registry, explaining the effect, if any, that public participation had on the final decision.[77]

4. The *EBR*: Evaluation, Limitations, and Lessons Learned

The *EBR* established important mechanisms to improve public participation, transparency, and government accountability and has had a significant impact on environmental decision-making in the province.

Prior to the *EBR*, it was generally accepted "that when individuals cast their ballots, they effectively delegate... [the] rights and obligations of environmental stewardship to government decision-makers."[78] The *EBR* countered this "government-centered approach" by allowing Ontarians increased access to environmental decision-making.[79] As the Lieutenant Governor of Ontario, Elizabeth Dowdeswell, observed:

> *Democracy is about so much more than government – so much more than casting a vote. Quite simply it is about the way in which we make decisions. How we govern ourselves as a society.*[80]

By providing the public with opportunities for direct input into government decision-making, the *EBR* serves as an important vehicle for government accountability. In essence, the Act is an expression of open, inclusive participatory governance. This is reinforced by the *EBR*'s preamble which recognizes that while the government has the primary responsibility for achieving this goal, Ontarians should also have the means to ensure that the Act's goals are achieved in an "effective, timely, open and fair manner."[81]

Successes

An early evaluation of the *EBR*'s impact on the formulation of environmental law and policy found that it had "provided members of the public with a comprehensive window on environmental decision-making in the province, unlike any which existed before."[82] In 2015, the Environmental Commissioner echoed this observation:

> *Thousands of people use the Environmental Registry each year to comment on government initiatives, ranging from technical compliance rules to sweeping policies on land use. Communities and individuals have also had*

input into site-specific permits and licenses, commenting on concerns such as local air and water quality, habitat protection and noise. Ontarians have also used EBR applications and appeals to convince the government to overhaul legislation, change approvals, and bring in new environmental protections.[83]

The Environmental Commissioner further noted that the public has helped improve a broad range of environmental decisions including plans for provincial parks, regulations for managing waste pharmaceuticals, the *Mining Act*, guidelines for transit planning, as well as specific decisions such as the issuance of permits to withdraw water.[84]

There have also been notable examples of improvement in environmental protection due to the *EBR*'s leave-to-appeal provision. These include the revocation of approvals granted to landfill sites;[85] restrictions on water-taking by a multinational company;[86] and the prevention of the burning of tires, plastic and other wastes at a cement plant.[87] The *EBR*'s request for investigation provision has resulted in a prosecution under the *Environmental Protection Act* against a company for noise and particulate emissions.[88] In addition, the Auditor General has noted that the *EBR*'s "application for review process has been successfully used by Ontarians to prompt ministries to improve environmental laws and policies."[89] These include "rules for rehabilitating aggregates pits and quarries, the development of a provincial agricultural soil health strategy, improved sewage management in provincial parks, and an end to the hunting of snapping turtles, an at-risk species."[90]

Perhaps the most consequential success of the *EBR* was the establishment of the Environmental Commissioner. The Environment Commissioner, whose office was established in the original *EBR*, has had a significant impact on improving environmental accountability in Ontario. The Commissioner has a statutory responsibility to oversee the operation and implementation of the Act. The Environmental Commissioner's annual and special reports to the provincial legislature have been instrumental in documenting the environmental challenges facing the province and government progress in implementing the *EBR*.

EBR Non-Compliance

Notwithstanding these successes, the provincial government's non-compliance with the *EBR* has been well-documented.

Although the Environmental Commissioner's reports have documented many instances on how the *EBR* improved environmental outcomes, the Environmental Commissioner has often been critical of government ministries' failure to comply with the requirements of the Act. For example, the Environmental Commissioner's first Annual Report found that ministries were failing to implement the *EBR*. More specifically, the Environmental Commissioner noted that the SEVs prepared by government ministries were vague, lacked details about how ministries would integrate environmental consideration into their decisions, and often failed to provide clear objectives or measurable goals.[91] The Environmental Commissioner also expressed concern about the public's access to information on the Registry.[92]

Shortly afterward, in two separate special reports to the Legislature, the Environmental Commissioner sharply criticized government ministries for non-compliance with the *EBR*. The Environmental Commissioner expressed concerns that ministries were failing to post environmentally significant decisions on the Registry;[93] were not providing Ontarians with timely information; and were not providing an adequate opportunity for public comment;[94] and were failing to assess and report on the environmental effects of proposals that were posted on the Registry.[95]

Over the years, the Environmental Commissioner and the Auditor General have expressed these or similar concerns repeatedly, raising significant questions about the effectiveness of the legislation and its implementation.[96]

Reduced Public Participation

Since the *EBR*'s enactment, public participation rights and accountability for environmental decision-making has been weakened by alternative compliance mechanisms. These include the self-registration process for certain environmental approvals, and the establishment of site-specific standards and technical standards in lieu of compliance with provincial air standards.

Self-Registration for Environmental Approvals

In 2010, the Environment Ministry commenced a "modernization of approvals" initiative to expedite its environmental approvals program. These changes culminated in the enactment of Bill 68, *Open for Business Act, 2010,* which created a self-registration regime that has reduced both *EBR* public participation rights and public accountability for certain categories of environmental decision-making.[97] These reforms were implemented through two important transformations to Ontario's environmental approvals program.

The first change modified the process for obtaining certain environmental approvals. An approval from the Environment Ministry is generally required for anyone who engages in an activity that discharges contaminants into the natural environment that causes, or is likely to cause, an adverse effect. The Ministry grants such approvals by issuing an instrument known as an environmental compliance approval (previously known as certificate of approval). These instruments usually include legally binding conditions intended to prevent and minimize adverse environmental impacts. [98]

To secure an environmental compliance approval, businesses are required to submit an application that is reviewed by the Ministry's engineers and technical staff to ensure that the proposed operation complies with regulatory standards. This process is subject to the *EBR*'s public consultation requirements, meaning that the Ministry must post notice of its intention to issue an environmental compliance approval on the Registry, and provide an opportunity for public comment. Furthermore, an environmental compliance approval, once issued, is generally subject to the leave to appeal provision under the *EBR*.

Bill 68 modified this process by introducing a self-registration process for certain activities deemed to be less complex and a lower risk to the environment.[99] Under this process, businesses that met the self-registration criteria were required to simply register their activity on the Environmental Activity and Sector Registry ("EASR"), a public web-based system, and comply with standard sector-wide rules.

The second change exempted the self-registration program from the *EBR*'s public consultation requirements and eliminated third-party appeal rights for these approvals.[100]

The transformation of the approvals program has had significant consequences for environmental accountability in Ontario, including reducing the number of approvals issued by the Environment Ministry and eliminating public consultation for certain categories of instruments. In the context of activities causing air emissions, for example, it is estimated that the EASR self-regulation program will cover between 50%-70% of air emitters and apply to more than 9,000 provincial facilities.[101]

A 2017 review of these reforms by the Environmental Commissioner found that the Environment Ministry had taken a reasonable approach to selecting activities eligible for self-regulation. The Environmental Commissioner determined that the loss of *EBR* participation and appeal rights was mitigated by the public's ability to participate in the development of sector-wide rules for EASR regulated facilities and new safeguards that ensure public concerns regarding specific facilities are heard and addressed by the Environment Ministry.[102]

However, an earlier review of the Ministry's environmental approval program by the Auditor General was more critical of the changes to the approvals program. In her 2016 report, the Auditor General noted:

> *In most cases, the Ministry must post the details of individual applications for Environmental Compliance Approvals on the Environmental Registry to inform and give the public an opportunity to comment on proposed polluting activities in their neighbourhood. However, such public consultation is not required if the proposed activity is eligible for self-registration. Public consultation is only conducted on the regulation that sets out activities for self-registration. At this stage, the public does not have the information regarding the potential location and operational details of these individual emitters. As a result, the public does not have an opportunity to comment on many potentially harmful activities before emitters begin to operate.*[103]

The Auditor General found that by 2016, approximately 4,600 operators had self-registered their activities, a number that the Auditor General anticipated would increase as the Ministry added more sectors to the self-registration program.[104]

Environmental accountability in Ontario is likely to be reduced further in the future: On August 31, 2023, the Environment Ministry posted a proposal on the Registry to expand the EASR regime to cover storm water management, short-term water takings, and waste management systems.[105] The proposal reflects a shift in the EASR regime from lower-risk activities to significantly higher risk activities such as the transportation of hazardous waste, asbestos waste, and bio-medical waste.[106] The Ministry also indicated that it is considering adding more activities currently requiring an approval to the EASR regime.[107]

Case Study: Site-Specific Standards, Technical Standards and Air Pollution in Ontario

The establishment of alternate compliance approaches have weakened Ontarians' ability to ensure government accountability for environmental decision-making. Provincial decision-making about air pollution standards demonstrates the impact of these changes in practice.

The Environmental Commissioner has made the following observations about the adverse impacts of air pollution on human health and the environment:

> *Ontario is home to a wide range of industries that emit pollutants into the air. These air pollutants can contribute to a range of environmental impacts, such as smog, climate change and contamination of lakes and soils. Some contaminants bio-accumulate in the higher trophic levels of ecosystems, affecting fish-eating birds and mammals. Air pollutants also contribute to a host of human health problems – some contaminants, for example, are carcinogenic, while others can contribute to neurological disorders or respiratory illnesses.*[108]

Over the past two decades, the Environment Ministry has been updating and establishing new air standards for many substances that can affect human health and the environment. Facilities that discharge air contaminants are required to obtain an environmental compliance approval and demonstrate that they meet the provincial air standards in Ontario Regulation 419/05.[109]

On February 1, 2010, Ontario Reg 419/05 was amended to allow for two alternate compliance approaches for facilities that were not able to meet the provincial air standards for technical or economic reasons.[110] These facilities were given the option of obtaining a site-specific standard,[111] or a technical standard.[112]

These alternate compliance approaches allow facilities to comply with a less stringent standard, provided they are making efforts to reduce their emissions.[113] People residing close to these facilities, however, may be exposed to air contaminants at higher levels than if these facilities were operating in compliance with the provincial air standards.[114] In some instances, the permissible emissions allowed under these alternate approaches are drastically higher than the provincial air standards. For example, an industrial facility in Northern Ontario has been releasing benzo(a)pyrene, a known human carcinogen, at 400 times the provincial air standard and is applying for an exemption of 530 times the provincial air standard.[115]

Site-specific standards and technical standards continue to be subject to the *EBR*'s notice and comment provisions, but are exempt from its leave to appeal provisions. As a result, the use of site-specific standards and technical standards have significantly eroded the applicability of the *EBR* and the opportunity for members of the public to mount legal challenges to government decisions that may be adversely impacting human health and the environment. This, in turn, has reduced accountability for the provincial government's environmental decision-making process.

Downgrading the Environmental Commissioner

The role of the Environmental Commissioner has also undergone a major transformation since the *EBR* was enacted. On December 6, 2018, the Government of Ontario passed the *Restoring Trust, Transparency and Accountability Act, 2018*, (*RTTA Act*), making significant changes to the Environmental Commissioner's functions. Under Schedule 15 of the *RTTA Act*, the Environmental Commissioner remains responsible for overseeing and reporting on the operation of the *EBR* and also leads the Auditor General's value-for-money audits on the Ontario government's environmental programs, a responsibility that had previously been undertaken by the Auditor General. [116] Although these changes seemingly appear to be merely administrative, a careful review suggests otherwise. [117]

The Task Force had wanted to establish a knowledgeable authority to provide "objective oversight and measurement of progress in implementing the Environmental Bill of Rights."[118] The Task Force considered the Office of the Environmental Commissioner to be central to ensuring government accountability. To that end, the Task Force recommended the Environmental Commissioner be accountable directly to the legislature and be a non-partisan appointment.[119] This structure was believed necessary to ensure the Environmental Commissioner's independence and impartiality.

Until the *RTTA Act*, the *EBR* reflected the Task Force's objectives. The appointment process for the Environmental Commissioner was akin to other provincial legislative officers such as the Auditor General, the Ombudsman, and the Information and Privacy Commissioner. Under the *EBR*, the Environmental Commissioner was an independent legislative officer who had security of tenure and could be removed from office only for cause by the legislature.

As a consequence of the *RTTA Act*, the Environmental Commissioner is now an employee of the Auditor General and is expected to perform the duties assigned by the Auditor General.[120] Furthermore, it is now the Auditor General who reports annually to the legislature, not the Environmental Commissioner.[121] Nor does the Environmental Commissioner have security of tenure, as their employment is now vulnerable to termination by the Auditor General.

The Environmental Commissioner's role as a policy advocate has also been weakened through the *RTTA Act*. Although the Task Force's report recommended that the Environmental Commissioner provide guidance and advice on government law and policies, this recommendation was not explicitly recognized in the *EBR*. Once the *EBR* was enacted, however, it became clear that the Environmental Commissioner was not content to undertake a process evaluation of the Act. Instead, the Environmental Commissioner's Office has consistently provided substantive comments on the adequacy of the environmental policies of government ministries. This aspect of the Commissioner's functions

was formally recognized by the Ontario legislature in the *Green Energy and Green Economy Act, 2009*. The Act required the Environmental Commissioner to report annually to the legislature on the province's progress in reducing greenhouse gas emissions and ensuring energy conservation.[122]

This requirement is no longer mandatory. The *RTTA Act* gave the Auditor General discretion to determine whether the Environmental Commissioner will continue reporting on these issues.[123] These amendments have raised concerns that the role, responsibilities, and functions of the Environmental Commissioner have been undermined and weakened the *EBR*'s political accountability model

Court Decisions

Recent court decisions have been very critical of the provincial government's failure to comply with the *EBR*.

For example, in 2019, the case of *Greenpeace Canada v. Minister of the Environment* (*Ontario*), (*Greenpeace #1*) considered the Government of Ontario's decision to revoke a regulation that ended the province's cap and trade program, aimed at reducing greenhouse gas emissions.[124] The case arose because the Environment Minister failed to comply with the *EBR*'s public participation requirements before revoking the regulation.

After the Applicants commenced a judicial review of the Environment Minister's decision, the government passed the *Cap and Trade Cancellation Act*, *2018*, which effectively repealed the regulation that was the subject of the court challenge.[125] The new Act included a privative clause that precluded judicial review of the government's conduct. The Ontario Divisional Court found that the government had acted unlawfully when it failed to consult the public. Two members of the Court declined to make a formal declaration because it would not have any legal effect, given that the regulation that was the subject of the judicial review had been repealed.[126]

However, in a strongly worded dissent, Justice Corbett observed that:

> *A close look at that clause could lead to the conclusion that the government was deliberately trying to insulate itself from review for illegality, bad faith or failure to comply with valid, subsisting legislation. This, in turn, could buttress arguments that the clear failure of the government was followed by actions, not acknowledging the error and fixing it, but justifying the error and refusing to permit judicial review of it.*[127]

"In a democracy characterized by the Rule of Law," Justice Corbett wrote, "the government cannot ignore the *EBR* on the basis that it has the legal authority to govern: its authority to govern is circumscribed by the law."[128]

Subsequently, in *Greenpeace Canada* (*2471256 Canada Inc.*) *v. Ontario (Minister of the Environment, Conservation and Parks), (Greenpeace #2)* the Ontario Divisional Court found that the Minister of Municipal Affairs and Housing had acted "unreasonably and unlawfully" by failing to consult with the public before making changes that significantly enhanced the government's power to issue Minister's Zoning Orders under the *Planning Act*.[129] These amendments, included in Bill 197, *COVID-19 Economic Recovery Act*, *2020*, were passed without public consultation.[130]

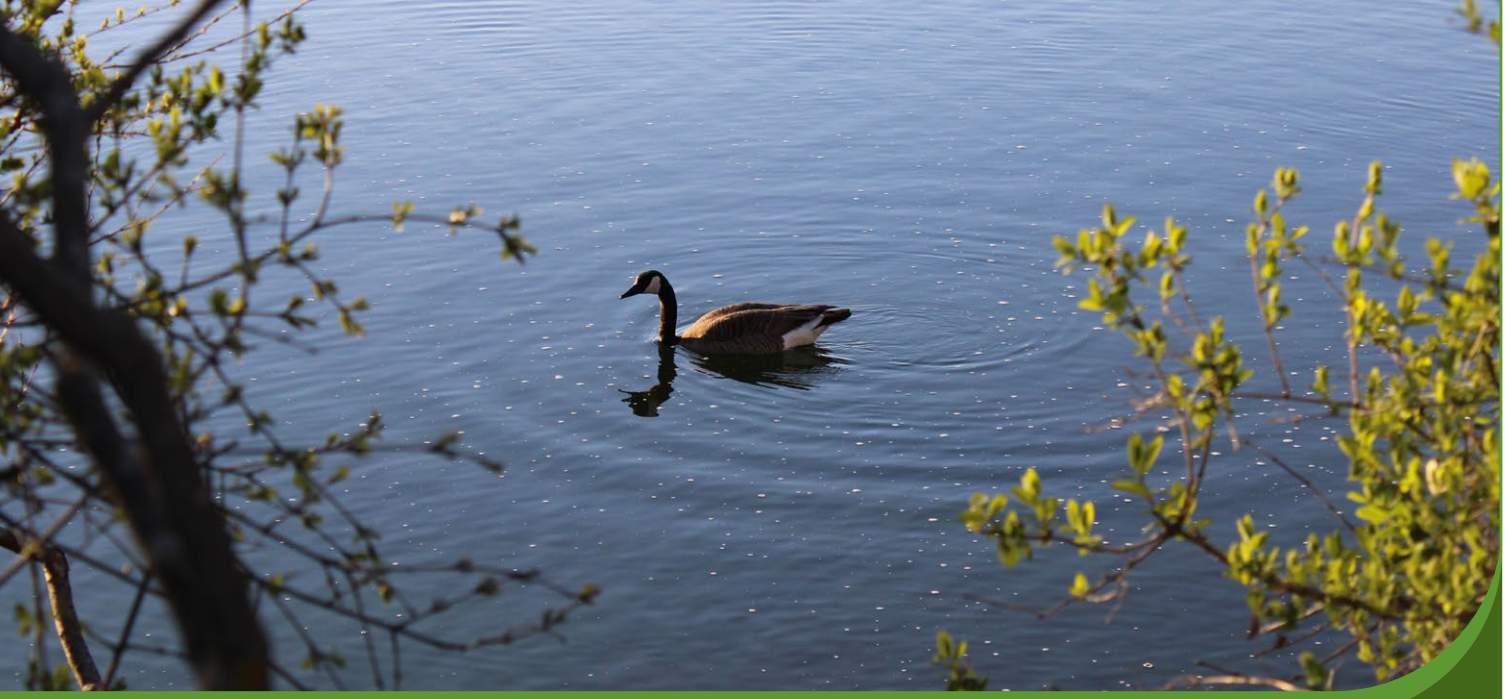
The Court found that it was "noteworthy" that the Auditor General had informed the Ministry before the proposed amendments were adopted that they should be posted on the Registry because of their environmental significance.[131] Nevertheless, the Ministry failed to do so. Instead, many months after Bill 197 became law, the government posted the legislative amendments on the Registry and invited public comment.

In its decision, the Court stated:

> *…an after-the-fact posting does not satisfy the requirements of the EBR, which is meant to give the public an opportunity to be consulted on certain types of proposals that could have a significant effect on the environment before such a proposal is enacted.*[132]

Unlike *Greenpeace # 1,* in this case the Court issued a declaration finding that the Minister of Municipal Affairs and Housing's actions were contrary to the public participation requirements of the *EBR*.[133]

These court decisions were followed by a further non-compliance in 2022 when the Ministry of Municipal Affairs and Housing posted notice of Bill 109, *More Homes for Everyone Act, 2022*, on the Registry but enacted legislation before the comment period expired, thereby obviating the opportunity for public comments.[134]



5. The LCO's Indigenous Environmental Project

Indigenous rights and Indigenous laws are a necessary lens built into the foundation of the LCO's Environmental Accountability Project. The LCO has established a dedicated Indigenous Environmental Accountability project to explore Indigenous rights, perspectives, and traditions as a possible source of environmental rights, as well as the crucial impact of environmental harm on Indigenous peoples in Ontario and elsewhere.

Notably, the main legislation being considered in this Final Report, the *EBR*, was developed 30 years ago without Indigenous representation on its Task Force. Nor does the *EBR* explicitly identify Indigenous issues as a factor to be considered in environmental accountability or the need to consult with Ontario's Indigenous communities. This is a major gap that must be addressed in any contemporary assessment of environmental accountability in Ontario.

The disproportionate impact of environmental harms and climate change on Indigenous peoples has been widely acknowledged for years.

For example, a 2020 United Nations Special Rapporteur's report stated that Indigenous Peoples face greater exposure to hazardous substances than the rest of the population. Among other findings, the Special Rapporteur noted that the Grassy Narrows First Nation and the Wabaseemoong (Whitedog) Independent Nations were still suffering serious health impacts from mercury poisoning which occurred over 50 years ago.[135] Over half of the community members either had, or were suspected to have, Minamata disease, a neurological disease linked to mercury exposure.[136]

Similarly, the Aamjiwnaang First Nation in Sarina was described in the Special Rapporteur's report as facing conditions that were "profoundly unsettling."[137] The community is almost surrounded by industrial facilities and residents suffer from "physiological and mental stress" because of "the risk of impending explosions or other disasters and because of chronic exposure to unquestionably poisonous substances."[138]

The PCCIA report, discussed above, reiterated that change is needed to address the disproportionate impact of climate change and environmental degradation on Ontario's Indigenous communities:

> *The direct and indirect impacts of climate change on Indigenous Communities in Ontario are far-reaching and complex, from increased populations with a need for relocation or evacuation during extreme weather events, to disruptions in cultural and community land-based practices, and reductions in access to health care and social services during extreme events.*[139]

> *Changing climate conditions present a range of direct and indirect health and well-being impacts on Indigenous Populations, threating their personal safety, water and food security, mental well-being, knowledge systems, ways of life and cultural cohesion. The impact assessment found that extreme heat and cold events, extreme precipitation (and associated flooding), and wildfire climate variables are driving the highest risks for Indigenous Populations. Specific vulnerability considerations for Indigenous Populations were applied to the assessment of climate impacts, including socio-economic disparities, social gradients in health, close relationships to sometimes rapidly changing environments, and other systemic barriers. Barriers to building resiliency to a changing climate and capacity constraints, as a result of colonial legacies are also important when considering climate impacts on Indigenous Populations.*[140]

> *Extreme temperature (e.g., extreme heat and cold) is currently driving the greatest risks to Indigenous Populations. Extreme heat and cold events are associated with higher mortality and morbidity rates, particularly for vulnerable populations which includes Indigenous Communities.*[141]

> *Flooding conditions from extreme precipitation events is greater for Indigenous Communities compared to non-Indigenous Populations. Flooding is already creating significant impacts for Indigenous Communities (e.g., property damage and evacuation), with an estimated 27% of Indigenous residents in Ontario facing heightened exposure to residential flood risk, compared to 16% of non-Indigenous residents…*
>
> *Wildfire risk to Indigenous Populations creates deep emotional and psychological impacts for communities, not only from the loss of property but also from damage to sacred lands and loss of cultural heritage.*[142]

The LCO's dedicated Indigenous Environmental Accountability Project will be consistent with contemporary approaches to Indigenous law reform.

The Truth and Reconciliation Commission's (TRC) *Calls to Action* highlights the importance of recognizing, elevating, and integrating self-determined Indigenous legal orders and traditions within Canada's justice system. The TRC found that "Aboriginal peoples must be able to recover, learn, and practice their own, distinct, legal traditions" and that "[e]stablishing respectful relations ... requires the revitalization of Indigenous laws and legal traditions."[143]

This finding has profoundly influenced how the LCO is planning its Indigenous Environmental Accountability Project. In a "conventional" LCO law reform project, it is assumed that "the law" is common ground for research, consultations, analysis, and

recommendations. Our project will aim to give full life and breadth to Indigenous experiences, values, culture, practices, and traditional laws. The LCO's role in this process will be to use our expertise to identify common issues emerging from these experiences; trace this experience back to Ontario's environmental law; explore how Indigenous experiences have been shaped by law; and highlight what steps the Province of Ontario could take to foster these conversations.

This approach is different from the "conventional" approaches to law reform. The "conventional" approach means that Indigenous rights are subordinated in favor of state sovereignty through legislation. Typically, this implicitly or explicitly frames the Indigenous-state relationship in one of three ways: legislation that attempts to incorporate Indigenous legal concepts or principles; legislation that either permits or requires engagement with Indigenous laws; or legislation that enables limited law-making powers for Indigenous communities.[144]

Law reform projects organized on conventional lines can easily narrow the scope of the legal imagination, unbalance a symmetrical relationship in favor of the colonial state, and construe Indigenous legal and cultural orders as "outsiders" to be accommodated.

As part of their ground-breaking "Accessing Justice and Reconciliation Project," Hadley Friedland and Val Napoleon worked closely with Indigenous communities across Canada in a manner that avoided "idealized, romanticized, or simplified representations of Indigenous law" and did "not underestimate the impact of colonialism on Indigenous legal traditions.[145] At the same time, they note how:

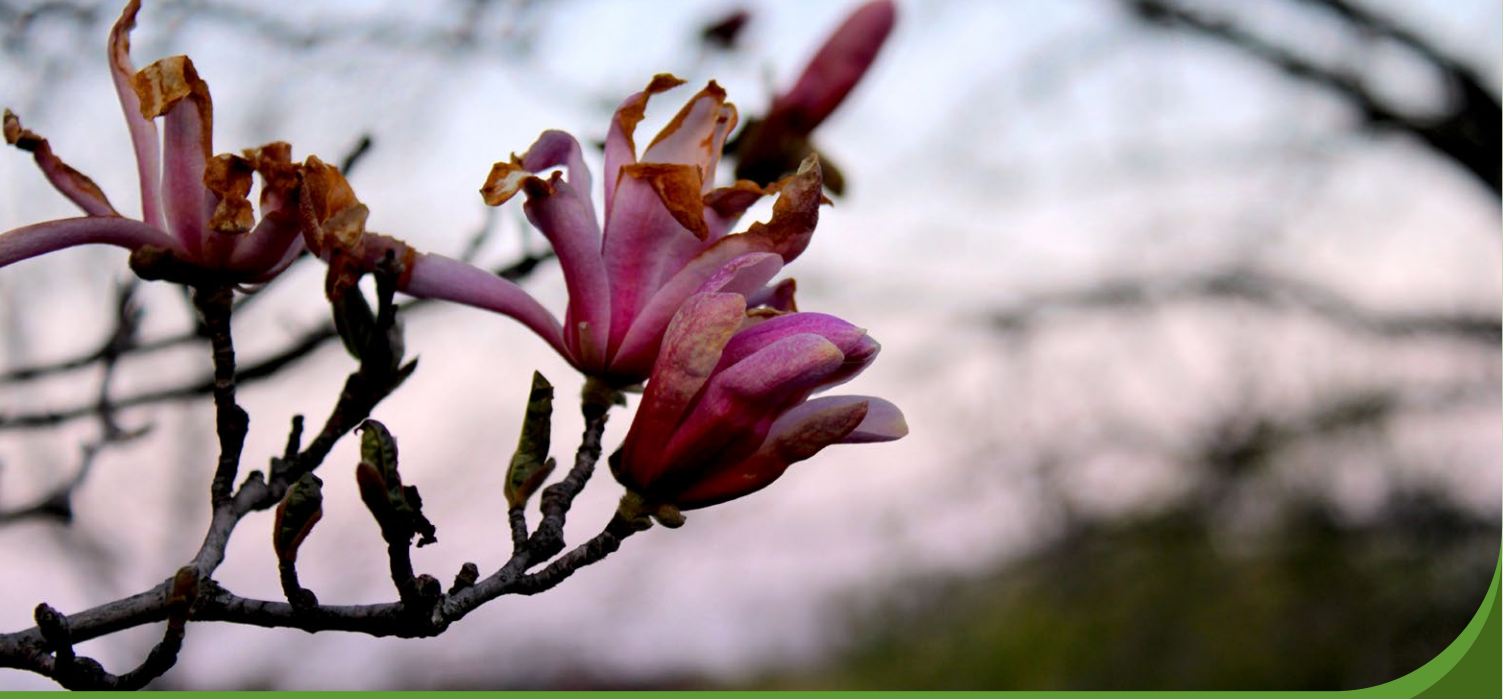
> *...it would be misleading to suggest that all Indigenous laws are completely intact, employed formally, or even in conscious or explicit use. We are not suggesting that here. Rather, when we talk about Indigenous legal traditions at this point in history we are necessarily talking about an undertaking that requires not just articulation and recognition, but also mindful, intentional acts of recovery and revitalization.*[146]

Friedland and Napoleon underscore that Indigenous communities "do not exist or operate in complete isolation from non-Indigenous people, the justice system, or the Canadian state generally. Interconnections and interdependence exist at many levels, and it is artificial and impractical to ignore the extent of this reality."[147]

This approach promotes "reflections about future research" that can help Indigenous peoples "manag[e] the everyday legal challenges of being self-governing."[148] For example, such efforts may help "to identify and articulate the Indigenous legal principles that could be accessed and applied today for the work of building strong, healthy communities now and in the future."[149] As Friedland and Napoleon put it, "[o]ur concern was to build in, from the ground up, the recognition that law is ultimately a collaborative enterprise."[150]

The LCO's Indigenous Environmental Accountability Project will be consistent with this approach. A good example of the LCO's work in this area is our recently released *Last Stages of Life for First Nation, Metis, and Inuit Peoples: Preliminary Recommendations for Law Reform* report.

The LCO's Indigenous Environmental Accountability Project will begin in spring 2024. The project is supported by a grant from the Law Foundation of Ontario.[151]



6. A New Environmental Bill of Rights for Ontario

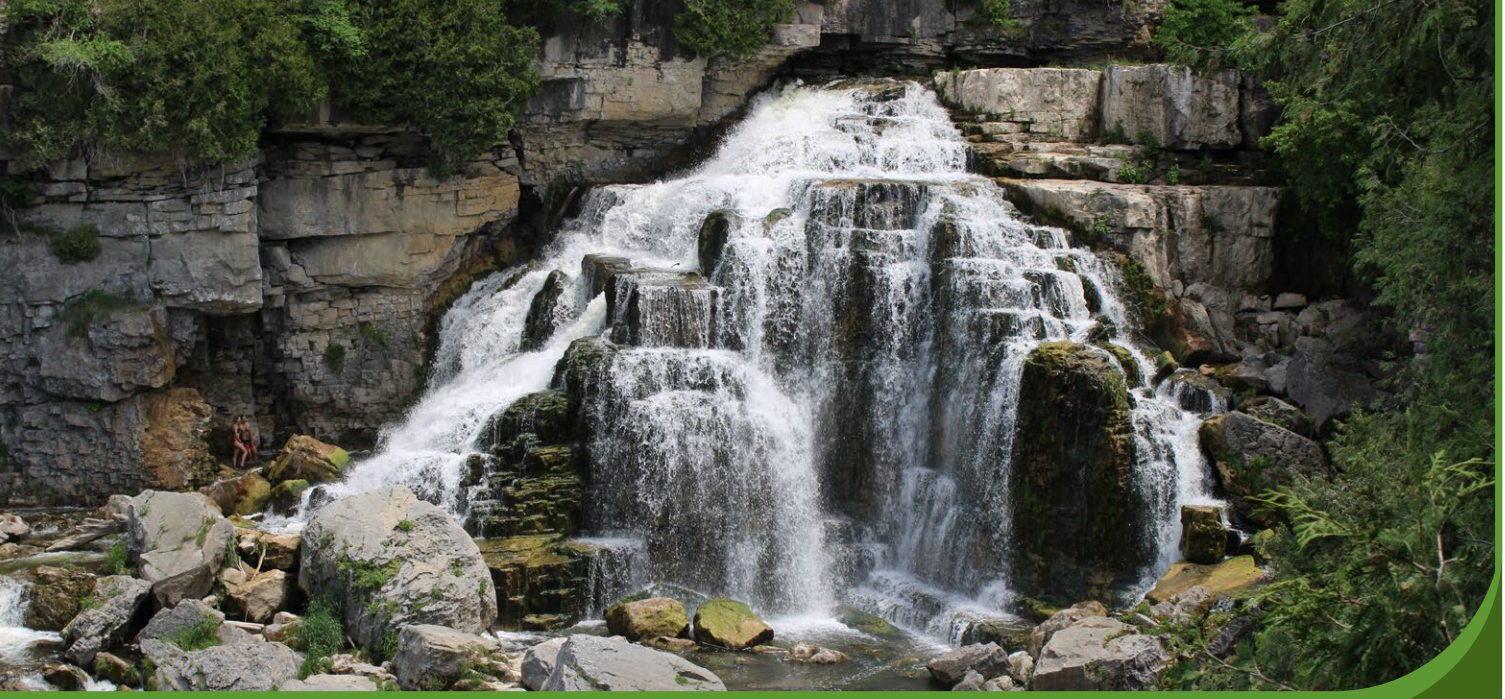
The *EBR* has a long track record against which Ontarians can assess its strengths, weaknesses, and limitations. The LCO and many others have concluded that the *EBR*, despite its many successes, has not fulfilled its objective:

> *(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.*[152]

In the sections that follow, the LCO sets out an ambitious but necessary law reform strategy that we believe will improve environmental decision-making in Ontario and enhance environmental accountability for all Ontarians.

The LCO's strategy has three parts:

- Updating the *EBR* to incorporate contemporary environmental accountability principles and priorities by:
  - Incorporating a right to a healthy environment into the *EBR.*
  - Establishing a right for citizens to commence environmental protection actions.
  - Incorporating environmental justice principles and practices into the *EBR*.
  - Updating the purposes of the *EBR.*
- Improving public participation in provincial environmental decision-making by:
  - Improving Statements of Environmental Values.
  - Enhancing the role of the Environmental Commissioner.
  - Improving Ontarian's access to environmental information.
  - Improving environmental data collection and transparency.
- Updating and clarifying *EBR* procedures by:
  - Updating rules for standing and judicial review.
  - Clarifying *EBR* exceptions.
  - Eliminating the *EBR* statutory cause of action for harm to a public resource.



7. The Right to a Healthy Environment

Over the years, there has been growing recognition of the right to a healthy environment (RTHE) internationally and in Canada. The first formal international recognition of the right to a healthy environment was in the Stockholm Declaration adopted by the United Nations Conference on the Human Environment in 1972. The Declaration states that:

> *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 environment for present and future generations.*[153]

Since Stockholm, more than 150 states have recognized the right to a healthy environment at the national or regional level. That number includes more than 120 states that are bound by regional treaties recognizing the RTHE; more than 100 states that have RTHE constitutional provisions; and more than 100 states that have adopted RTHE legislation in some fashion.[154]

In July 2022, international efforts to advance the RTHE culminated in the United Nations General Assembly (UNGA) adopting a resolution declaring the "right to a clean, healthy and sustainable environment as a human right."[155] The resolution was approved by 161 UN members (including Canada, the United States, Great Britain, EU countries, Australia, and Japan), zero votes against, and eight abstentions (including China and the Russian Federation).[156] Although the resolution is not legally binding, it is expected to be a "catalyst for action and to empower ordinary people to hold their governments accountable."[157] The text of the UN resolution is set out page 35.

U.S. scholar James May and others have identified several means by which the RTHE has been recognized legally, including:

- Express constitutional recognition.[158]
- Implied constitutional recognition (including rights to life, health, and dignity).[159]
- Recognition in domestic legislation.[160]
- Recognition in international law.[161]
- Recognition in regional law.[162]
- Recognition of related rights, such as environmental justice or the rights of nature.[163]

Given this context, it is important to consider whether the adoption of the right to a healthy environment could advance environmental accountability in Ontario. The LCO's analysis includes an in-depth analysis of recent amendments to the *Canadian Environmental Protection Act, 1999* (*CEPA*). These amendments are the most recent and important legislative articulation of the RTHE in Canada to date. These amendments, when combined with other *CEPA* provisions, provide a good illustration of the potential, and limitations, of legislative efforts to enshrine a RTHE in Canada.

The question of how to enforce a RTHE is discussed in section 8 below.

United Nations General Assembly
The human right to a clean, healthy and sustainable environment

A/RES/76/300
28 July 2022

All people have the right to a clean, healthy and sustainable environment. As human rights and the environment are interdependent, a clean, healthy and sustainable environment is necessary for the full enjoyment of a wide range of human rights, such as the rights to life, health, food, water and sanitation and development, among others.

At the same time, the enjoyment of all human rights, including the rights to information, participation and access to justice, is of great importance to the protection of the environment.

Despite myriad international agreements, as well as national laws and policies, the condition of our environment keeps deteriorating. The global crises we currently face, including climate change, the loss of biodiversity, and pollution, represent some of the biggest threats to humanity, severely affecting the exercise and enjoyment of human rights. Some examples include:

Rising global temperatures are increasing water shortages and land degradation, including soil erosion, vegetation loss, wildfires, and permafrost, affecting people's rights to life, health, food, water and adequate standard of living, among other rights.

Air pollution is considered one of the biggest environmental threats to health resulting in an estimated seven million premature deaths every year in violation of the rights to health and life.

Over 38 million people were newly displaced by climate-related disasters in 2021. This directly affects the enjoyment of the rights to adequate housing, education, health and security, among others.

Environmental degradation disproportionately impacts persons, groups and peoples already in vulnerable situations. The impacts of the triple planetary crisis augment the structural and other intersecting barriers they face.[164]

The Link Between Environmental Protection and Human Rights

Legal theorists and policymakers have noted the close connection between environmental protection and human rights. In the words of the United Nations, "[p]utting rights at the centre of addressing the triple planetary crisis – climate change, biodiversity and nature loss, and pollution – is more important now than ever…"[165]

The 1972 Stockholm Declaration was the first international document to recognise the link between human rights and the environment. This link was made more explicit in the 2015 Paris Climate Agreement, the first binding multilateral environmental agreement to include an explicit environmental human rights reference. The link was later reaffirmed in the Glasgow Climate Pact adopted at the 2021 Climate Change conference.[166]

For many, the relationship between environmental protection and human rights are mutually interdependent. Professor Lynda Collins of the Centre for Environmental Law and Global Sustainability at the University of Ottawa, Faculty of Law, explains the connection as follows:

> *The biophysical reality is that all other rights, including the right to life itself, depend on a viable environment. From this perspective, the right to environment may be seen as the primary, indeed, irreducible, human right. If this is correct then it would appear to make good sense explicitly to recognize this ancestor of all rights.*[167]

At the same time, the exercise of human rights (particularly procedural rights such as access to information, public participation and access to remedies) are necessary for effective environmental protection.

Definition/Elements of a RTHE

According to the U.N., there is no universally agreed upon definition of the RTHE.[168] The U.N. notes, however, that the RTHE "is generally understood to include substantive and procedural elements":

> *The substantive elements include clean air; a safe and stable climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, study and play; and healthy biodiversity and ecosystems.*
>
> *The procedural elements include access to information, the right to participate in decision-making, and access to justice and effective remedies, including the secure exercise of these rights free from reprisals and retaliation.*[169]

The U.N. has produced extensive research on the legal definition of the RTHE as expressed in treaties, legislation, and international agreements.[170] The box on pages 37 and 38 includes a sample of RTHE definitions from across Canada and other countries.

Selected Definitions of the RTHE

QUEBEC

Charter of Human Rights and Freedoms

S.46.1. Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law.[171]

YUKON

Environment Act

S.6. The people of the Yukon have the right to a healthful natural environment.[9]

NORTHWEST TERRITORIES

Environmental Rights Act

S.2. The purposes of this Act are

(a) to protect the right of the people of the Northwest Territories to a healthy environment;

(b) to provide the people of the Northwest Territories with tools to exercise their right to protect the integrity, biological diversity and productivity of the ecosystems in the Northwest Territories;

(c) to ensure that the Government of the Northwest Territories carries out its responsibility, within its jurisdiction, to protect the environmental rights of the people of the Northwest Territories; and

(d) to ensure that the Government of the Northwest Territories carries out its responsibility to make environmental information accessible to the public in a reasonable, timely, culturally appropriate and affordable manner.[172]

BOLIVIA

Constitution Article 33

Everyone has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way.

Article 34

Any person, in his own right or on behalf of a collective, is authorized to take legal action in defense of environmental rights, without prejudice to the obligation of public institutions to act on their own in the face of attacks on the environment.[173]

COSTA RICA

Constitution Article 50

The State will procure the greatest well-being to all the inhabitants of the country, organizing and stimulating production and the most adequate distribution of the wealth.

All persons have the right to a healthy and ecologically balanced environment. For that, they are legitimated to denounce the acts that infringe this right and to claim reparation for the damage caused.

The State will guarantee, will defend and will preserve this right. The Law will determine the responsibilities and corresponding sanctions.

Every person has the human, basic and non-renounceable right of access to potable water, as an essential material for life. Water is an asset of the nation, essential to protect such human right. Its use, protection, sustainability, conservation and exploitation will be governed by that which the law created for these effects establishes [,] and the supply of potable water for consumption by persons and the populations will have priority.[174]

FINLAND

Constitution Section 20. Responsibility for the environment

Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone.

The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.[175]

NORWAY

Constitution Article 112

Every person has a right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well.

In order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to be informed of the state of the natural environment and of the effects of any encroachments on nature that are planned or commenced.

The State authorities shall issue further provisions for the implementation of these principles.[176]

RTHE Benefits

According to the U.N., rights-based approaches to environmental decision-making and policy development can provide the following benefits:

- Establishment of consistent global environmental human rights standards to facilitate interventions at the appropriate levels (local, national, regional, and international).
- Strengthened capacities of States to meet their human rights and environmental obligations in a coherent manner, including their duty to ensure that private entities/non-State actors respect human rights.
- Enhanced accountability by enabling people to uphold their rights, and hold States and other stakeholders to account.
- More effective, legitimate, and sustainable outcomes.[177]

David Boyd, the former U.N. Special Rapporteur on human rights and the environment, summarized the benefits of recognizing a RTHE somewhat differently:

- Stronger environmental laws and policies.
- Improved implementation and enforcement.
- Greater public participation in environmental decision-making.
- Reduced environmental injustices.
- A level playing field with social and economic rights.
- Better environmental performance.[178]

Implementing the RTHE

Research demonstrates that simple *recognition* of the RTHE does not necessarily produce benefits or improve environmental outcomes.[179] This is because, in the words of John Knox, the former United Nations Special Rapporteur on human rights and the environment, "… not all recognitions are equal"[180] and that

> *Recognizing a right to a clean and healthy environment without judicial, legislative, regulatory, and other means to implement them is tantamount to Pyrrhic victory.*[181]

Knox's comment underscores the importance of recognizing that RTHE implementation has several facets, including development of legal standards, best practices, and, most importantly, "judicial and legislative engagement."[182]

The Right to a Healthy Environment in Canada

The RTHE and the *EBR*

The right to a healthy environment was considered by the Task Force during the development of the *EBR*. One of the issues the Task Force debated was whether the legislature should be prohibited from enacting laws that harmed or had the potential to harm the environment. The Task Force ultimately rejected this option, believing it would create "too much uncertainty while the courts considered government's decisions with respect to the environment."[183]

The *EBR* references the RTHE in the preamble which states that: "The people of Ontario have a right to a healthful environment."[184] A preamble does not confer any legal right, hence, the RTHE in the *EBR* is unenforceable.[185]

The RTHE and the Canadian *Constitution*

There have been attempts to establish a constitutional RTHE in Canada.[186] According to many environmental advocates, constitutionalizing environmental rights would provide the greatest level of environmental protection. However, these efforts have been unsuccessful.[187]

There have also been attempts to create constitutional protections for environmental rights based on sections 7 and 15 of the *Charter.*[188] Section 7 provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 15 provides that '[e]very individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination." To date, these efforts have also been unsuccessful.[189]

Statutory Recognition of the RTHE in Canada

In addition to the *EBR*, the RTHE has been recognized in several Canadian provincial statutes and at least one federal statute. This section reviews some of these provisions and includes a detailed analysis of Bill S-5, *Strengthening Environmental Protection for a Healthier Canada Act*, which amended *CEPA* to provide for a RTHE.

Quebec

In Quebec, the right to a healthy environment is recognized in the *Environment Quality Act* (*EQA*) and the *Charter of Human Rights and Freedoms.*

Environment Quality Act

The *EQA*, which was passed in 1978, made Quebec the first province in Canada to legislate the right to a healthy environment. Section 19.1 of the *EQA* states:

> *Every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this Act and the regulations, orders, approvals and authorizations issued under any section of this Act…*

The Act operationalizes the right by prohibiting the release of a contaminant into the environment in a greater quantity or concentration than in accordance with the Act.[190] The prohibition also applies if the release of the contaminant is prohibited by regulation or is likely to adversely affect human health or safety or the natural environment. [191] Finally, the *EQA* broadened standing requirements to allow any resident of Quebec who frequents the place where the right was contravened to seek injunctive relief.[192] The reform of standing requirements has contributed to greater public access to justice.[193] There have been approximately a dozen court cases which have referenced s. 19.1 of the Act.

Charter of Human Rights and Freedoms

In 2006, Quebec's *Charter of Human Rights and Freedoms*, a quasi-constitutional law, was amended to include the right to a healthy environment. Section 46.1 of Quebec's *Charter* states "[e]very person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law."

A violation of Quebec's *Charter* rights gives right to several remedies, including an order for the cessation of the interference with the right and damages.[194] Section 46.1 has significantly expanded environmental rights in the province given all legislation passed by the provincial government must comply with Quebec's *Charter*. [195] At least 40 cases have been brought under the Quebec Charter to enforce the right to a healthy environment.

Yukon

Yukon's *Environment Act* recognizes that the people of Yukon have a right to a healthful environment.[196] The Act also declares that it is in the public interest to provide residents of Yukon with a remedy adequate to protect the natural environment.[197]

Section 8 of the Act allows adult residents to commence an action if they have reasonable grounds to believe that a person has impaired or is likely to impair the natural environment. Standing requirements have been liberalized and evidence of special harm or personal or proprietary interest is not required to commence an action.[198] Notably, in cases involving impairment of the natural environment by a contaminant, the Act imposes a reverse onus provision, requiring that the defendant establish the contaminant did not cause impairment.[199]

Section 12 of the Act provides for broad remedies, including injunctions, declarations, damages, and an award of costs. In addition, the court can also impose various types of orders against the defendant. These include establishing a monitoring and reporting system, restoration or rehabilitation of the environment, preventative measures, and financial assurance.

These aspects of Yukon's statute appear to provide effective protection of environmental rights. However, the impact of Yukon's statutory RTHE are limited by the broad range of available defences under section 9, including:

- Compliance with a permit, license, or a standard.
- If the impairing activity was restricted to the polluter's residential property.
- If there was no "feasible and prudent alternative."

These defences are discussed in more detail below.

There are no reported cases under Yukon's *Environment Act* to enforce the right to a healthy environment.

Northwest Territories and Nunavut

The Northwest Territories *Environmental Rights Act* and Nunavut's *Environmental Rights Act* both recognize the right to a healthy environment and are similar in many respects. Both statutes allow a resident to commence a civil action to protect the environment.[200]

Standing is open to any resident, and there is no requirement to demonstrate special harm or the infringement of pecuniary or proprietary rights or interests to commence an action.[201] Both statutes, however, provide for numerous defences, including the fact that the defendant complied with an approval or a standard.[202]

Both statues have been used rarely.[203]

Bill S-5 and *CEPA*

In June 2023, the Parliament of Canada passed the first major amendments to *CEPA* since 1999. Bill S-5*, Strengthening Environmental Protection for a Healthier Canada Act*, included important amendments enshrining elements of a RTHE in the federal government's primary legislation for regulating toxic substances.

Bill S-5 added three important provisions to *CEPA* regarding the RTHE:

- *CEPA*'s preamble was amended to recognize the "right to a healthy environment as provided under this Act."
- *CEPA* s.2(1) was amended to require the federal government to "protect the right of every individual in Canada to a healthy environment as provided under this Act, subject to any reasonable limits."
- A new section, s. 5.1, was added to *CEPA* requiring the federal Ministers of Environment and Health to "develop an implementation framework to set out how the right to a healthy environment will be considered in the administration of this Act."

Notably, Bill S-5 did not amend s. 22, *CEPA*'s remedial provision.

The next section of the report looks at the *CEPA* amendments in detail to assess how the RTHE was incorporated into *CEPA*.

Preamble: Recognition of the RTHE

CEPA's preamble was amended to recognize the "right to a healthy environment as provided under this Act." The meaning of this statement was given further clarity in s. 3(1), the definitions section, which states that:

> ***Environment*** *means the components of the Earth and includes*
>
> *(a) air, land and water;*
>
> *(b) all layers of the atmosphere;*
>
> *(c) all organic and inorganic matter and living organisms; and*
>
> *(d) the interacting natural systems that include components referred to in paragraphs (a) to (c).*
>
> ***Healthy environment*** *means an environment that is clean, healthy and sustainable.*

Section 2(1): RTHE Duties Imposed on the Federal Government

CEPA s.2(1) was amended to require the federal government to "protect the right of every individual in Canada to a healthy environment as provided under this Act, subject to any reasonable limits." This section includes an extensive list of considerations the federal government must consider when implementing *CEPA*:

Duties of the Government of Canada

2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),

(a) exercise its powers in a manner that

(i) protects the environment and human health, including the health of vulnerable populations,

(ii) applies the precautionary principle, which provides that the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation if there are threats of serious or irreversible damage, and

(iii) promotes and reinforces enforceable pollution prevention approaches;

(a.1) take preventive and remedial measures to protect, enhance and restore the environment;

(a.2) protect the right of every individual in Canada to a healthy environment as provided under this Act, subject to any reasonable limits;

(a.3) in relation to paragraph (a.2), uphold principles such as principles of environmental justice — including the avoidance of adverse effects that disproportionately affect vulnerable populations — the principle of non-regression and the principle of intergenerational equity;

(b) take the necessity of protecting the environment into account in making social and economic decisions;

(c) implement an ecosystem approach that considers the unique and fundamental characteristics of ecosystems;

(e) encourage the participation of the people of Canada in the making of decisions that affect the environment;

(f) facilitate the protection of the environment by the people of Canada;

(g) establish nationally consistent standards of environmental quality;

(h) provide information to the people of Canada on the state of the Canadian environment;

(i) apply knowledge, including traditional aboriginal knowledge, science and technology, to identify and resolve environmental problems;

(j) protect the environment, including its biological diversity, and human health, from the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes;

(j.1) protect the environment, including its biological diversity, and human health, by ensuring the safe and effective use of biotechnology;

(m) ensure, to the extent that is reasonably possible, that all areas of federal regulation for the protection of the environment and human health are addressed in a complementary manner in order to avoid duplication and to provide effective and comprehensive protection;

[Emphasis added.]

Section 5(1): Duty to Develop an RTHE Implementation Framework

Finally, s. 5.1, added a new requirement that the federal Ministers of Environment and Health develop an "implementation framework" for how the RTHE will be "considered" in the administration of the Act:

5.1 (1) For the purposes of paragraph 2(1) (a.2), the Ministers shall, within two years after the day on which this section comes into force, develop an implementation framework to set out how the right to a healthy environment will be considered in the administration of this Act…

(2) The implementation framework…shall, among other things, elaborate on

(a) the principles to be considered in the administration of this Act, such as principles of environmental justice — including the avoidance of adverse effects that disproportionately affect vulnerable populations — the principle of non-regression and the principle of intergenerational equity, according to which it is important to meet the needs of the present generation without compromising the ability of future generations to meet their own needs;

(b) research, studies or monitoring activities to support the protection of the right to a healthy environment referred to in paragraph 2(1) (a.2);

(c) the relevant factors to be taken into account in interpreting and applying that right and in determining the reasonable limits to which it is subject, including social, health, scientific and economic factors; and

(d) mechanisms to support the protection of that right.

Evaluation of Bill S-5 and CEPA Amendments

Bill S-5 includes several important provisions that acknowledge and advance the RTHE in Canada, including statutory recognition of the "right to a healthy environment as provided under this Act." Perhaps more importantly, the *CEPA* s.2(1) amendments create a positive duty on the federal government to incorporate key aspects of the RTHE (environmental justice, ecosystem approach, public participation, etc.) into *CEPA* decision-making. Similarly, the *CEPA* s.5(1) amendments create a duty to incorporate key aspects of the RTHE (environmental justice, non-regression, intergenerational equity, mechanisms to support protection of the right) into federal "implementation frameworks" required by the Act.

However, the extent to which Bill S-5 established a meaningful "right" to a healthy environment is a matter of substantial debate. The Canadian Environmental Law Association and others have criticized the *CEPA* amendments, stating that they "do not necessarily establish a right to healthy environment" for several reasons:

> *First, as a matter of law, preambles are not enforceable in and of themselves. They are merely interpretative aids.*
>
> *Second…[the amendments] are so circumscribed with caveats about "reasonable limits" and consideration of, for example, economic factors that they hardly constitute recognition of environmental rights, let alone an environmental magna carta.*

> *Third, the commitment to develop an "implementation framework" several years down the road is pretty vague and certainly does not on its face create a stand-alone "right" of individuals to a healthy environment. It is a regime entirely dependent on the will of the government i.e., the opposite of a rights-based approach to the law. A right requires a remedy for individuals to invoke in an independent forum (i.e., a court)….*[204]

These concerns were also voiced by other legal commentators. For example, several lawyers at the Osler law firm noted that:

> *…the impact of recognizing the right to a healthy environment in CEPA is unclear, for two reasons.*
>
> *First, the statutory language in Bill S-5 is broadly worded, leaves significant discretion to the federal executive, and has no enforcement mechanism. A statute's preamble merely sets out its purpose. On it is own, it is unenforceable. And the right recognized in section 2(1) of CEPA is qualified by "reasonable limits"— a definition that is left to executive discretion and judicial interpretation.*
>
> *Second, Bill S-5 does not provide a remedy for when the right is allegedly violated.*[205]

Many environmental groups had recommended that *CEPA* s. 22 be amended to provide a workable remedy to enforce the right healthy environment.[206] Similarly, Conservative MP Andrew Scheer, speaking in the House of Commons, noted the "the lack of provisions that would make … [the RTHE] enforceable."[207]

Should Ontario Adopt a Statutory RTHE?

As noted above, the *EBR* does not establish a legally enforceable RTHE.

Given the momentum to establish the RTHE in jurisdictions across the world, a central question for the LCO in this project is whether Ontario should adopt a statutory RTHE, and if so, what substantive or procedural protections should be included.

In some respects, this is not a difficult issue:

- During the LCO's consultations, most stakeholders favoured the recognition of a statutory RTHE.
- The RTHE has become an international norm in treaties, agreements, and legislation across the world.
- The RTHE amendments in *CEPA* were broadly supported in principle by a wide array of stakeholders.
- The RTHE is already acknowledged in the *EBR*'s preamble.

These reasons alone could justify a statutory RTHE in the *EBR*. In the LCO's view, however, statutory recognition is primarily justified for two reasons:

First, statutory recognition addresses, in part, many of the law reform catalysts driving *EBR* reform in the first place (*EBR* erosion, non-compliance and accountability gaps; need to address climate change; need to reflect contemporary environmental accountability strategies; and the need to reflect modern public administration).

Second, the LCO believes the potential benefits of a statutory recognition of a RTHE in Ontario are consistent with the benefits that have been identified internationally:

- Reducing the risks and impact of climate change on Ontario's environment, communities, and economy.
- Promoting stronger provincial environmental laws, regulations, policies, and standards.
- Improving public accountability for environmentally significant decision-making.
- Improving *EBR* implementation and enforcement.
- Promoting procedural guarantees and remedies.
- Promoting development of a common law of environmental protection.
- Greater public participation in Ontario's environmental decision-making.
- Symbolic catalyst acknowledging the importance of environmental issues.

In short, statutory recognition of a RTHE in the *EBR* could significantly improve environmental accountability and performance in Ontario, the central objectives of this project. As a result, the LCO recommends that the *EBR* be amended to incorporate a statutory RTHE.

Scope or Parameters of a Provincial RTHE

In principle, a recommendation to incorporate a RTHE in the *EBR* may not be controversial. The more complicated question is how to define the scope and content of the right. Should the right be defined narrowly or broadly? Should it be limited to procedural protections, or include substantive protections? Should it be based on the *CEPA* model? Should it be enforceable against the provincial government, private actors, or both? What is needed to ensure the RTHE is effective?

At this point, it bears repeating that the RTHE is generally understood to include both substantive and procedural elements. *Substantive* elements are typically considered to include the right to clean air; a safe and stable climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, study, and play; and healthy biodiversity and ecosystems. *Procedural* components are typically understood to include access to information, the right to participate in decision-making, and access to justice and effective remedies.[208]

Substantive Components

As noted above, the right to a healthy environment is unenforceable under the *EBR* and the only references to the right are in the in the preamble and the purpose section. Nor does the *EBR* provide a definition of the right.

From an environmental accountability perspective, the LCO believes that clear, explicit, and substantive RTHE provisions are preferable to the wording of the current *EBR*.

Defining the actual legal text of a substantive RTHE is a complex and consequential choice. Policymakers in Ontario could adopt the *CEPA* definition of a "healthy environment", which is largely consistent with the substantive RTHE elements identified by the UN.

There are also legal and policy arguments in favour of the Quebec definition, the Yukon/Northwest Territories/Nunavut definitions, and other potential definitions.

The LCO believes a new substantive RTHE provision should be defined broadly, including the right to environmental quality that protects human health, ecological health, and environmental sustainability. We further believe that the RTHE definition in *CEPA* is a good place to start. Adopting this language would promote federal and provincial harmonization and help ensure consistent judicial decision-making in the development of the common law. The specific legislative wording of this provision will undoubtedly be commented upon by governments, environmental and industry organizations, legal professionals, and academics.

Procedural Components

The *EBR*'s procedural and participation provisions are discussed at length in sections 11 to 12 of this report and will not be repeated here.

Significantly, some of the procedural components of the RTHE are already incorporated into the *EBR*, including the right to access to information and the right to participate in environmental decision-making. As will be discussed below, however, the *EBR*'s current access and participation provisions are not sufficient.

The most consequential, RTHE "procedural" omission/gap in the *EBR* is the lack of an effective remedy. As discussed in section 8 below, the LCO recommends this gap be addressed by amending the *EBR* to create a right to initiate an environmental protection action.

Qualifying or Limiting the Impact of a Provincial RTHE

Research demonstrates that the mere recognition of the RTHE within a statute does not necessarily produce benefits or improve environmental outcomes.[209]

Recent *CEPA* amendments illustrate how legislative drafting can be utilized to qualify or arguably undermine the effectiveness of a provincial RTHE. *CEPA* s. 2 (1) (a.2), for example, requires the federal government to "protect the right of every individual in Canada to a healthy environment as provided under this Act, *subject to any reasonable limits.*" Similarly, s. 5.1 (1) requires the federal Ministers of Environment and Health to develop implementation frameworks to "set out how the right to a healthy environment will be *considered* in the administration" of *CEPA*. Finally, s. 5.1 (2)(c) states that implementation frameworks must consider "the relevant factors to be taken into account in interpreting and applying that right and in determining the reasonable limits to which it is subject, including social, health, scientific *and economic* factors…" [Emphasis added.]

During the Bill S-5 legislative process, the Canadian Environmental Law Association (CELA) recommended several amendments to these sections, including replacing the s. 5(1) duty to "consider" the RTHE with a duty to "apply" the RTHE. CELA also recommended removing explicit requirements to balance the RTHE with "economic factors," arguing that these qualifications will undermine or compromise environmental accountability and protection. Finally, CELA was concerned about *CEPA*'s new "implementation framework" requirements, believing there is a risk that poorly developed frameworks could further weaken *CEPA*'s RTHE provisions.[210]

Statutory implementation of a RTHE in the *EBR* would likely raise similar issues. The LCO has considered these questions, and makes the following comments:

As a starting point, the LCO believes the *EBR* should be amended to include a duty to "apply" rather than "consider" the RTHE. A stricter legal standard is necessary to ensure the RTHE will be implemented in Ontario.

The LCO acknowledges CELA's argument that there is a risk of diluting the RTHE if policymakers are given a mandate or duty to consider "economic factors" when applying the RTHE. The LCO notes, however, that the *CEPA* reforms require federal policymakers to consider "social, health, scientific and economic factors…" From a public policy perspective, the LCO believes these are appropriate considerations. Moreover, as Boyd notes, the RTHE, like other rights, is not absolute and does not necessarily mean "pollution-free air, pure water and pristine ecosystems."[211] The LCO further believes that concerns about qualifying or undermining a new provincial RTHE will be mitigated if the *EBR* is amended to mirror *CEPA* s. 2(1), to establish a positive duty on the provincial government to incorporate key aspects of the RTHE (environmental justice, ecosystem approach, public participation, etc.) into provincial *EBR* decision-making.

Finally, provincial RTHE implementation will be enhanced by ensuring the right is legally enforceable, as discussed below.

Is the RTHE Too Vague?

Notwithstanding the growing international consensus in favour of the RTHE, there are many concerns that the RTHE, however defined, is simply too uncertain or vague to implement through legislation. For example, it is often asked what level of environmental quality is protected by the right. Also,

> *…[i]s such a right individual or collective? Is it a positive or a negative right? Can we conceptualize such rights as anthropocentric (i.e., human rights to environmental quality) or ecocentric (animal rights, species' rights or rights for nature)? Do these rights extend to future generations? Are there duties that accompany the rights? What is an appropriate scope for such a right or group of rights, and is there a societal consensus on this?* [212]

These uncertainties have led some to ask whether a RTHE can be legally interpreted and effectively operationalized.[213]

A related argument was noted by the Ontario Chamber of Commerce in their recent policy paper, *The Climate Catalyst: Ontario's Leadership in the Green Global Economy*:

> *Uncertainty about future government policies is one of the main barriers that deters the private sector from making major investments. This is especially true when it comes to climate and energy policies, where volatility can significantly impact financial returns.*
>
> *While businesses do not expect to know all the outcomes of future policy choices, they need more transparency and predictability around the decision-making process to understand how policies and regulations will impact their investments. Federal and provincial governments should establish a coherent decision-making framework that outlines the criteria, considerations, and procedures upon which climate policies will be based. How will jobs, emission reductions, and other benefits be weighed against costs? Where will decisions rely on Indigenous governance, leadership, and knowledge? When and how will industry expertise be leveraged?*[214]

To address this concern, the Ontario Chamber of Commerce recommended that governments "[m]inimize uncertainty: outline a clear decision-making framework for future climate policy decisions."[215]

These critiques raise important issues that need to be addressed.

Professor David Boyd, has considered these questions at length. Boyd contends that the RTHE is no less vague than other rights, such as freedom of expression guaranteed under the *Charter.*[216] The scope and content of the right to a healthy environment, Boyd maintains, will evolve over time through legislation, jurisprudence, and the development of scientific knowledge.[217]

The LCO agrees with Boyd's analysis, subject to the following comments:

First, "vagueness" in a statutory definition of a RTHE can and should be mitigated. An important law reform priority, therefore, should be to "minimize uncertainty" and to "outline a clear decision-making framework", as per Ontario Chamber of Commerce's recommendations. Fortunately, there is already an important Canadian precedent to meet this objective: *CEPA* s. 2(1) provides an extensive list of issues that the federal government must consider when implementing *CEPA*. In this manner, the statute provides important legal guidance about how the *CEPA* RTHE should be implemented.

Second, as Boyd notes, the scope and content of the RTHE will evolve over time through legislation, policy analysis, and the development of scientific knowledge. RTHE issues will also be litigated, allowing parties and courts to develop the appropriate legal principles to govern the RTHE over time.

Finally, some have also questioned the need for a statutory RTHE given that environmental harm has traditionally been addressed under tort law. The LCO does not believe tort law can meet the objectives of a provincial RTHE. Many legal commentators have noted the numerous obstacles to relying on common law causes of actions to resolve environmental claims, including the difficulty of establishing causation and fault, particularly in cases involving adverse health impacts:

> *A party alleging negligence will have an especially difficult task attributing liability in environmental claims, given the numerous hurdles that must be overcome to achieve success. Claimants must meet the burden of proof in establishing, on a balance of probabilities, that the injury suffered was of a kind that a reasonable person ought to have foreseen. Difficulties are frequently encountered in environmental claims because concepts of reasonable foreseeability and the standard of care in environmental matters are unsettled, especially in cases where the plaintiff brings action over long-term exposure to minor emissions.*[218]

Other obstacles include the cost of litigation and the risk of an adverse cost award if an action fails.[219]

Reliance on tort law, thus, has significant constraints and may be of limited usefulness for litigants seeking to address environmental harm.

Potential Risks and Impacts of the RTHE on the Provincial Economy

Opponents of statutory recognition of a RTHE argue that it will harm the economy, reduce private investments, undermine competitiveness, and lead to fewer jobs.[220]

There is nothing in the literature assessing the impact of the RTHE indicating these types of outcomes. Indeed, some observers have suggested that the establishment of a RTHE has strengthened progress on sustainable development, even in the context of a heavily resource export-oriented economy. Norway has been identified as a notable example.[221]

The LCO also notes that the impacts and risks of climate change to the private sector in Ontario have been studied extensively. The Ontario Chamber of Commerce recently released an important analysis discussing the challenges and opportunities for Ontario in the global green economy. According to the Ontario Chamber of Commerce,

> *Climate change has costly implications for both residents and businesses in Ontario…*
>
> *For primary sectors such as agriculture and forestry, these impacts are direct…*
>
> *In Ontario, extreme weather events are disproportionately affecting Northern and Indigenous communities…*
>
> *There are also ways in which the climate crisis impacts businesses across all sectors, including the physical damage inflicted on transportation, electricity, telecommunication, and other infrastructure…*
>
> *Insurance providers, faced with increased risk of weather-related events and claims, have no option but to price that risk within premiums*
>
> *Flooding is the most widespread natural disaster across Canada and the lead driver of rising catastrophic insurable losses…*
>
> *Climate change affects shipping costs as well, which has broad consequences for supply chains…*
>
> *Finally, the socioeconomic impacts of climate change – on public health, social stability, and resource availability – represents a serious threat to the underpinnings of society and business prosperity…*[222]

Similarly, the PCCIA summarizes the risks of climate change to Ontario's business and economy as follows:

> *Changes in physical climate risks are already impacting Ontario firms of all sizes, and these impacts are expected to continue (and potentially be exacerbated) into the future. The significance of climate risks to business performance and sustainability are anticipated to vary widely, depending on factors such as firm size, geographic location of business assets and activities (including supply chain relationships), and complexity of business arrangements (e.g., partnerships).*[223]

The legal landscape governing environmental protection, climate change, and economic activity in Canada and internationally is changing rapidly. The RTHE has been recognized by most of the the world's nations in treaties, legislation, or regional agreements. Simply stated, the RTHE is becoming an international legal norm. As the Ontario Chamber of Commerce notes:

> *Domestic policies rarely exist in a vacuum, and this is especially true for climate policy. After all, emissions ignore borders, and solutions should too. Climate commitments adopted abroad send signals to organizations, governments,*

and investors everywhere. Global agreements such as those signed (or not signed) in Kyoto, Copenhagen, and Paris, serve as guideposts for decision-makers.

Today, approximately 70 percent of the world's economy is now committed to reaching net-zero emissions, with every member of the G7 on a pathway to net zero by 2050.

International coordination on climate is far from absolute, but it does signal a growing consensus among leaders on the need for action.[224]

Finally, recent *CEPA* amendments have enshrined a limited form of the RTHE at the federal level in Canada, establishing a federal environmental legal "baseline" that is likely to prove influential across the country.

The RTHE and the Private Sector

A related and important law reform question is whether the RTHE should only apply to government or also extend to private actors. It will likely be argued that because the primary objective of the *EBR* is to ensure government accountability, private actors should not be liable under an environmental rights regime. Instead, it is argued that the enforcement of the right should be restricted to government to incentivize state action to prevent and remediate environmental harm.

The LCO does not believe the private sector should be exempted from RTHE obligations. We have reached this conclusion for several reasons, many of which have been discussed earlier in this report.

First, the LCO has repeatedly stressed the transcendent need to address climate change and improve environmental accountability in Ontario. The LCO has also emphasized the impact of climate change on the private sector.

Second, limiting the RTHE to government actions and decisions would not directly address the underlying source of most pollution in Ontario and could delay prompt remedial measures to address significant environmental harms. Such an approach would also be at odds with the polluter pays principle, a well-established principle of environmental law and policy, which holds that those who produce pollution should bear the costs of managing it to prevent damage to human health and the environment.

Third, as noted elsewhere, the LCO believes the best way to assess the potential impact of the RTHE on a private sector project, economic sector, or potential investment is on an evidence-based, case-by-case basis through comprehensive consultations, regulations, licensing, or litigation.

Finally, and perhaps most importantly, private sector activity will, in many respects, be governed by RTHE principles in any event. This is because the RTHE will apply to many forms of government environmental decision-making, legislation, regulations, provincial policies and standards, and decisions respecting individual approvals/licences, etc.

For all these reasons, the LCO recommends that the right to a healthy environment under the *EBR* should apply to both government and private actors.

The LCO Recommends:

1. The *EBR* should be amended to state that every person residing in Ontario has a right to a healthy environment. The right to a healthy environment should be broadly defined to include, but not limited to, the right to environmental quality that protects human health, ecological health, and environmental sustainability.
2. The right to a healthy environment should be enforceable against both government and private actors.

8. Environmental Protection Actions

The major theme of this report thus far has been the need to improve accountability for the provincial government's environmental decision-making. Our first and most far-reaching recommendation to meet this objective is to amend the *EBR* to incorporate a RTHE.

This reform alone will not be sufficient to improve environmental accountability. Experience in Ontario and other jurisdictions demonstrates that a RTHE is likely to be largely symbolic and ineffective unless there is an accompanying legal process available to enforce it. As James May notes, "[r]ecognition of something akin to a right to a healthy environment does not make it legally enforceable."[225] As a result, this section of the report considers whether the *EBR* should be amended to include a new and substantive citizen suit provision to enforce the RTHE.

Environmental Citizen Suits in the United States

The concept of environmental citizens' suits is often credited to Joseph L. Sax, an environmental law professor at the University of Michigan Law School. Sax played a central role in the development of the concept of environmental rights. In his influential 1971 text, *Defending the Environment: A Strategy for Citizen Involvement,* Sax argued that embedding citizen suits into legislation was the most effective mechanism for ensuring environmental protection.[226] The courts were regarded as the preferred institution to resolve environmental disputes because they were immune from political pressure.[227]

In response to arguments that the courts are an institutionally inappropriate forum because judges lack sufficient expertise on environmental matters, Sax noted that the courts often determine complicated matters, such as medical malpractice or product liability cases, that also involve highly scientific and technical issues.[228] According to Sax, protection of the environment and natural resources could only be achieved by shifting the balance of power from bureaucrats to judges.[229]

The pioneering American environmental citizen suit statute, the *Michigan Environmental Protection Act* (*MEPA*), drafted by Sax and passed in 1970, reflected his theory on the need for the courts to protect the environment.[230] *MEPA* has since served as the model for citizen suit provisions in numerous U.S statutes and other countries, including Canada.[231] For example, all major U.S. federal environmental statutes authorize citizen suits, and they constitute a primary mechanism for enforcing environmental law.[232] In the U.S., citizen suits are regarded as an essential means of ensuring public participation in environmental decision-making.[233] U.S. courts have reiterated the important role that citizen suits can have on the enforcement of anti-pollution standards in the face of government inaction.[234]

In the U.S., the "vast majority"[235] of citizen suits filed under pollution statutes involve the U.S. *Clean Water Act (CWA)* and *Clean Air Act (CAA)*, both of which include provisions that are "novel for the breadth and authority they give citizens to file enforcement suits directly against private or public entities for alleged regulatory violations."[236]

Michigan's Natural Resources and Environmental Protection Act

324.1701 Actions for declaratory and equitable relief for environmental protection; parties; standards; judicial action.

Sec. 1701.

(1) The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

(2) In granting relief provided by subsection (1), if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:

(a) Determine the validity, applicability, and reasonableness of the standard.

(b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.[237]

There is a rich literature in the U.S. analyzing the law and impact of environmental citizen suits. The LCO will briefly review some of this material because it provides important context and lessons for Canadian policymakers hoping to improve environmental accountability.

Justification and Criticisms

According to David Adelman and Jori Reilly-Diakun, in the U.S., environmental citizen suits were created to address concerns about the "shortcomings of government enforcement," including limited budgets, practical constraints on monitoring compliance, and political or institutional barriers to implementation and enforcement.[238] They were also viewed as a form of

> *…democratic empowerment, enabling direct public enforcement of environmental rights rather than relying solely on government officials. These aspirations were mirrored in the expectations of commentators and environmental advocates, most importantly that citizen suits would provide a backstop to lax or ideologically antagonistic administrations.*[239]

Critics of citizen suits worried that environmental citizen suit provisions would encourage a flood of environmental litigation.[240] They also argued that environmental citizen suits would disrupt government regulatory activity and delay or frustrate economic development. Finally, it was argued that environmental citizen suits were undemocratic and unaccountable because they would allow environmental organizations to "highjack" environmental law enforcement and disrupt the discretion/industry cooperation that is often part of successful environmental governance.[241] Critics were particularly concerned about the potential impact of environmental citizen suits on private entities.[242]

Empirical Record and Practical Experience

In 2021, Adelman and Reilly-Diakun released "the first comprehensive empirical study of environmental citizen suits in the United States."[243] Their study analyzed cases filed under several U.S. federal environmental statutes between 2001 and 2016, intentionally covering both the Bush and Obama administrations. This study provides valuable insights into the use, type, and impact of American federal environmental citizen suits.

As a general matter, Adelman and Reilly-Diakun concluded that both citizen suit advocates and critics were mistaken. Across the United States, environmental citizen suits have neither fulfilled their ambitious promise nor realized their critic's worst fears. Among their key findings:

Citizen Suit Provisions Did Not Open the Floodgates of Environmental Litigation; the Number of Citizen Suits is Relatively Low

- *"In absolute and relative terms, the number of citizen suits [filed across the U.S.] is remarkably modest."*[244]
- *"An average of about 2,500 administrative and judicial orders are issued to regulated entities in federal enforcement actions under the major pollution statutes annually, versus roughly 80 third-party citizen suits filed annually under the CAA, CWA, and RCRA. These numbers are dwarfed by the roughly 9,000 informal enforcement actions undertaken by EPA and state agencies annually."*[245]

The Great Majority of Citizen Suits Are Filed Against the Federal Government, Not Private Entities or To Challenge Specific Licensing Decisions or Permits

- "*We observed dramatic differences in the relative volumes of wholescale litigation (typically challenges to agency rulemaking) and retail litigation (generally specific decisions on the implementation of a program.)*"[246]
- "*[A]lmost 85 percent of citizen suits are filed against the federal government, rather than private entities, and a large share of these cases involve wholescale challenges to regulations, rather than retail litigation over discrete agency decisions.*"[247]
- "*These statistics highlight the degree to which private third-party citizen suits are overshadowed by actions involving the federal government and thus contradict claims that citizen suits routinely override government enforcement and priority setting.*"[248]

The Complexity and Cost of Environmental Litigation Influence the Type of Suits Filed

- "*Given the importance of resource constraints and the need to triage cases, the high cost and complexity of filing private third-party enforcement actions likely reinforces the bias observed towards wholesale litigation. In other words, the relative difficulty of retail litigation may elevate the importance of litigating over strict standards, as they represent both high-profile legal actions and may make it easier for government and public enforcement.*"[249]
- "*The other notable pattern that emerges from the data is the prominence of procedural challenges… The relative ease of filing procedural cases… suggests that access to scientific and technical expertise may be a limiting factor for many environmental organizations and individual citizens, which in turn may reflect financial resources…*"[250]

Environmental Plaintiffs Must Use Citizen Suits Strategically and Triage Cases Carefully

- "*We find little to no evidence of the pathologies that critics commonly raise and little evidence that citizen suits systematically offset the shortcomings of government implementation or enforcement of environmental laws. Citizen suits can establish important precedent, provide effective checks on agency rulemaking, and draw attention to grave deficiencies in federal programs. They do not, however, backstop day-to-day implementation or enforcement of federal laws; the numbers of permits and government actions are simply overwhelming relative to the number of challenges that can feasibly be brought by nongovernmental organizations and individuals. As a consequence, environmental plaintiffs and organizations must wield citizen suits strategically and triage cases carefully.*"[251]

Significantly, these findings were largely consistent with an earlier study (2017) analyzing citizen suits under the *Clean Water Act* by Mark Ryan, an American environmental attorney:

> *In conclusion, the data show citizens play a major role in CWA enforcement and in forcing the government to do what it is obligated to do statutorily. Although not all citizen suits are successful, they enjoy a relatively high success rate, suggesting that they are doing what Congress intended them to accomplish, especially considering the weak state agency enforcement numbers. The data tell us that the suits are not spread evenly across the country, but are concentrated largely in a handful of states that are a mix of red and blue, and that citizen suits are dominated by local or regional groups rather than the large national environmental groups that one often identifies with citizen suits. We also have learned that a large percentage of the reported CWA citizen suits are against EPA or the Corps and not against private parties or municipalities, which dispels the common notion that these cases primarily target alleged permit violators for penalties.*[252]

Similarly, a study of the impact of *MEPA* found the Act had not overburdened the courts as opponents had feared.[253] However, an evaluation of *MEPA*'s effectiveness by various studies has produced mixed results. An assessment eight years after *MEPA* was adopted concluded that there were "intrinsic difficulties of gauging *MEPA*'s substantive impacts" and that *MEPA* cases had produced "a rather unimpressive record."[254] Yet another study, undertaken twenty-five years after the passage of *MEPA*, concluded that it had achieved its legislative purpose of developing a "common law of environmental quality."[255]

Finally, a 2018 study by the California Waterkeepers Alliance summarized the practical impact and benefits of citizen suits for clean water enforcement in California.[256] According to the report, "the benefits associated with these cases is striking…"[257] and that "without citizen lawsuits, the vast majority of *Clean Water Act* violations would go unaddressed [in California]."[258] The study highlighted several examples of successful citizen suits, including a "single case aimed at reducing sewage pollution resulted in a 90% reduction of sewage spills into Santa Monica Bay."[259] The report also stated that

> *Often citizen lawsuits can help transform a polluter to an industry-leading water steward, accelerating the use of more modern, efficient and sustainable practices by years or decades. Citizen suits have spurred innovations and changes to industry best practices and have resulted in improvements that make our environment and communities safer.*[260]

The studies cited above provide a nuanced picture of how environmental citizen suits have been used in the United States. As Adelman and Reilly-Diakun suggest, the studies dispel many of the optimistic assumptions and worst fears about environmental citizen suits. In sum, the studies suggest that the environmental citizen suits supplement, but do not replace, environmental regulators; that citizen suits are comparatively rare; and that they are primarily directed against government standards or procedural obligations, rather than permit decisions or private entities.

Environmental Citizen Suits in Canada

The Canadian RTHE statutes reviewed in the preceding section include several citizen suit provisions. For example, s. 84 of the *EBR* creates a right for "any person resident in Ontario" to bring an action against any person (including a corporation) who

> *…has contravened or will imminently contravene an Act, regulation or instrument…and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario…*

The right of action established in s. 84 is subject to several qualifications, including the precondition that a plaintiff must first apply for an investigation with the appropriate government ministry (s.84(2)).

Section 22 of *CEPA* also includes "environmental protection action" provisions, stating that:

> *22 (1) An individual who has applied for an investigation may bring an environmental protection action if*
>
> *(a) the Minister failed to conduct an investigation and report within a reasonable time; or*
>
> *(b) the Minister's response to the investigation was unreasonable.*
>
> *(2) The action may be brought in any court of competent jurisdiction against a person who committed an offence under this Act that*
>
> *(a) was alleged in the application for the investigation; and*
>
> *(b) caused significant harm to the environment.*

Unlike the United States, there is no significant record or history of environmental citizen suits in Canada. Neither of the two significant Canadian provisions identified above have been used to promote environmental accountability in this country: Section 84 was included in the original *EBR* and dates from 1994. Since that time, it has been used rarely, and environmental lawyers who represent residents and environmental groups have concluded that the section is "essentially useless."[261] Similarly, s. 22 of *CEPA* has not been utilized since it was enacted in 1999, almost 25 years ago.

Analysis and Issues Considered

The LCO has long experience analyzing statutes, regulations, and policies for their impact on access to justice and legal accountability.[262] Many LCO reports consider how legal complexity, procedural barriers, costs rules, and information asymmetries promote or frustrate public interest litigants from challenging important government and private sector decision-making.

The LCO believes environmental protection actions are needed to ensure the RTHE is a meaningful tool to improve environmental accountability, improve access to justice, and address climate change and the adverse impacts of environmental degradation.

As currently enacted, neither *EBR* s. 84 nor *CEPA* s. 22 ensure Ontarians have access to environmental citizen suits. For reasons which will be explained below, both statutes include substantive and procedural shortcomings that have "impeded citizen suits in predictable ways."[263]

Like the RTHE, it is easy to recommend environmental protection actions in principle. It is more difficult to strike an appropriate balance on the many substantive and procedural questions that must be considered.

The LCO's research suggests important lessons about how to craft environmental citizen suit provisions to ensure they are both effective and targeted to appropriate cases. This section of our report discusses several key issues relevant to this discussion, including:

- Standing
- Defining the cause of action
- Onuses
- Defences
- Remedies
- Costs

Standing

The traditional rule of standing has often been a barrier for public interest litigants in environmental cases. Over the years, the courts have significantly broadened the rules of public interest standing to allow individuals or organizations who are not directly affected to bring cases before the courts. In the 2022 Supreme Court of Canada decision, *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, the Court reiterated that public interest standing provides an important means by which "courts can promote access to justice and simultaneously ensure that judicial resources are put to good use."[264] Public interest standing, the Court observed, can play an important role "where issues may have a broad effect on society as a whole as opposed to a narrow impact on a single individual."[265]

In some respects, citizen suit provisions under provincial and federal statutes have broadened the rules for standing for bringing an action to enforce environmental rights. For example, legislation in Quebec, Yukon, the Northwest Territories and Nunavut that provide for the RTHE allow persons not directly impacted by the infringement of the right to commence an action.[266] Similarly, section 22 of *CEPA* allows a person who has not been directly impacted to bring an action to address significant environmental harm.[267] The LCO believes a similar approach should be adopted in the new *EBR* environmental protection action provisions we recommend.

The LCO departs from the *CEPA* standing requirements in one key respect: Prior to bringing an action under *CEPA*, a person must request the Federal Environment Minister to investigate the matter. An action can only be undertaken if the Minister has failed to undertake an investigation and report in a reasonable time, or the Minister's response to the investigation was unreasonable. This requirement is similar to s. 84(2) of the *EBR* which requires a plaintiff to first apply for an investigation.

The LCO does not believe the new *EBR* environmental protection action provision should include an investigation precondition requirement. These provisions have been criticized by the Environmental Commissioner and others for imposing an unnecessary procedural barrier to commencing an action to protect public resources.[268]

One of the benefits/objectives of an investigation precondition requirement is that it weeds out frivolous, vexatious, or unmeritorious lawsuits. The LCO agrees this is an important objective. We believe, however, that this concern can be addressed through other procedures, which we recommend below. As a result, the LCO would not include this precondition in the new *EBR*.

Cause of Action

The appropriate threshold or test for initiating an environmental protection action is an important legal, policy, and practical question.

The term "significant harm to the environment" has been used as the basis for a cause of action in Canadian environmental statutes, including *CEPA* and the *EBR*. Section 22 of *CEPA*, for example, authorizes any person to bring a court action for an offence that has caused "significant harm to the environment."[269] Similarly, s. 84(1) of the *EBR* authorizes a plaintiff to bring an action for an offence that "has caused or will imminently cause significant harm to a public resource."[270]

Many critics believe the "significant harm to the environment" test is too onerous. They note, for example, that s. 22 of *CEPA* has not been used since it was adopted in 1999, almost 25 years ago.[271] A 2008 report of Standing Senate Committee on Energy, the Environment and Natural Resources came to a similar conclusion, recommending that *CEPA* be amended to remove the "significant harm" requirement.[272]

The LCO believes that "significant harm to the environment" should remain the legal threshold for commencing a citizen suit under the *EBR* for two reasons:

First, the phrase "significant harm to the environment" is already used in the *EBR*. As a result, there is a standing body of cases and jurisprudence interpreting the phrase. For example, the Environmental Appeal Board has stated that, where possible, the term "significant" should be determined by reference to scientific principles and evidence or legal criteria.[273] Notably, the Board stated that establishing "significant harm" does not necessarily require evidence that the level or concentration of a contaminant has exceeded a numerical limit in a regulation. Harm could be established by showing that emissions are capable of causing adverse effects despite being at levels that comply with a numerical standard.[274]

Second, the LCO believes this threshold is an appropriate means to ensure *EBR* environmental protection suits are targeted to serious environmental harms. Removing the "significant harm" threshold would potentially encourage inappropriate RTHE lawsuits.

Reverse Onus

Reverse onus provision that shift the burden of proof are a feature of citizen suit provisions in the United States. [275] *MEPA*, for example, provides that once a plaintiff has established a *prima facie* case that the defendant's action harmed, or is likely to harm the environment, the onus shifts to the defendant to rebut the evidence, or establish an affirmative defence.[276]

This approach is also reflected in Bill C-219, *An Act to enact the Canadian Environmental Bill of Rights and to make related amendments to other Acts*.[277] The Bill is the most recent iteration of several federal private members bills proposing to allow members of the public access to the courts to enforce the right to a healthy environment. Under Bill C-219, if the plaintiff demonstrates a *prima facie* case of significant harm to the environment, or likely significant harm to the environment, the onus is on the defendant to prove that their action or inaction, did not, or is not likely to result, in significant harm to the environment.[278]

Similarly, Yukon's *Environment Act* provides that once the plaintiff has proved that the release of a contaminant has impaired the natural environment, and that the defendant released a contaminant of the type that caused the impairment, the onus is on the defendant to prove that they did not cause the impairment.[279]

The rationale for imposing a reverse onus is based on access to justice and environmental protection principles. Plaintiffs in environmental actions are often at a significant informational disadvantage because the defendants usually have the information, knowledge and control over the contaminants they release into the environment.[280] In these circumstances, it is reasonable that a defendant should be required to demonstrate that the contaminant did not cause, or is not likely to cause, significant harm to the environment, or establish a recognized defence (e.g., due diligence).

NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT (EXCERPT)
Act 451 of 1994

324.1703 Rebuttal evidence; affirmative defense; burden of proof; referee; costs.

Sec. 1703.

(1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant›s conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this part.[281]

The LCO believes a similar approach should be adopted in the *EBR*. The LCO believes this approach strikes an appropriate balance between the need to ensure plaintiff's lawsuits are justified, and the need to avoid an unduly high legal threshold that deters access to justice. Consequently, the LCO recommends that once a plaintiff has established that a contravention of an Act, regulation, or instrument caused or is likely to cause significant harm to the environment, the onus is on the defendant to prove that their action, or inaction did not, or is not likely to, result in significant harm to the environment.

Defences

Thus far, the LCO has discussed questions of standing, thresholds, and onuses regarding environmental protection action. In each case, the LCO has emphasized the importance of removing procedural requirements that create practical or legal barriers to ensure greater legal accountability for environmental decision-making.

In this section, we discuss appropriate defences to environmental protection actions.

In our view, environmental protection actions should not become a vehicle for inappropriately challenging or frustrating government decisions or private sector activities. Equally important, potential plaintiffs, defendants and the broader public need to have a reasonable degree of certainty about what is permitted by the *EBR* and what is not.

The LCO's goal is to find the right balance between promoting environmental accountability and facilitating legitimate environmental decision-making. Our starting point for this analysis is s. 30 of *CEPA* which provides four defences against a section 22 action, including:

- The defence of due diligence.
- That the alleged conduct is authorized by or under an Act of Parliament, except with respect to Her Majesty in right of Canada or a federal source.
- That the alleged conduct is authorized by or under a law of a government that is the subject of an order made under subsection 10(3).
- The defence of officially induced mistake of law.[282]

Due Diligence: The defence of due diligence allows a defendant to avoid liability by demonstrating that all reasonable care was taken to avoid the event that caused the harm. The defence is recognized as having two branches. The defendant can avoid liability by establishing that (i) all reasonable care was taken to avoid the occurrence of the prohibited conduct; or (ii) that the defendant reasonably believed in a mistaken set of facts, that if true, would render the act or omission innocent.[283]

Statutory Authorization: *CEPA* allows for the defence of statutory authorization against an environmental protection action. This defence has evolved under the common law to protect public authorities who were carrying out activities pursuant to a statute. However, the defence only applies if the law imposes a duty on the public authority to carry out the activity and the harm was the inevitable result of carrying out the activity. Where a statute provides discretion in how the activity is to be carried out, the defence does not apply.[284]

Equivalency: Under section 10 of *CEPA*, where Canada and another government (provincial, aboriginal or territorial) agree in writing that there are in force laws in the latter's jurisdiction that: (1) are equivalent to a regulation promulgated under *CEPA*; and (2) possess similar authorities for the investigation of alleged environmental offences as those under *CEPA*, Canada may make an order declaring that the relevant provisions of the *CEPA* regulation do not apply in the other government's jurisdiction. The purpose of such equivalency agreements is to avoid duplication in environmental compliance obligations.

Induced By Mistake of Law: *CEPA* allows the defence of officially induced mistake of law. This defence can be raised where a defendant commits an offence due to an error of law, but the error was officially induced. For this defence to apply, a defendant must be able to show that advice was sought advice from a government official, it was reasonable for the defendant to rely on the advice, and the offence happened as result.

Significantly, section 30(2) of *CEPA* states that it does not preclude any other defences that may be otherwise available. This is a common feature in citizen suit provisions in Canada, including Bill C-219 and section 84 actions under the *EBR*.

The defences afforded for a citizen suit under *CEPA* are like those available to a s. 84 action under the *EBR*. Section 85(4) of the *EBR* provides for three types of defences:

1. The defence of due diligence.
2. That the action or omission which caused the contravention was statutorily authorized.
3. That the defendant complied with an interpretation of an instrument that the court considers reasonable.

Practically speaking, the most significant and controversial question in this area is whether the compliance with an instrument (such as an environmental compliance approval or government licence) should be a defence to an environmental protection action.

As noted above, both *CEPA* and the *EBR* recognize the defence of statutory authorization. Similarly, the environmental statutes in the Yukon, Northwest Territories and Nunavut have expanded the scope of the statutory authorization defence and provide that compliance with a permit, license, or other authorization, or a standard constitutes a defence to a RTHE action.[285]

On one hand, it seems reasonable to expect that activities and facilities that operate pursuant to an instrument issued by the provincial government should be entitled to rely on it as a defence to a RTHE environmental protection action. On the other hand, enshrining such a defence in the *EBR* could have significant implications for the RTHE and environmental accountability in Ontario.

The debate over the extent to which an instrument should provide a defence is not a new issue in Canadian environmental law. The issue was considered by Supreme Court of Canada in a 1966 case, *British Columbia Pea Growers Ltd. v. Portage La Prairie* (*City*)[286] in which the Supreme Court held that a certificate issued for the use of a sewage lagoon did not provide the City immunity in a civil nuisance action. This decision appears to remain the leading precedent, although there have been subsequent lower court decisions holding that compliance with an approval or license provides a defence in a civil action.[287]

Interestingly, in Ontario, in the context of a provincial prosecution, compliance with an instrument or an applicable standard does not afford a defence if the discharge of a contaminant causes, or is likely to cause, an adverse effect.[288] However, compliance with an instrument or a standard may indicate evidence of due diligence.[289]

Similarly, in Canada, in the context of a civil action, compliance with a statutory standard does not necessarily alter a defendant's common law duty of care but may be relied upon to prove an absence of negligence.[290]

The LCO does not believe the *EBR* should provide that compliance with an instrument or a standard constitutes a defence to an environmental protection suit in Ontario. We are concerned that a blanket statutory authorization defence would significantly undermine the RTHE and leave a wide gap in Ontario's environmental accountability regime.

Consequently, the LCO does not recommend that compliance with an instrument or a standard should provide a statutory defence under the *EBR*. This conclusion does not mean that compliance with an instrument or standard should have no or little weight in an *EBR* environmental protection action. On the contrary, the LCO believes that the courts will be in the best position to assess the extent to which these factors should provide a defence to a RTHE citizen suit in individual cases.

Over time, the LCO anticipates courts will develop appropriate principles and precedents to guide the regulated community about the duty of care required in these cases. These decisions and principles will become part of the environmental common law in Ontario.

Remedies

The question of what remedies should be available for successful environmental protection actions has important practical and legal consequences.

The remedies under *CEPA* include any or all the following:

(a) A declaratory order.

(b) An order, including an interlocutory order, requiring the defendant to refrain from doing anything that, in the opinion of the court, may constitute an offence under this Act.

(c) An order, including an interlocutory order, requiring the defendant to do anything that, in the opinion of the court, may prevent the continuation of an offence under this Act.

(d) An order to the parties to negotiate a plan to correct or mitigate the harm to the environment or to human, animal or plant life or health, and to report to the court on the negotiations within a time set by the court.

(e) Any other appropriate relief, including the costs of the action, but not including damages.[291]

These remedies are similar to remedies available in a section 84 action under the *EBR.* Section 93(1)(a) of the *EBR* states that a Court can grant injunctive relief, order the negotiation of a restoration plan, grant declaratory relief, and make any other order the court considers appropriate. The LCO agrees and recommends that the *EBR*'s remedy provisions remain unchanged.

Notably, a court cannot award damages to a plaintiff under either *CEPA* or the *EBR*. This limitation is consistent with the U.S. approach which does not allow citizens to gain financially by bringing environmental protection actions.[292] The LCO notes that Bill C-219 also precludes a court from awarding damages.[293]

The LCO believes environmental protection actions should be brought to advance environmental protection for the benefit of the broader community, and not to promote private financial interests. This approach ensures environmental protection actions are brought to advance environmental protection for the benefit of the broader community, as opposed to promoting private financial interests. As a result, the LCO recommends that remedies for an environmental protection action under the *EBR* should be limited to currently available remedies and not include damages.

Costs

The English/Canadian Approach

In Canada, courts have traditionally applied a two-way costs award whereby a litigant's entitlement to costs is contingent on the successful outcome of the case.[294]

For the losing party the potential liability for an adverse costs award is perhaps the most significant barrier to public interest litigation.[295]

Courts in many jurisdictions (including the United Kingdom, Australia, New Zealand, and South Africa) have recognized that a rigid application of the two-way rule can cause considerable unfairness in public interest litigation.[296] This is because public interest litigants typically do not stand to gain financially but face serious economic consequences if their case is unsuccessful. As a result, courts in these jurisdictions have, in appropriate cases, departed from the two-way costs regime.[297]

In Canada, there has also been growing recognition that costs reform may be needed to support public interest litigation. The 2003 Supreme Court of Canada's decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band* reflects this shift. While the decision focuses on the appropriate circumstances for awarding advance costs, the Court also commented more broadly on the special factors that come into play in public interest litigation. Lebel, J. declared that in public interest litigation, "access to justice" has increased importance when ordinary citizens "seek to resolve matters of consequence to the community as a whole."[298] These factors distinguish public interest ligation from other civil disputes and arguably justify reform to normal costs rules.[299]

Costs considerations are particularly relevant in the context of public interest environmental litigation. These types of cases frequently involve questions regarding the allocation of public resources with implications for the broader public interest.[300] Chris Tollefson, Professor of Law at the University of Victoria, has written extensively about costs in the context of public interest environmental litigation. Tollefson notes that:

> *These cases usually involve challenges to the way government has allocated rights in public resources to private interests for the purposes of profit, whether that "resource" is a right to pollute the air, to harvest Crown timber or to dam a river. There is a strong public interest in ensuring that these arrangements are subjected to regular and careful public supervision, including judicial scrutiny.*[301]

To ensure access to justice, Tollefson asserts the two-way costs rule should be replaced by a one-way costs rule in public interest litigation.[302] This approach would allow public interest litigants who are successful to recover costs, but they would not be liable for adverse costs if they lost the case. Tollefson maintains this is necessary given the unique characteristics of public interest litigation and access to justice considerations. This approach has also been recommended by the Ontario Law Reform Commission, the LCO's predecessor organization.[303]

The American Approach

In contrast to Canada, in the United States each party in a civil litigation matter is responsible for paying its own litigation expenses, including attorneys' fees, irrespective of the outcome.[304] This approach is known as the no-way costs rule.

However, virtually all U.S environmental statutes which provide for citizen suits include attorneys' fee provisions.[305] This allows a successful plaintiff to be compensated for the expenses incurred for enforcing environmental legislation.[306] These fee-shifting provisions are considered necessary to mitigate the otherwise prohibitive financial costs of environmental citizen suit litigation.[307]

Costs for *EBR* Environmental Protection Actions

Canadian federal and provincial statutes that authorize environmental citizen suits do not specifically address costs for public interest litigants. Instead, public interest litigants remain potentially liable for adverse costs under both *CEPA* and the *EBR*. That said, both statutes permit the court to consider whether the action is a test case or raises a novel point of law when awarding costs.[308] If these criteria are not met, normal costs rules apply.

The LCO believes that reform to the current costs regime is essential if citizen suits to protect the RTHE under the *EBR* are to be realized. In our view, costs reform is an important component of implementing the RTHE and improving environmental accountability in Ontario. Accordingly, the LCO recommends the *EBR* be amended to establish a one-way costs rule for litigants bringing an environmental protection action to enforce the right to a healthy environment.

The liberalization of costs rules raises legitimate concerns that the lack of costs deterrent could increase meritless lawsuits and/or unreasonable or abusive conduct by plaintiffs. To safeguard against this prospect, the U.S. statutes discussed above allow courts to award attorney fees to a prevailing defendant if the plaintiff's action is found to be frivolous, unreasonable, or without foundation. The LCO believes these provisions

strike a reasonable compromise. Accordingly, the LCO recommends that a similar provision be included in the *EBR* to give courts the discretion to award costs against the plaintiff if the action is frivolous, vexatious or where the court believes the proceeding was misused.

Impact of Plaintiff Having a "Personal Interest" on Costs

Some stakeholders have asked how costs ought to be addressed if a litigant commences a claim under the *EBR*'s environmental protection action provisions and concurrently claims damages for adverse environmental impacts. In other words, which costs rules should apply? The LCO's recommended one-way costs rule or the normal two-way costs rule?

The LCO does not believe our proposed one-way costs rule should automatically apply in these circumstances. Nor should it be assumed that having a personal financial interest in an environmental protection action means that two-ways costs are always appropriate. In our view, the court supervising the litigation is in the best position to judge the facts and equities in a matter. In these situations, a putative public interest litigant could bring a motion to seek a determination whether the litigation is in the public interest and justifies a departure from the two-way costs regime.

The LCO notes that courts have found that a party's personal interest in the outcome of litigation has not necessarily precluded a finding that the case is in the public interest. Tollefson and others have noted that in *Okanagan Indian Band*, the Supreme Court did not require the litigants have no "personal, proprietary or pecuniary interest" in the litigation.[309] Similarly, in the 2006 decision *Incredible Electronics Inc. v. Canada (Attorney General)*, the Ontario Superior Court of Justice noted that a litigant's personal interests, including financial interest, does not preclude a finding that the litigant qualifies as a public interest litigant.[310] These decisions acknowledge the practical reality that, in some cases, the public interest and personal interests may coincide.

The LCO Recommends:

3. The *EBR* should be amended to allow a person to commence an environmental protection action in a court of competent jurisdiction against a person who contravenes any provision in a provincial Act, regulation or instrument that causes or is likely to cause significant harm to the environment.
4. The *EBR* should provide that every person residing in Ontario has the right to commence an environmental protection action regardless of whether they are directly affected by the matter.
5. Once the plaintiff establishes a *prima facie* case of significant harm to the environment, or the likelihood of significant harm to the environment, the onus is on the defendant to prove that their action or inaction, did not, or is not likely to result in significant harm to the environment.
6. Compliance with an instrument or a standard should not be recognized as a statutory defence to a RTHE action.
7. The remedies for an environmental protection action should include injunctive relief, declaratory relief, the issuance of an order to negotiate a restoration plan, and any other order the court considers appropriate, but not monetary damages.
8. There should be a one-way costs rule for a plaintiff who brings an environmental protection action.
9. Costs in an environmental protection action should be awarded against the plaintiff only if the court is of the opinion that the action is frivolous, vexatious or otherwise misused.

Administrative Decisions

Citizen suit provisions will not be sufficient to address all government decisions that may be violating the RTHE. These include situations where the government's decision to authorize a particular activity causes, or is likely to cause, significant harm to the environment.

Most notably, additional legal tools are required to counter the increasing use of alternative compliance measures that reduce public scrutiny and environmental accountability, such as the EASR regime and site-specific standards and technical standards, discussed above. Use of these measures has reduced the public's ability to challenge administrative decisions that may violate Ontarian's right to a healthy environment. This is an important gap in Ontario's environmental accountability framework.

To address this issue, the LCO recommends that the *EBR* be amended to provide that a person has a right to seek judicial review of government decisions that violate the RTHE and causes, or is likely to cause, significant harm to the environment.

The LCO expects that judicial reviews will be limited to decisions which are not subject to an appeal before the Ontario Land Tribunal (OLT). As a result, we expect judicial reviews to be infrequent. In most cases, an applicant is likely to appeal an administrative decision to the OLT on the basis that it violates the RTHE and any other applicable grounds.

There are concerns that establishing a substantive RTHE and providing specific mechanisms to enforce the right could result in a flood of litigation, imposing an undue burden on the justice system. This is unlikely given that judicial review applications are time-consuming, expensive, and applicants risk adverse costs awards if they are unsuccessful.

The LCO Recommends:

10. The *EBR* should be amended to allow a person to bring a judicial review application of a government ministry decision that violates the right to a healthy environment and that causes or is likely to cause significant harm to the environment.

Looking Forward: Potential Impact of the RTHE and Environmental Protection Actions in Ontario

The LCO believes environmental protection actions are necessary to ensure the legislated RTHE is a meaningful tool to improve environmental accountability, strengthen access to justice, and address climate change and environmental degradation in Ontario.

The LCO's recommended reforms are designed to expand environmental citizen suits in Ontario, while ensuring that they are limited in important respects. On the one hand, our recommended reforms reduce many current procedural hurdles for bringing an environmental protection suit in Ontario, including changes to the rules of standing, important limitations on statutory defences, and reform to costs rules. On the other hand, the LCO has taken care to craft recommendations that target environmental protection suits to appropriate and serious cases. We have done this by ensuring that the cause of action in these cases is limited to instances of "significant harm to the environment" and by giving courts the discretion to award costs against a plaintiff if the action is frivolous, vexatious, or where the court believes the proceeding was misused.

At this point, it is fair to ask how the LCO believes the RTHE and environmental protection suits will be used in Ontario and to what effect. Based on the American experience and our own analysis, the LCO makes the following predictions:

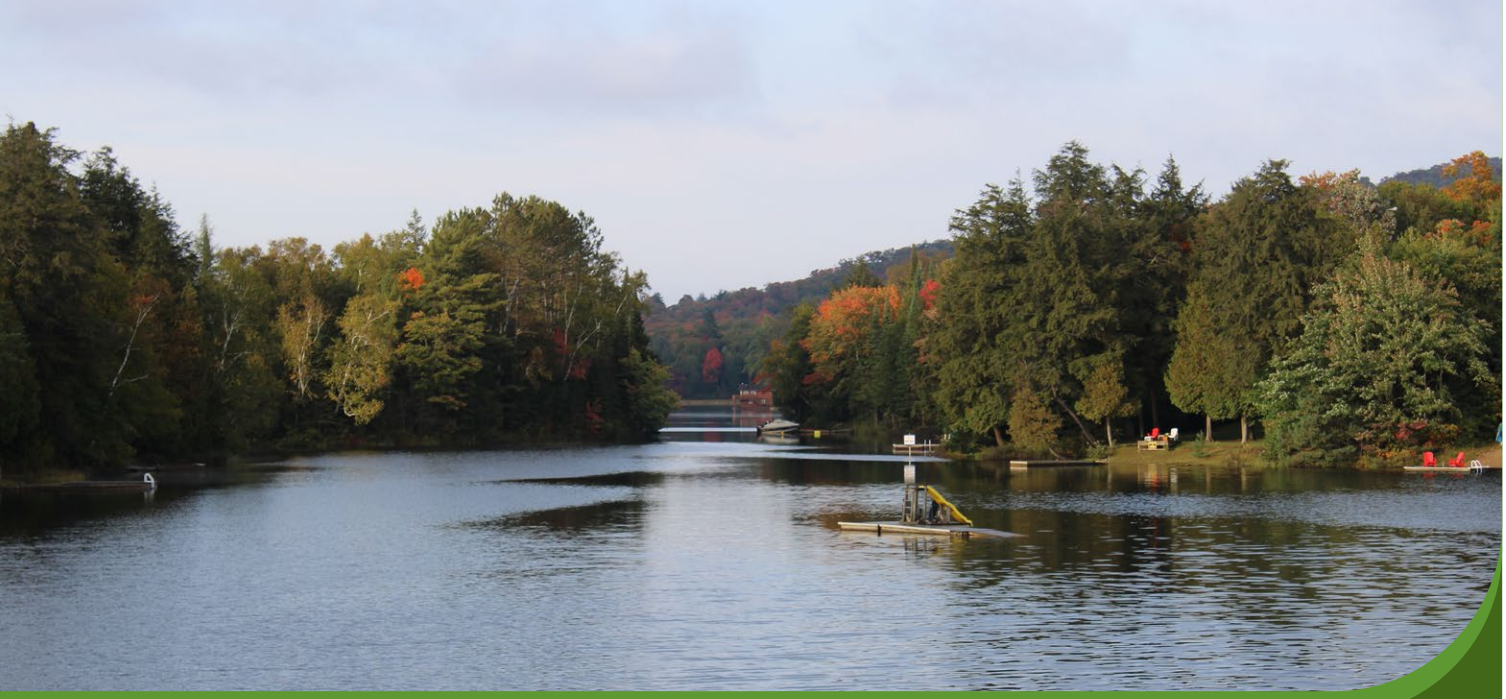
First, the LCO expects that *EBR* environmental protection actions will be an important, but infrequent, litigation tool used by environmental advocates, organizations, or individuals. Environmental protection suits will increase, while remaining comparatively expensive, factually complex, and legally challenging. Environmental advocates and others hoping to use these provisions will have to be strategic and triage cases carefully.

Second, most lawsuits will likely be brought against the provincial government, municipal governments, or related agencies, challenging their environmental decisions or to enforce procedural obligations. The prohibitive cost and complexity of environmental litigation will mitigate against what Adelman and Reilly-Diakun call "retail" litigation and suits against private entities.[311]

Third, environmental protection suits will supplement, but in no way replace government environment regulation and enforcement.

Fourth, the legal principles and parameters of the RTHE and environmental protection suits will develop over time through regulations, standard-setting, consultations, licensing, and litigation. Rather than being a complication or drawback, this is a welcome development, as it will allow the law to develop based on experience, evidence, and with the participation of affected parties and the broader public. As Professor David Boyd notes, this approach "provides flexibility in filling gaps in legislation, dealing with emerging issues, and responding to new knowledge in the fields of science, health and ecology."[312]

Finally, the LCO predicts that our recommended environmental protection action provisions will be much more effective than the citizen suit provisions currently enacted in the *EBR* and *CEPA.* Both statutes include substantive and procedural provisions that impose significant legal hurdles on environmental citizen suits and have proven wholly ineffective. Our recommended reforms eliminate many of these hurdles and will improve environmental decision-making in Ontario, close many existing "accountability gaps", and promote the RTHE in Ontario.



9. Environmental Justice

Environmental justice has been defined as both a social movement and a theoretical framework for assessing whether environmental risks and burdens are distributed fairly in society.[313] Environmental justice analysis seeks to evaluate the impact of environmental risks and harms from a geographic, racial, gender, disability and/or income perspective to determine whether these risks and harms are shared equally. Environmental justice analysis also asks whether there is unequal access and influence over environmental decision-making.[314]

Environmental justice principles and practices are well-established in the United States. More recently, the principles of environmental justice have been reflected in federal legislation and environmental analysis in Canada.

The LCO believes it is important to analyze environmental justice concepts and practices to assess whether they should be part of a comprehensive law reform strategy promoting environmental accountability in Ontario.

Background

The *EBR* was enacted long before environmental justice concepts moved to the forefront in Canada. Consequently, the *EBR* does not directly incorporate environmental justice principles.

Studies show that low-income and marginalized communities in Ontario, including Indigenous communities, are disproportionately impacted by pollution. The PCCIA report, for example, concluded that:

> *Climate change has already had significant impacts on the individuals, communities, and associated services in Ontario. These risks are expected to continue. The assessment reveals that climate change risks are highest among Ontario's most vulnerable populations and exacerbate existing disparities and inequities.*[315]
>
> *There are significant segments of the Ontario population that are and will continue to be disproportionately impacted by climate change…*

The effects of climate change will not be felt uniformly across sub-populations, with certain groups anticipated to be disproportionately impacted. Examples of these groups include:
- Seniors
- Infants and children
- Socially disadvantaged people, including low-income populations
- People with disabilities, including pre-existing illnesses or otherwise compromised health
- People living in Northern communities
- Emergency response workers

The report emphasized the impact of climate change on Ontario's Indigenous communities:

There is significant research to indicate that Indigenous Communities are disproportionately impacted by climate change, due to impacts that affect the natural environment, existing socio-economic disparities, remoteness of many community reserves, and lack of adequate infrastructure (water, wastewater, roads, etc.).[316]

A United Nations Special Rapporteur's report in 2020 reached similar conclusions, finding that

- Poor communities in Toronto and Hamilton faced a disproportionate exposure to industrial pollution.[317]
- Indigenous Peoples face greater exposure to hazardous substances.[318] The Special Rapporteur noted that the Grassy Narrows First Nation and the Wabaseemoong (Whitedog) Independent Nations were still suffering serious health impacts from mercury poisoning which occurred over 50 years ago.[319] Over half of the community members either had or were suspected to have Minamata disease, a neurological disease linked to mercury exposure.[320]
- The Aamjiwnaang First Nation in Sarina was described in the Special Rapporteur's report as facing conditions that were "profoundly unsettling."[321] The community is almost surrounded by industrial facilities and residents suffer from "physiological and mental stress" because of "the risk of impending explosions or other disasters and because of chronic exposure to unquestionably poisonous substances."[322]

These reports confirmed the results of several earlier studies:

- A 2005 study found that the number of boys born relative to the number of girls had been sharply declining in the Aamjiwnaang First Nation community and recommended additional studies to determine if the skewed sex ratio was caused by exposure to chemicals.[323] There have also been other studies in the area which have "found changes in the sex ratios and reproductive abilities of fish, bird and turtle populations, which are also thought to be due to exposures to endocrine-disrupting chemicals."[324]
- A 2013 study of Aamjiwnaang mothers and children found that their bodies contained pollutants that were associated with the industries operating nearby, including elevated levels of cadmium, mercury, perfluorinated compounds and polychlorinated biphenyl also known as PCB.[325]

In the 2017 Annual Report titled *Good Choices: Bad Choices*, the Environmental Commissioner analyzed the issue of environmental justice and made several recommendations to the Government of Ontario. In the report, the Environmental Commissioner made the following observations:

- There is strong evidence that pollution is causing people in Aamjiwnaang adverse health effects which neither the federal nor provincial government have properly investigated.[326]
- Indigenous people and communities are disproportionately impacted by pollution due to "a long and shameful history of mistreatment by all levels of government."[327]
- Indigenous people have "often been subjected to environmental decisions made without consideration to their interests, let alone participation."[328]

Accordingly, the Environmental Commissioner recommended that the Government of Ontario incorporate environmental justice as part of its commitment to reconciliation with Indigenous people and communities.[329]

Cumulative Impacts

An important component of environmental justice analysis involves assessing the cumulative impacts of pollution.

The Environmental Commissioner's 2017 Report addressed the failure of Ontario's regulatory framework to assess cumulative effects before issuing air approvals. The Commissioner found that this flaw in Ontario's air quality regulation had resulted in the Aamjiwnaang community being exposed to significant health impacts. In the report, the Environmental Commissioner noted that "the root cause of the Aamjiwnaang's pollution problem is the existence of so much heavy industry in such close proximity to their residential community (sometimes literally across the street)."[330] Consequently, the Environmental Commissioner recommended, among other things, that the Environment Ministry ensure that the cumulative effects of air pollution be considered when issuing approvals to industry.[331]

The Environment Ministry's approval regime has been criticized on similar grounds by Professor Dayna Scott of Osgoode Hall Law School and the Faculty of Environmental and Urban Change at York University. Scott has analyzed the Environment Ministry's approach to issuing air approvals for industrial facilities and assessed its implications on environmental justice. Professor Scott states that *"*[t]he glaring failure of this approach is that it does not consider the environment being dumped into; it does not take into account the background contaminant levels in the ambient air."[332] As a result, Professor Scott notes that while the air regulatory framework may work for an individual facility it does not consider the overall impact of emissions discharged by other industrial facilities.[333]

A cumulative effects assessment would allow the impact of air pollution from multiple emitters to be assessed prior to determining whether an air approval should be issued to an industrial facility. Professor Scott notes that advocates of environmental justice have called upon regulators to focus on the cumulative effects of air contaminants and not just the emissions from an individual facility.[334]

The Environment Ministry has recently developed a cumulative effects assessment policy which came into effect on October 1, 2018.[335] The policy does not apply to existing facilities, but only covers new and expanding facilities.[336] The policy has been characterized by Professor Scott a "major disappointment," as it only applies to two contaminants, benzene and benzo[a] pyrene, in the Hamilton/Burlington region, and only benzene in the Sarina/Corunna region.[337] The Environment Ministry has indicated that the policy may be extended to other contaminants and to other areas of the province, but this has not yet occurred.[338]

Environmental Justice at the Federal Level

Bill S-5 amends subsection 2(1)(a) of *CEPA* to require the Government of Canada to exercise its powers in a manner that "protects the environment and human health, including the health of vulnerable populations." Vulnerable populations are defined for the first time in *CEPA* as "a group of individuals within the Canadian population who, due to a greater susceptibility or greater exposure, may be at an increased risk of experiencing adverse health effects from exposure to substances."[339] This is an important Canadian recognition of certain principles behind the concept of "environmental justice."

Environmental Justice in the U.S.

The extent to which environmental justice considerations must inform government decision-making in the United States may surprise Canadian observers. The LCO acknowledges the Canadian experience is not the same as that of the U.S. Nevertheless, there are valuable lessons we can learn from the U.S. efforts to advance environmental justice in government decision-making.

History

Environmental justice in the United States can be traced back to the American Civil Rights movement of the 1960s. Since then, it has evolved to become a well-established principle entrenched in American law and government decision-making.

In 1982, environmental justice gained national attention in the United States when residents and civil rights activists protested the proposal to dump soil contaminated with polychlorinated biphenyls (PCBs) in Warren County, North Carolina. The residents of the county, one of the poorest in the state, were predominately African American. The demonstrations in Warren County are regarded as the triggering event which galvanized the environmental justice movement in the United States.[340] Professor Robert Bullard, a leading expert on environmental justice in the United States, highlights the case in his book *Dumping in Dixie: Race, Class and Environmental Quality.*[341] Professor Bullard's book was the first to analyze the concept of environmental justice and is widely considered as a classic text in the field.

The following year, the General Accountability Office, (GAO), an independent non-partisan agency that works for the United States Congress, released a study, *Siting Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*.[342] The study confirmed that waste sites in the southeastern United States were disproportionally located within African American communities. Four years later, in 1987, the United Church of Christ for Racial Justice released a more comprehensive study, titled *Toxic Wastes and Race* which determined that there was a consistent national pattern establishing that race was the most significant factor in siting commercial hazardous waste facilities.[343] Over the years there has been a multitude of studies in the United States which confirm that exposure to pollution and other environmental risks are correlated to factors such as race and socio-economic status.[344]

In 1992, the United States Environmental Protection Agency (U.S EPA) established an Office of Environmental Justice, which is now known as the Office of Environmental Justice and External Civil Rights.[345]

On February 11, 1994, President Bill Clinton issued Executive Order 12898 directing all Federal agencies to make environmental justice part of their mission. Federal agencies were asked to identify and address "the disproportionately high and adverse human health or environmental effects" of programs, policies and activities on minority populations and low-income populations.[346]

The Obama Administration revitalized this effort through a Memorandum of Understanding (MOU) on Environmental Justice and Executive Order 12898 which was signed on August 4, 2011. Through this MOU, federal agencies agreed to develop environmental justice strategies to protect the health of people living in communities overburdened by pollution and to release annual implementation progress reports.[347]

Federal Level

The U.S. EPA seeks to integrate environmental justice into its rulemaking, permitting, enforcement, and other activities.[348] The term environmental justice is defined by the U.S. EPA as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies."[349] According to the Agency "fair treatment" means "no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies."[350] In 2023, the U.S. EPA for the first time developed implementation plans to assess what was needed to achieve "tangible progress" on environmental justice.[351] This included recommendations on undertaking environmental justice analysis and embedding equity and justice principles in the Agency's programs, policies and activities.[352]

Environmental justice is a major focus of the Biden Administration's environmental, climate, and energy policy. In 2021, the Biden Administration issued Executive Order 14008 titled "Tackling the Climate Crisis at Home and Abroad."[353] The Order aims to secure environmental justice and spur economic opportunity.[354] Under this mandate, the federal government established the "White House Environmental Justice Advisory Council" (WHEJAC) to address environmental justice through an inter-governmental strategy.[355] A major initiative arising from Executive Order 14008 is Justice40. Under this initiative, the U.S. government seeks to provide 40 percent of benefits from certain federal investments to "disadvantaged communities that are marginalized, underserved, and overburdened by pollution."[356]

The WHEJAC has also issued recommendations to improve best practices for community engagement and public outreach.[357] These include ensuring there is an adequate budget to undertake public consultation; providing advance notice of public meetings; making notice of events and requests for information available online and in print; disseminating all information through community leaders, social media, newspapers; and holding public meetings both virtually and in-person to accommodate individuals unable to travel as well as those without internet access.[358]

In February 2022, the Biden Administration announced the Environmental Justice Scorecard, which will track the progress on the government's environmental justice agenda and include an evaluation of whether environmental burdens are being reduced. The scorecard is intended to ensure accountability and transparency by assessing federal agencies progress in advancing environmental justice, including the Justice40 initiative.[359]

In November 2022, as part of its Justice40 initiative, the Biden Administration launched the Climate and Economic Justice Screening Tool, a geospatial mapping tool to help federal agencies identify disadvantaged communities. The screening tool, which is publicly available, identifies disadvantaged communities by assessing whether they are adversely impacted by specific factors such as climate risks; transportation barriers; lack of green space; lack of indoor plumbing; historic underinvestment; legacy pollution; and water pollution.[360] In addition, any lands that are within the boundaries of Federally Recognized Tribes and Alaska Native Villages are recognized under the screening tool as disadvantaged communities. The screening tool was subsequently updated to incorporate new datasets, an updated methodology, and improve the site experience.[361]

Finally, in April 2023, President Biden signed an executive order establishing a new White House Office of Environmental Justice that among other responsibilities, will coordinate the implementation of environmental justice policy across the federal government.[362]

State Level

In addition to the initiatives at the federal level, many states in the U.S. have enacted laws and implemented policies that address environmental justice.[363] These initiatives have emphasized "public participation, cumulative impacts, permitting reforms, monitoring, and compliance."[364]

Washington State, for example, enacted the *Healthy Environment for All Act (HEAL Act)* in July 2021.[365] The *HEAL Act* encourages environmental accountability by requiring state agencies to conduct environmental justice assessments before implementing state actions.[366] Section 14 of the *HEAL Act* provides:

> *...a covered agency must conduct an environmental justice assessment in accordance with this section to inform and support the agency's consideration of overburdened communities and vulnerable populations when making decisions and to assist the agency with the equitable distribution of environmental benefits, the reduction of environmental harms, and the identification and reduction of environmental and health disparities."* [367]

The *HEAL Act* exempts forest practice permits and timber sales from any environmental justice analysis.[368] This demonstrates a significant gap yet to be filled by Washington's environmental justice legislation, given the size of the forestry industry in Washington and the negative environmental impacts associated with forestry operations.[369] In contrast, New Jersey's current environmental justice legislation is more stringent, requiring a permit to be denied if an environmental justice analysis determines a new facility will have a disproportionate negative impact on overburdened communities.[370] New Jersey is the first U.S. state to implement mandatory action following a negative environmental justice assessment.[371]

Other states have implemented environmental justice initiatives that engage public consultation and environmental monitoring. Like the Justice40's Climate and Economic Justice Screening Tool, some states have implemented environmental justice initiatives improving public consultation and environmental monitoring, including state-specific screening tools to identify areas disproportionately impacted by environmental justice issues.[372] For example, some states have implemented, or are implementing, screening tools to identify communities overburdened by pollution.[373]

In March 2023, New York adopted one of the strongest environmental justice laws in the United States. Following the New Jersey model, the New York law stipulates that a new permit will not be issued for a project if it will "cause or contribute more than a de minimis amount of pollution to a disproportionate pollution burden on the disadvantaged community."[374] Furthermore, subject to certain exceptions, permit modification will not be approved if the issuance of the permit would significantly increase the existing disproportionate pollution burden.[375] The New York and New Jersey laws are notable in that they impose substantive limits at the permitting stage.

Environmental Justice and the EBR

In contrast to the U.S., environmental justice has not been incorporated into environmental decision-making in Ontario. However, the *EBR*'s principles of public participation, transparency, and government accountability are consistent with many environmental justice concepts. At the same time, consideration needs to be given to how the *EBR* may be amended to better respond to the circumstances of low-income and marginalized communities.

As a starting point, the LCO believes that environmental justice should be reflected in the *EBR*'s purpose.

In addition, a comprehensive provincial environmental justice strategy would necessarily have to be developed in partnerships with the communities affected by environmental harms, including Indigenous communities, racialized communities, and low-income communities.

Based on the American experience and the LCO's analysis, however, some key initiatives can be provisionally identified, including:

- Enhancing public participation and access to justice for low-income and marginalized communities.
- Requiring government ministries to engage with low-income and marginalized communities during the environmental decision-making process.
- Requiring government ministries to consider the environmental impacts of proposed Acts, regulations, policies, and instruments on low-income and marginalized communities.
- Requiring government ministries to provide regular reports on progress in addressing environmental justice in the province.

Each of these topics is discussed below.

Enhancing Public Participation and Engagement

The *EBR* provides for additional participatory rights in relation to instruments to address environmental justice. The *EBR*, for example, provides additional methods of providing notice including news releases, notice through local, regional, or provincial news media such as television, radio, newspapers and magazines, door-to-door flyers, signs, mailings to members of the public, actual notice to community leaders and political representatives, and actual notice to community organizations, including environmental organizations.[376]

While many of these additional notice measures reflect the U.S. approach to community engagement and environmental justice, they remain at the discretion of the minister.[377] Although in some instances additional notice is mandatory, the minister retains the discretion of selecting the means of providing notice.[378]

The *EBR* also provides for enhanced public comment rights, including opportunities for oral representations, public meetings, mediations, and any other processes that would facilitate more informed public participation in government decision-making regarding instruments.[379] Again, the decision to use these additional comment opportunities is subject to ministerial discretion. Government ministries currently largely rely on electronic postings on the Registry as opposed to proactively using the *EBR*'s enhanced notice and comment provisions.[380]

Considering Environmental Impacts

The LCO believes government ministries should be required to assess whether a proposed environmentally significant Act, regulation, policy, or instrument will cause disproportionately higher levels of exposure to environmental and health hazards to a community in comparison to the rest of the province. If so, government ministries should be required to make specific efforts to reach out to these communities and provide for enhanced public comment rights.

Environmental Data

To engage with communities that may face disproportionately higher levels of exposure to pollution, government decision-makers will first need to identify the location of these communities within the province. The LCO, therefore, recommends that the Environment Ministry gather and combine demographic, geospatial, and environmental data to identify communities within the province that may face disproportionate exposure to environmental and health hazards.

Progress Reports

Finally, the LCO recommends that government ministries regularly report on their progress in addressing environmental justice in the province to ensure accountability.

The LCO Recommends:

11. The *EBR* should be amended to:
    a) Include "environmental justice" in the EBR's purpose section and provide a broad definition of the term.

    b) Require government ministries to consider whether a proposed environmentally significant Act, regulation, policy, or instrument will cause a community to suffer disproportionate exposure to environmental and health hazards.

    c) Make specific efforts to reach out to the community and provide for enhanced public comment rights.

    d) Require government ministries to report regularly on their progress in addressing environmental justice in Ontario.

12. The LCO further recommends that the Environment Ministry should make efforts to gather and combine demographic, geospatial, and environmental data to identify communities within the province that may face disproportionate exposure to environmental and health hazards.

10. Updating the Purpose of the *EBR*

Each of the issues considered thus far in this report (RTHE, environmental protection actions, and environmental justice) represent an important law reform strategy to update the *EBR* to incorporate contemporary environmental accountability strategies. This section considers a fourth "update" strategy: adding new provisions to the purpose section of the *EBR*.

Section 2.1 of the *EBR*'s provides for a broad purpose section that encompasses and impacts virtually all aspects of the Act. The section is central to the Act because government ministries are required to develop their SEVs to reflect the *EBR*'s purposes. Government ministries are required to explain how they will apply the *EBR*'s purposes when making environmentally significant decisions and how considerations of the purposes will be integrated with social, economic, and scientific considerations. This structure is intended to ensure the *EBR* is operationalized in government decision-making.

Given the importance of section 2.1, it is reproduced in its entirety below.

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.

(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.*

(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.

The purposes of the *EBR* currently include important environmental principles such as the "pollution prevention principle," "biodiversity conservation," and "natural resources conservation." However, since the *EBR* was enacted, additional environmental principles have been recognized in Canada and internationally. The LCO believes four such principles should be incorporated into the *EBR* to ensure the Act reflects contemporary objectives in environmental accountability and Canadian law, including:

- **The Polluter Pays Principle**.
  The polluter pays principle holds that the person who causes pollution to the environment is responsible for bearing the remediation costs. The underlying objective of this principle is reflected in several environmental provisions, including clean-up orders against polluters or the requirement to consider remediation costs and profits in penalty provisions.[381]

  In the 2003 decision, *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, the Supreme Court of Canada observed that the "polluter pays principle has become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial environmental legislation." [382] The Court noted that the principle is also recognized at the international level.[383] One of the best examples being the 16th Principle of the *Rio Declaration on Environment and Development* (*Rio Declaration*).[384]

- **The Precautionary Principle.**
  The precautionary principle holds that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The definition of the precautionary principle originated from the *Rio Declaration* and is recognized in *CEPA*. The Government of Canada is required to exercise its powers in a manner that applies the precautionary principle in the administration of *CEPA*.[385] The Supreme Court of Canada has also upheld the precautionary principle on several occasions, acknowledging it as a principle embodied in international law and reflected in several provincial statutes.[386] For example, in 2001, in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson* (*Town*), the Court endorsed the precautionary principle due to its broad application in the international context. The Court noted that "[s]cholars have documented the precautionary principle's inclusion in "virtually every recently adopted treaty and policy document related to the protection and preservation of the environment.""[387] Consequently, legal scholars assert that the precautionary principle has developed into a principle of customary international law.[388]

- **The Principle of Intergenerational Equity.** The principle of intergenerational equity holds that the needs of the current generation should be met without compromising the ability of future generations to meet their own needs. The United Nations' Department of Economic and Social Affairs has noted that the underlying rationale for this principle is that "fairness between generations is embedded in the principle of sustainable development."[389] Although the principle has not been explicitly recognized by Canada's Supreme Court, the values underlying the principle are reflected in decisions such as *Imperial Oil* and *British Columbia v. Canadian Forests Products Ltd*.[390] More recently, the federal government has amended the *Federal Sustainable Development Act* to require consideration of the intergenerational equity principle in the development of sustainable development strategies.[391]
- **The Principle of Environmental Justice.** The LCO discussed the principle of environmental justice above. The environmental justice principle holds that there should be fair distribution of environmental benefits and burdens in society and equal access to the environmental decision-making process. In essence, the principle seeks to ensure the fair treatment of all people regarding the application of environmental laws, regulations, and policies.

The LCO Recommends:

13. The *EBR*'s purpose section should be updated to reflect other important environmental principles including, but not limited, to the polluter pays principle, the precautionary principle, the environmental justice principle, and the principle of intergenerational equity.

11. Ensuring Public Participation and Public Accountability

Introduction

Since the late 1960's, there have been many provincial and federal environmental statutes incorporating participatory requirements and processes.[392] These developments are also reflected at the international level, most notably in the adoption of the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the "Aarhus Convention") a multilateral environmental agreement signed by the European Union and numerous other countries.[393]

The Aarhus Convention established public rights to access information, participation, and access to justice in environmental decision-making. Public participation is now widely accepted as essential to ensure democratic accountability and legitimacy of government decision-making.[394]

As noted above, public participation and transparency underpin the *EBR*'s political accountability model: By providing the public with information and opportunities to participate in environmental decision-making, the *EBR* sought to promote government accountability for significant environmental decisions. The centrality of public participation and transparency are reflected in the Act's preamble, which states that Ontarians should have the means to ensure the *EBR*'s goals are achieved in an "effective, timely, open and fair manner."[395] It is also reiterated in s.2 (3) of the *EBR*'s purpose section, which states that:

> *In order to fulfill the purposes …[of the EBR], this Act provides,*
>
> *(a) the 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;*

The LCO has already summarized how the *EBR* and the institutions and processes it established have been incrementally eroded since its enactment. These include non-compliance by government ministries, changes to the environmental approvals process, the downgrading of the role of the Environmental Commissioner, and other factors. As a result, the LCO and others have concluded that the *EBR* 's political accountability model is failing in important ways.

Since the enactment of the *EBR,* several new (or at least more widely recognized) environmental accountability strategies have been adopted, or are under development, in Canada and internationally. The LCO has already discussed and recommended reforms related to these strategies, including the RTHE and environmental justice. As noted, these strategies represent fundamental reconsiderations or restructuring of the *EBR*'s political accountability/public participation model.

Irrespective of whether, or when, a RTHE is adopted in Ontario, the LCO believes there is an urgent need to improve public accountability for the provincial government's environmental decision-making. The erosion of public participation rights and the *EBR*'s political accountability model would be concerning in any circumstances. In the face of the climate emergency, however, the need for government accountability in environmental decision-making is perhaps greater than it ever has been. This section, therefore, considers potential *EBR* reforms that would strengthen public participation rights and political accountability for provincial environmental decision-making, including Statements of Environmental Values (SEVs), the Environmental Commissioner, access to information, and applications for review.

Statements of Environmental Values (SEVs)

The Task Force regarded enhancing government accountability in environmental decision-making as one of the primary objectives of the *EBR*.[396] This was necessary to ensure that the public could hold the government responsible for the protection of the environment. Thus, a central issue for the Task Force was how to provide the public with the means to hold the government accountable for protecting the environment. The two mechanisms that the Task Force recommended to achieve this objective were SEVs and the Office of Environmental Commissioner.[397]

SEV Objectives and Requirements

The Task Force recommended that each ministry be required to prepare a SEV that 1) explained how the Ministry would apply the *EBR* purposes whenever the ministry made environmentally significant decisions; and 2) described how these purposes will be integrated with social, economic, and scientific considerations.[398]

The Task Force believed that SEVs would be the best method of ensuring that the purposes of the *EBR* would be integrated into the provincial government's environmental decision-making process.[399] In essence, the Task Force expected that SEVs would operate both as a mission statement and a strategic plan.[400]

At first, the Task Force did not expect that SEVs would ensure the *EBR*'s purposes were embodied in ministries' decisions.[401] In other words, SEVs were intended to ensure that the *EBR's* purposes were *considered* by ministries in their decision-making process, along with other factors.[402] The goal of SEVs was essentially to create a "new attitude" in government when environmentally significant decisions were made."[403] The Task Force believed that over time the public would become aware of those decisions and would judge the government on its environmental record.[404]

The Task Force subsequently decided that ministries should be required to *apply* rather than just *consider EBR* principles when environmentally significant decisions were made. The Task Force emphasized that SEVs were not intended to set priorities or trump other considerations, rather they were to be weighed along with other factors in reaching a "sound decision."[405]

Section 7 of the *EBR* reflects the Task Force's recommendation regarding SEV objectives. This section is explicit that ministry "shall" prepare a SEV that

> *(a)* ***explains how the purposes of this Act are to be applied*** *when decisions that might significantly affect the environment are made in the ministry; and*
>
> *(b)* ***explains how consideration of the purposes of this Act*** *should be integrated with other considerations…that are part of the decision-making process of the ministry.*
>
> *[Emphasis added.]*

What the *EBR* does not do, however, is specify the requirements or contents of a SEV. Nor does the *EBR* require ministries to review or update their SEVs. Instead, s. 10 of the *EBR* simply states that the minister "*may* amend the ministry statement of environmental values *from time to time* [emphasis added]."

The ineffectiveness of SEVs in ensuring environmental accountability has been confirmed by long experience. Over the years, both the Environmental Commissioner and the Auditor General have concluded that SEVs have not met their objectives and lack detail, goals, and measurable targets. For example,

- In 2005, the Environmental Commissioner stated in a special report to the Ontario legislature that SEVs are "vague, outdated and have had little impact on decision-making" in government ministries.[406]
- In 2017, the Environmental Commissioner noted that SEVs have only been "minimally effective" in changing environmental outcomes due, in part, to the failure of ministries to share with the public how SEVs were considered in decision-making.[407] The Environmental Commissioner stated that if the ministries publicly shared this information, the public could hold ministries accountable for how SEVs were considered in decision-making.[408]
- In 2021, the Auditor General concluded that ministries could not consistently demonstrate that they used their SEVS in their environmental decision-making process.[409]
- In 2022, the Auditor General found that several ministries could not show that they considered the SEVs in a way that would improve environmental decision-making.[410]
- In 2023, the Auditor General again found that ministries were not considering SEVs when making decisions.[411]

The failure of SEVs is particularly problematic given they are a foundation of the *EBR*'s political accountability model.

The expectations of public administration and public accountability are much higher in 2023 than they were in 1994. Accordingly, the LCO believes there are many ways in which SEVs can be improved to meet contemporary standards of democratic governance and environmental accountability.

The *EBR*'s approach to SEV requirements can be contrasted to the approach to the sustainable development strategies (SDS) included in the 2008 *Federal Sustainable Development Act* (*FSDA*).[412] The LCO believes SDSs can serve as a useful model for improving SEVs.

SDSs differ from SEVs in many significant ways. Unlike the *EBR*, the *FSDA* requires that:

- At least every three years, the Minister for the Environment and Climate Change prepare a Federal Sustainable Development Strategy (FSD Strategy) that sets out specific goals, targets, and an implementation strategy and time frame for meeting the targets.[413]
- The FSD Strategy must identify the minister responsible for meeting the targets set out in the FSD strategy.[414]
- Each government department and agency that is subject to the *FSDA* is required to prepare an SDS that complies with and furthers the objectives set out in the FSD Strategy.[415]
- Federal departments and agencies are required to report annually on their progress in implementing their SDS.[416]
- Every three years, the Federal Environment Minister is required to table a report in Parliament on the federal government's progress in implementing the FSD Strategy.[417]

Importantly, these requirements are set out in legislation, ensuring a much higher level of public and legal accountability than the general and undefined requirements in the *EBR*.

The LCO believes that the *EBR* should be updated to include more detailed accountability requirements consistent with the *FSDA*. These reforms would address many of the long-standing shortcomings of the *EBR* and would comprehensively modernize SEVs, enhance transparency, and improve accountability for government environmental decision-making.

The LCO emphasizes that simply improving SEVs is not a panacea to enhance environmental accountability in Ontario. The impact and effectiveness of SDSs has been mixed,[418] confirming that improving SEVs are one part of a comprehensive and effective provincial environmental accountability strategy.

The LCO Recommends:

14. The *EBR* should require that the provincial government establish a comprehensive and coordinated government-wide strategy describing how the purposes of the *EBR* will be integrated into the environmental decision-making process and to provide periodic progress reports.

15. Ministry SEVs should identify specific goals and targets describing how the purposes of the *EBR* will be considered and applied in the government decision-making process, including an implementation strategy for meeting the targets.

16. Government ministries should provide an annual progress report on their actions and results in meeting the commitments established in their SEVs.

17. The *EBR* should impose a specific duty on ministers to undertake a periodic public review of their SEVs at least every five years to revise and update them as deemed appropriate.

Decision Notices

The *EBR* requires the minister to post on the Registry a "notice of decision" about a policy, Act, regulation, or instrument after a decision has been made.[419] However, there is no requirement to indicate how the ministry's SEV was considered and applied in the environmental decision-making process.[420]

To address this issue, the Auditor General has recommended that decision notices posted on the Registry should include documentation on how ministries considered their SEVs when making decisions.[421] The LCO agrees. Accordingly, the LCO recommends that the *EBR* be amended to require that government ministries post information on how SEVs were considered and applied when environmentally significant decisions are made. This information can be incorporated into the "notice of decision" that are required to be posted on the Registry pursuant to sections 36(1) and 36(2) of the *EBR*.

The LCO Recommends:

18. Government ministries should be required to explain how SEVs were considered and applied when environmentally significant decisions are made in relation to polices, Acts, regulations, and instruments.

19. The information referenced in recommendation 18 should be included in the notice of decision posted on the Registry pursuant to section 36 of the *EBR*.

SEVs and Instruments

Prescribed ministries make countless decisions each year that have environmental consequences. These decisions fall within four main categories: legislation, regulations, policies, and instruments.

The application of SEVs to environmental legislation, regulations, and policies is important and uncontroversial. SEVs would effectively have no impact whatsoever if they did not apply, at a minimum, to these environmental decisions.

Section 11 of the *EBR* states that "the minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry." The *EBR* does not specify what "decisions" should be subject to this requirement, creating considerable uncertainty whether SEVs apply to instruments.

The application of SEVs to instruments is a subtle but consequential issue. Instruments (which include permits, licenses, and environmental compliance approvals) are the mechanism through which government grants legal authorization to a person or organization (typically a corporation) to carry out an activity that may have an environmental impact.

Earlier in this report, the LCO discussed the significance of instruments as an environmental accountability tool in the context of potential defences to environmental protection actions. In that discussion, we emphasized how instruments are crucially important government decisions that can either "operationalize" – or undermine – provincial environmental legislation, regulation, and policies.

To obtain an instrument, such as an environmental compliance approval, a person or organization must apply to the Environment Ministry. In determining whether to issue an environmental compliance approval, the Environment Ministry staff consider applicable legislation, regulations, and policies. The Ministry generally imposes specific terms and conditions in an environmental compliance approval related to the operation, monitoring, and maintenance

of a facility. After an environmental compliance approval is issued, it has legal force and the failure to comply with its terms and conditions can result in enforcement action.

The Task Force assumed that SEVs would apply instruments and noted that it is this "category of decisions of which there are the greatest number."[422] However, the Environment Ministry takes the position that SEVs apply to Acts, regulations, and policies, but not instruments. This interpretation has significant implications for government accountability as it is through instruments that the *EBR*'s purposes can be implemented, via the SEV, at the operational level.

The long-standing debate over the applicability of SEVs to instruments came to a head before the Environmental Review Tribunal in the 2007 *Dawber* case. In that matter, the Applicants sought leave to appeal the air and waste approvals issue to Lafarge Canada that authorized the burning of scrap tires, plastic and other waste in its cement manufacturing plant. The Environmental Review Tribunal granted leave on the grounds that the Environment Ministry's SEV "endorses an ecosystem approach as a guiding principle" and that this required a cumulative effects assessment of the proposed project.[423] The Tribunal found that the Ministry Director had erred in failing to assess the "potential cumulative ecological consequences of the project."[424] Furthermore, it also found that authorizing the burning of tires was not consistent with the precautionary principle, which was also part of the Ministry's SEV.[425] In other words, the Tribunal concluded that the SEVs were part of the relevant laws and policies that the Environment Ministry Director had to consider when issuing the instruments.

Lafarge filed a judicial review application challenging the Environment Review Tribunal's decision. The case generated considerable interest in the environmental law community given its potential impact on the government's environmental decision-making process and the issuance of instruments.

In 2008, the Ontario Divisional Court dismissed the judicial review application in *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal).* The Court unanimously upheld the Environmental Review Tribunal's decision and found that the Environment Ministry's SEV applied to the instruments at issue. The Court stated:

> *We conclude that the Tribunal was reasonable in finding that leave should be granted because of the failure to apply the SEV. The Tribunal concluded that the SEV falls within "government policies developed to guide decisions of that kind", which was consistent with past jurisprudence of the Tribunal on SEVs….*[426]

The effect of the *Lafarge* decision is that SEVs now constitute government policies under s. 41 of the *EBR* and can be used to challenge instruments issued by government ministries. Since then, the Ontario Review Tribunal has cited and applied the *Lafarge* decision in over fifty decisions.[427]

Despite the Court's ruling, the Environment Ministry's SEV still states that it only applies to "Acts, regulations, and policies," but omits the term "instruments."[428]

The LCO is concerned about any policy or position that would effectively preclude government accountability for environmental decisions involving permits, licenses, and approvals that could have significant environmental consequences. In our view, environmental accountability will not be effective if whole categories of significant environmental decision-making such as instruments are effectively or pre-emptively excluded from SEV review and accountability.

The LCO, therefore, recommends the *EBR* be amended to explicitly require government ministries to consider SEVs when making environmentally significant decisions in relation to policies, Acts, regulations, and instruments.[429]

The LCO Recommends:

20. Section 11 of the *EBR* should be amended to specify that government ministers are required to consider and apply their ministry's SEV when environmentally significant decisions are made in relation to policies, Acts, regulations and instruments.

Office of the Environmental Commissioner

The Office of the Environmental Commissioner has been described as the "*EBR*'s institutional centerpiece."[430] Its creation reflected the Task Force's intention to have a knowledgeable authority who would provide "objective oversight and measurement of progress in implementing the [*EBR*]."[431]

As noted earlier, the Environmental Commissiner's role has undergone fundamental changes as a result of the *RTTA Act.* These changes are discussed in more detail below.

Origin and Purpose of the Environmental Commissioner

The Task Force recognized that SEVs and other measures in the *EBR* would have limited impact without additional tools and strategies to hold the government to account.[432] Accordingly, the Task Force recommended a new independent legislative officer, the Environmental Commissioner, whose mandate would be to review the implementation of the *EBR* and ensure government ministries complied with its requirements.

The Environmental Commissioner was central to the political accountability model. The Task Force assumed that the Environmental Commissioner would provide "objective, non-partisan analysis"[433] through annual reports to the legislature on the operation of the *EBR* and this, in turn, would ensure political accountability."[434]

The Environmental Commissioner was also to have a public education role. The Environmental Commissioner was expected to provide educational programs about the *EBR* and to offer assistance and advice to members of the public who wanted to participate in the decision-making process under the *EBR*.

Independent Officer of Legislature

Prior to the *RTTA Act,* the *EBR* largely reflected the Task Force's recommendations:

- The Environmental Commissioner was established as an independent officer of the Ontario legislature, appointed by the provincial cabinet "on the address of the assembly."
- The appointment was for a five-year term, subject to reappointment for further terms.
- The Environmental Commissioner reported directly to the legislature to ensure accountability and independence.
- The Environmental Commissioner was provided with security of tenure and could only be removed from office for cause by the legislature.

In this manner, the appointment of the Environmental Commissioner was similar to other legislative officers such as the Auditor General, the Ombudsman, and the Information and Privacy Commissioner.

The *RTTA Act* changed this structure. The Environmental Commissioner is now an employee of the Auditor General and is expected to perform the duties assigned by the Auditor General.[435] This also means that the person occupying the role of the Environmental Commissioner can be terminated at the discretion of the Auditor General.

Under the *RRTA Act*, the Environmental Commissioner remains responsible for overseeing and reporting on the operation of the *EBR*, but is also required to lead the Auditor General's value-for-money audits on the provincial government's environmental programs, a responsibility that had previously been undertaken by the Auditor-General.[436] Finally, the Auditor General is now responsible for reporting annually to the legislature, not the Environmental Commissioner.[437]

The question for the LCO is whether the *RTTA Act* reforms have maintained, improved or undermined the Environmental Commissioner's role in ensuring government environmental accountability.

For comparative purposes, the provincial Environmental Commissioner's role now resembles that of the federal Commissioner of the Environment and Sustainable Development ("Federal Environment Commissioner"). The Federal Environment Commissioner is appointed by the Auditor General of Canada and reports directly to them.[438]

The role of the Federal Environmental Commissioner has been the subject of ongoing debate for more than twenty-five years. This issue was revisited by the federal Standing Committee on Environment and Sustainable Development in 2021.[439]

Several witnesses testified to the Standing Committee that the Federal Environmental Commissioner should be a fully independent body. These witnesses argued that having the Federal Commissioner subordinate to the Federal Auditor General limits the effectiveness of the former's role. For example, Mr. Paul Fauteux, the former Director General of Environment Canada's Climate Bureau observed that a former Federal Auditor General, Sheila Fraser, dismissed the Federal Environmental Commissioner, Johanne Gélinas. The dismissal occurred shortly after the Federal Environmental Commissioner released a "devastating report on the federal government's record on fighting climate change."[440]

Professor Corinne Le Quéré, a Professor of Climate Change Science at the University of East Anglia, in the United Kingdom, testified that having an independent federal environmental commissioner would be consistent with reforms in other countries that have established independent bodies to ensure effective governance on the issue of climate change.[441] Professor Le Quéré noted the advantages of this model:

- Annual reviews of progress made by a fully independent body.
- A direct voice to Parliament.
- A duty from government to respond to these progress reports annually.[442]

That said, other witnesses favored the status quo and recommended leaving the Federal Commissioner within the Federal Auditor's Office.[443] Karen Hogan, the Auditor General of Canada, noted that having the Federal Environment Commissioner within the Federal Auditor General's Office allowed for environment and sustainable development issues to be addressed more "comprehensively and holistically" across government organizations.[444] The Federal Auditor General's Office may also confer other benefits to the Federal Environmental Commissioner in terms of the prestige of institutional status and enhanced capacity.[445] Similar advantages may also flow from having the Environmental Commissioner housed within the provincial Auditor General's office. It is notable that stakeholders have commented favourably on how the Auditor General and the new Commissioner of the Environment have performed their new duties under the *EBR*.[446]

The LCO can see the benefit of both institutional structures, and the Office of the Auditor General should be commended for its leadership on environmental issues so far. On balance, however, the LCO believes that the Office of the Environmental Commissioner should be independent and that the Environmental Commissioner should be appointed by the legislature and accountable directly to the legislature. The LCO also believes the Environmental Commissioner should be afforded security of tenure and only be removed from office by the legislature for cause. The LCO believes that environmental accountability is more likely to be achieved through a separate stand-alone Office of the Environmental Commissioner, particularly if given the full powers and duties we outline below.

The LCO Recommends:

21. There should be a separate stand-alone Office of the Environmental Commissioner.
22. The Environmental Commissioner should be appointed as an independent officer of the legislature and be accountable directly to the legislature.
23. The Environmental Commissioner should only be removable from office by the legislature for cause.

Policy Advocacy

The Environmental Commissioner's role as a policy advocate has been weakened through the *RTTA Act.*

Prior to the *RTTA Act*, Environmental Commissioners routinely provided substantive comments on the adequacy of the environmental policies of government ministries. This aspect of the Commissioner's functions was formally recognized by the Ontario legislature in the *Green Energy and Green Economy Act, 2009*, which required the Environmental Commissioner to report annually to the legislature on the province's progress on improving energy conservation and reducing greenhouse gas emissions.[447]

The *RTTA Act* removed the mandatory requirement that the Environmental Commissioner report on the Ontario government's progress in improving energy conservation and reducing greenhouse gas emissions. In contrast, the *RTTA Act* gives the Auditor General the discretion, but not the duty, to determine whether the Environmental Commissioner will continue reporting on these issues.[448]

The *RTTA Act's* amendments to the *EBR* raise concerns about the extent to which the Environmental Commissioner can continue to play an effective policy advocacy role in ensuring government accountability in environmental decision-making. The Task Force anticipated the Environmental Commissioner would have a dual role as environmental auditor (responsible for overseeing government ministries' implementation of the *EBR*) and as policy advisor on proposed environmental policies and laws.[449] These roles contributed to the Office of the Environmental Commissioner of Ontario's efficacy and impact on a broad range of critical environmental issues.

The LCO believes that the Environmental Commissioner's policy mandate should be explicitly recognized within the *EBR* to better ensure government accountability in environmental decision-making. This should include the authority to provide comments on proposed legislation, policies, and regulations as they relate to the environment and their implementation by government ministries.

The LCO further believes government ministries should be legally required to respond to the recommendations in the Environmental Commissioner's annual and special reports by a specified timeline. Although many government ministries have voluntarily responded to the recommendations in the Environmental Commissioner's annual report, the LCO believes it would enhance government accountability to establish this as a positive legal duty under the *EBR*.

The LCO Recommends:

24. The *EBR* should be amended to provide that the Environmental Commissioner has the authority to comment on:

    a. Proposed government bills, policies, regulations and instruments as they relate to the environment.

    b. The implementation of government laws, policies, regulations, and instruments as they relate to the environment.

    c. The province's progress in addressing energy conservation, the reduction of greenhouse gas emissions, and environmental sustainability more broadly.

25. Government ministries should provide written responses to the Environmental Commissioner's special and annual reports within a specified timeline.

Clearinghouse Function

The Task Force recommended that the Environmental Commissioner's responsibilities include receiving and monitoring applications for review and applications for investigation and their eventual disposition.[450] The Task Force also recommended that it should be the Environmental Commissioner who should forward these applications to the appropriate minister or ministers. [451]

As a result, the Environmental Commissioner acted as a depository for applications for reviews and applications for investigation.[452] This structure allowed the Environmental Commissioner to have oversight over the public's engagement with the *EBR.*

The *RTTA Act* eliminated the Environmental Commissioner's clearinghouse function by requiring that all applications for review and applications for investigation be filed with the appropriate minister.[453] This reform has reduced the Environmental Commissioner's oversight over how the public is utilizing the *EBR*. The LCO recommends that the clearinghouse function be restored to ensure that the Environmental Commissioner has oversight over how the public uses the *EBR*.

The LCO Recommends:

26. The *EBR* should be amended to require the Environmental Commissioner review the receipt, handling, and disposition of applications for review and applications for investigation.

Public Education

The *EBR* originally provided a statutory basis for the Environmental Commissioner to undertake public education about the *EBR* and to provide advice and assistance on how to participate in the Act's decision-making processes.[454]

The *RTTA Act* transferred the Environmental Commissioner's public education responsibilities to Ontario's Environment Minister. At present, it does not appear the Environment Ministry has prioritized this responsibility. The Auditor General has found that the Environment Ministry had done "little" since it was given responsibility in 2019 to provide educational programs to the public.[455]

The transfer of public education responsibilities to the Environment Ministry also raised concerns that public trust in the *EBR* may be undermined given that the Environment Minister and other cabinet ministers are respondents in legal proceedings brought by members of the public under the Act.[456] As one legal commentator observed,

> *… it is unrealistic to expect elected officials to provide credible and comprehensive advice to the people of Ontario on how to effectively use EBR tools to hold the provincial government accountable in the environmental context.*[457]

The LCO believes the Environmental Commissioner – reconsitituted as an independent office – should provide *EBR* public education programs and public advice/assistance on how to participate in environmental decision-making. This institutional arrangement is more likely to promote public education about the operation of the *EBR*. It would also address the potential conflict of interest with the Environment Minister undertaking this role.

The LCO Recommends:

27. The *EBR* should be amended to provide that the Environmental Commissioner may provide educational programs about the *EBR* to the public; and provide advice and assistance to the public on how to participate in government environmental decision-making processes.

Investigative and Enforcement Powers

Although many of the changes made by the *RTTA Act* have weakened the role of the Environmental Commissioner, the *RTTA Act* has significantly expanded the investigative and enforcement powers that now are available under the *EBR*. Prior to the *RTTA Act*, the Environmental Commissioner's investigatory powers were limited. As a result of the *RTTA Act*, the Auditor General now has every power possessed under the *Auditor General Act* to carry out his or her function and responsibilities under the *EBR*.[458] For example, the Auditor General has extensive powers to require government ministries to provide information and access to records,[459] examine any person under oath,[460] and station one or more staff members in a ministry.[461]

The *Auditor General Act* also makes it an offence for a person to obstruct the Auditor General or a member of his or her staff, or conceal or destroy documents relevant to a special audit or examination.[462] A person who knowingly commits an offence is liable to a fine, or imprisonment for a term of not more than a year, or both.[463]

The LCO believes these investigative and enforcement powers, subject to any necessary modification, should remain in the event the Environmental Commissioner is restored as an independent legislative officer, as recommended above. In addition, the LCO believes it should be an offence to knowingly mislead the Environmental Commissioner in the performance of his or her duties.

The LCO believes these provisions are necessary for the Environmental Commissioner to effectively fulfill his or her responsibilities under the *EBR* and to ensure government accountability. These recommendations are also consistent with the investigative and enforcement mechanisms that are typically afforded to other legislative officers to discharge their roles and responsibilities under their governing statutes.[464]

The LCO Recommends:

28. The Environmental Commissioner should have the power to access information and records from government ministries that the Environmental Commissioner thinks are necessary to perform their duties under the *EBR*.

29. The Environmental Commissioner should have the power to examine any person under oath on any matter relevant to the *EBR*.

30. It should be an offence for a person: (i) to obstruct the Environmental Commissioner in the performance of their duties under the *EBR*; (ii) to conceal or destroy a document the Environmental Commissioner has requested; (iii) or to make a false statement to, or to mislead, or to attempt to mislead the Environmental Commissioner in the performance of their duties under the *EBR*.

31. Any person convicted who knowingly commits an offence under the *EBR* should be liable to a fine or imprisonment for a term of not more than one year, or both.

Access to Environmental Information

Access to government-held information is essential for the public to meaningfully exercise their public participation rights under the *EBR*. It is also necessary to ensure transparency and government accountability in environmental decision-making. Consequently, delays in accessing information may constitute a significant barrier to the exercise of public participation rights under the *EBR*.

In this section, the LCO considers how to improve two important elements of the *EBR*: the Registry and access to environmental information under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).

The Environmental Registry

The Task Force recognized that public participation in environmental decision-making could only occur if individuals obtained notice of the government's intention to make an environmentally significant decision.[465] Accordingly, the Task Force recommended the establishment of a Registry which would provide a "uniform predictable and certain system for providing notice of pending significant environmental decisions, an opportunity to comment, notice of the decision once made, and in some cases, appeal rights."[466]

The establishment of an electronic publicly accessible registry that allowed the public to obtain notice of new environmental legislation, regulations, policies, and instruments was visionary at the time. In essence, the Registry was to serve as a "databank and a bulletin board for all proposed environmental decisions being considered by the province."[467]

The *EBR* incorporated the Task Force's recommendations. Section 5(1) of the *EBR* establishes the Environmental Registry as an electronic database that allows the public to participate in the government decision-making process.

The Registry has been described as having "three main purposes: (i) opening up the decision-making process; (ii) offering information to various sectors, including business; and (iii) making government more accountable."[468]

The Registry is accessible to anyone who has a computer with internet access and members of the public can provide their comments online.[469] Notice of a proposal in the Registry must include a brief description of the proposal, the timeline for providing comments, where information about the proposal can be reviewed, and the address to which members of the public may direct their comments.[470]

The *EBR* generally requires there be a minimum of a thirty-day comment period after notice has been provided on the Registry to allow the public to comment on a proposal.[471]

However, certain decisions are exempt from *EBR* notice and comment provisions. These include decisions of an administrative or financial nature, and decisions deemed by the responsible minister as not being environmentally significant.[472] In addition, posting on the Registry is not required for: (i) decisions to address emergency situations;[473] (ii) where the decision has been or is required to be subject to a public participation process that was "substantially equivalent" to the *EBR* process;[474] or (iii) for an instrument implementing a project in accordance with a statutory decision.[475]

After the end of the comment period, the minister responsible must take every reasonable step to ensure that all the public comments are considered in decision-making.[476] Furthermore, after a decision has been reached, the minister must post notice of the decision on the Registry, including a brief explanation of how the public's comments were taken into consideration.[477]

Overall, the LCO believes the Registry has been successful in ensuring Ontarians have access to timely information about environmentally significant proposals and decisions. For example, in 2020/21 government ministries posted 1,446 notices of environmentally significant proposals relating to a policy, act, regulation, or instrument and 1,427 decision notices.[478] In the following year, 2021/22, government ministries posted 1,561 notices of proposals relating to a policy, act, regulation, or instruments and 1,429 decision notices.[479]

Notwithstanding this record, the LCO believes the Registry can and should be reformed to improve Ontarian's access to significant environmental decisions.

To ensure that the public can meaningfully comment on a proposed decision, the Registry needs to provide the public with adequate information about a proposal. Section 27(2) of the *EBR* provides the minimum information that must be posted on the Registry about a proposal, including:

- A description of the proposal.
- How public comments are to be provided and the timelines for public participation.
- Where and when the public can review information about the proposal.
- An address to which the written comments are to be sent.
- Any information prescribed by the regulations pursuant to the *EBR*; and,
- Any other information the minster giving the notice thinks is appropriate.

These requirements are appropriate, but may not be sufficient to provide the public with the information needed to thoughtfully comment on a proposal. For example, the Environmental Commissioner has expressed concern that "[s]ubstandard instrument notices may prevent the public from participating effectively in decisions about approvals for activities that affect the environment right in their own communities."[480]

To address these concerns, the Environmental Commissioner's Office has recommended that section 27(2) of the *EBR* be amended to require that, where possible, electronic links to proposals and supporting documentation should be made available on the Registry."[481] This recommendation was reiterated in the Auditor General's most recent report on the operation of the *EBR*.[482]

The LCO supports these recommendations. We believe these modest but important reforms to the Registry would improve Ontarian's access to environmental information.

The LCO Recommends:

32. The *EBR* should be amended to require government ministries provide electronic links to proposed instruments and supporting documentation.

33. The *EBR* should be amended to require government ministries to provide electronic links to the text of proposed policies, Acts and regulations once they are approved for public consultation.

Freedom of Information and Protection of Privacy

This section discusses another key area of environmental information: access to information under Ontario's *Freedom of Information and Protection of Privacy Act* (*FIPPA*).

It is well-established that access to information is essential to ensure the public can participate meaningfully in the environmental decision-making process. Several legal commentators have noted that:

> *In the world of environmental advocacy, information is an essential commodity. Without comprehensive and timely information, it may be difficult or impossible to identify, let alone address, many environmental issues.*[483]

In the international context, the public's right to access information has been recognized in several international declarations, covenants and conventions.[484] The most notable is the Aarhus Convention. The Convention provides that:

> *In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*[485]

Canada is not a signatory to the Aarhus Convention. The Federal Government has explained that because Canada already has well-established mechanisms for engaging the public, joining the Convention would provide limited benefit to the processes that already exist in Canada.[486] Nevertheless, the Federal Government has asserted that it complies with most of the objectives and provisions of the Convention.[487]

In Ontario, the public's right to access information is governed by *FIPPA*. The Act provides members of the public with the right to access information held by prescribed institutions, including government ministries, subject to a limited number of statutory exemptions.[488] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* the Supreme Court of Canada observed that *FIPPA* protects both openness and confidentiality.[489] Access to information held by public institutions, the Court stated, "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society."[490]

Information obtained through a *FIPPA* request can provide important scientific information as well as valuable insight into the government's environmental decision-making process.[491] This information can be essential for members of the public to meaningfully comment on laws, regulations, policies and instruments under the *EBR*. For applicants filing an application for leave to appeal an instrument, this type of information will invariably be vital to their case. Consequently, public participation under the *EBR* may be a hollow exercise unless the public has access to environmental information held by government ministries.

The LCO's research and consultations have revealed three areas of concern regarding access to information under the *EBR*:

- The timeliness of government responses to information requests.
- The fees charged to fulfill *FIPPA* requests.
- The effect of *FIPPA* delays on statutory appeal rights.

Each of these issues has a significant effect on Ontarian's timely and meaningful access to environmental information.

Timeliness

Under *FIPPA,* if a record is producible, it must be provided within 30 days of the request.[492] However, the time limit may not be met for several reasons. A government ministry may extend the time for production if the request involves many records or consultation with a person outside the ministry is required and cannot be completed within the time limit.[493] The request for an extension of time must be provided in writing and may be subject to review by the Information and Privacy Commissioner (IPC).[494]

A review of recent statistics collected by the IPC demonstrates that compliance with the 30-day standard is mixed at best. The IPC 2020 Statistical Report indicates that the overall provincial compliance rate was 66.8 % for providing access within 30 days.[495] In that year, the Environment Ministry received 6,960 requests, the most access requests of any government ministry, and its 30-day compliance rate was 42.4%.[496] In 2021, the provincial compliance rate had decreased to 63.8%[497] and the Environment Ministry's 30-day compliance rate had dropped sharply to just 1.2%.[498] By 2022, the Environment Ministry's 30-day compliance rate had bounced back to 17.3% but it was still well below the overall provincial 30-day compliance rate of 51.2%.[499]

Lengthy delays in accessing access to government-held environmental information means it is difficult for the public to meaningfully exercise their public participation rights under the *EBR.* The LCO, therefore, believes the *EBR* should expressly stipulate that the public has a right to comprehensive and timely information to exercise their public participation rights.

The LCO Recommends:

34. The *EBR* should be amended to recognize the public's right to reasonable and timely access to information.

Fees

Fees that may be charged for a *FIPPA* request can be a barrier to access to justice. Under *FIPPA*, a requester can seek a waiver of all or a portion of the fee on several grounds, including financial hardship or where the dissemination of the record will benefit public health or safety.[500] Unlike British Columbia's *Freedom of Information and Protection of Privacy Act*, *FIPPA* does not explicitly allow for a fee waiver where the information relates to the environment.[501]

The right of citizens to receive environmental information without incurring significant expense is likely to enhance public participation in the environmental decision-making process. As a result, the LCO recommends that consideration be given to a full or partial fee waiver where a *FIPPA* request relates to environmental information.

The LCO Recommends:

35. The public should be allowed to seek a fee waiver of all or part of *FIPPA* fees where the information requested relates to the environment.

Effect on Third-Party Appeals

The Environment Ministry has sometimes required individuals to submit a *FIPPA* request for information pertaining to matters posted on the Registry.[502] This has been criticized by both Ontario's Information and Privacy Commissioner and the Environmental Commissioner.[503] As noted above, the *EBR* generally requires the public to provide comments within a 30-day period, even though it often takes longer to obtain information under *FIPPA*.[504] As a result, the public's right to comment may be lost if they are required to make a formal *FIPPA* request to obtain information.[505]

This situation is particularly challenging when applicants seek to leave to appeal an instrument. These applications must be filed within 15 days after notice of a decision has been posted on the Registry. The Ontario Environmental Appeal Board, the predecessor to the Ontario Land Tribunal, observed that the lack of information available for leave applicants has meant "it is difficult, if not impossible" for leave applicants to submit to the Board a meaningful analysis of whether the Director's decision to issue the instrument was reasonable.[506] The Board consequently recommended that:

> *If the right to apply for leave to appeal is to be meaningful, it may be necessary to develop mechanisms to ensure that leave applicants have access to the documentation upon which the Director based his or her decision, whether generated before or after the comment period.*[507]

The Auditor General's most recent report on the operation of the *EBR* found that government ministries were still not providing links or attachments to key documents or providing clear and complete information on their proposals or decisions.[508]

The LCO believes meaningful public participation in environmental decision-making is contingent upon the proactive disclosure of documents, including the links to all key documents related to an instrument when it is posted on the Registry. A government-wide environmental information disclosure policy would obviate the delay and costs associated with *FIPPA* requests, and significantly enhance transparency and accountability in environmental decision-making.

The LCO Recommends:

36. A government-wide policy should be developed and implemented to ensure proactive disclosure of environmental information.

Application for Review

The Task Force believed Ontario residents should have the right to seek a review of existing policies, Acts, regulations, and instruments to ensure their consistency with the *EBR*'s purposes.[509] The Task Force noted that while Ontario residents could write to the appropriate ministry asking for consideration or reconsideration of a policy, Act, regulation, or instrument, there was no standardized process for doing so.[510] To ensure accountability, the Task Force recommended a uniform, predictable review process be established.[511]

Section 61(1) of the *EBR* reflects the Task Force's recommendation. The section provides that any two Ontario residents can apply for a review of an existing policy, Act, regulation, or instrument to protect the environment.

An application for review must include the names and addresses of the applicants, an explanation of why the applicants believes the review should be undertaken, and a summary of the evidence in support of the application.[512]

The number of applications for reviews has varied greatly over the years. Between 2015 and 2020, an average of 10 applications for review were submitted each year and ministries agreed to undertake 33% of the requested reviews.[513] In 2020/21, three new applications for review were submitted and both were denied.[514] In 2021/22, two new applications for review were submitted and both were also denied.[515] In 2022/23, no new applications for review were submitted. [516]

Extension of Request for Review to New Instruments

The Task Force recommended a process to allow Ontario residents to request a new policy, Act, regulation, or instrument be adopted.[517] The *EBR* only partially reflects the Task Force's recommendation. Section 61(2) permits the right to seek a new policy, Act, or regulation, but not an instrument. Muldoon and Lindgren have stated the reason for excluding a review of the need for a new instrument is unclear.[518] They note that "it is conceivable that someone may want a ministry to license a previously unapproved activity, thereby enabling the ministry to impose strong terms and conditions to control the activity."[519]

The LCO notes that extending section 61(2) to instruments would be consistent with the Task Force's recommendation and improve environmental accountability. The LCO does not anticipate this will cause an undue burden to government ministries given the relatively few applications for review.

The LCO Recommends:

37. Section 61(2) of the *EBR* which allows a review of the need for a new policy, Act or regulation should be extended to apply to instruments.

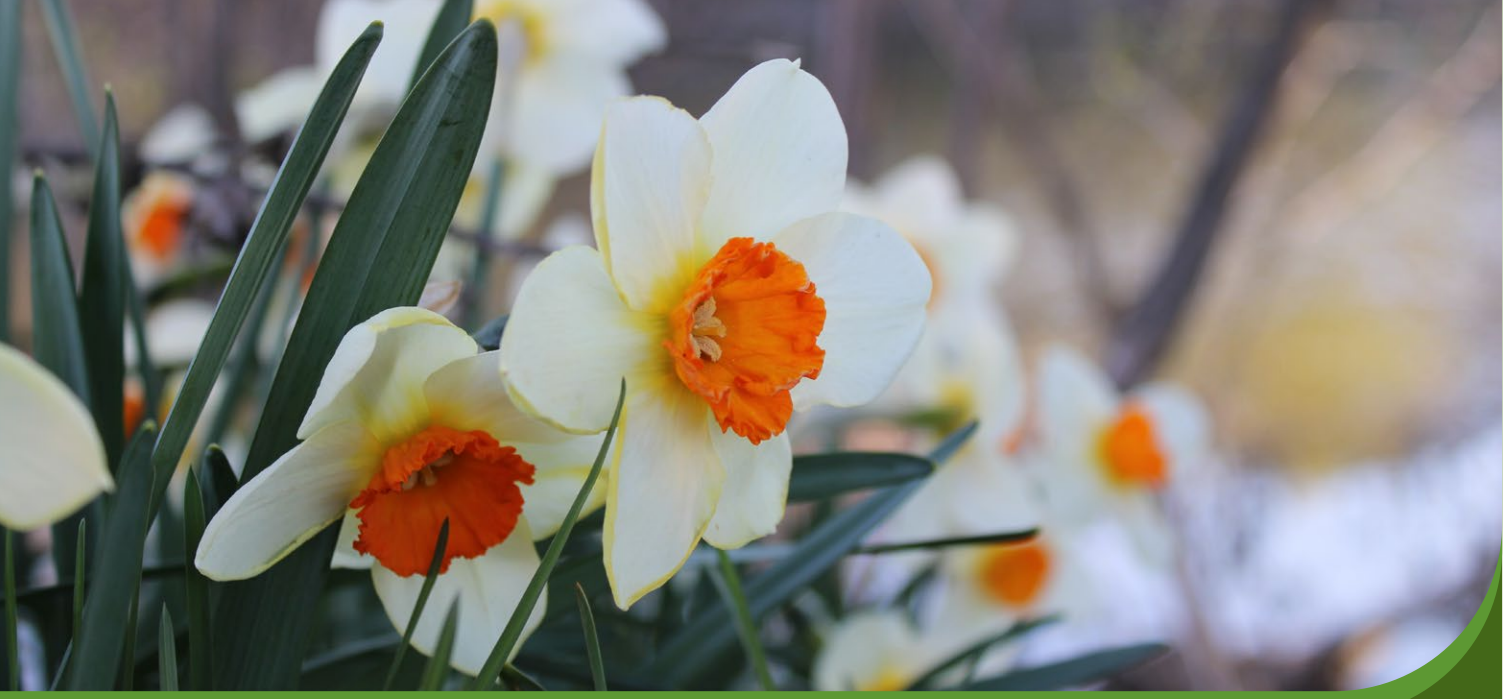
Public Input into the Request for Review Process

Sections 69(1) of the *EBR* specifies that if the minister determines that a review is warranted, the review must be undertaken within a reasonable time. The minister is also required to give notice of his or her decision whether to conduct a review to the applicants, the Auditor General, and any other person who may be directly affected by the decision.[520]

The LCO believes it would be beneficial to post a notice of the minister's decision whether to undertake a review on the Registry and provide the public with an opportunity to provide comments during the review process. This would be consistent with the *EBR*'s public participation requirements and improve environmental accountability.

The LCO Recommends:

38. Government ministries should be required to post an information notice of the decision to undertake a review to consider or reconsider a policy, Act, regulation and instrument and provide the public with an opportunity to provide comments during the review process.



12. Streamlining Processes, Reducing Uncertainty, and Clarifying the Law

Earlier sections of this report have discussed both substantive new amendments to the *EBR* (such as the RTHE and environmental protection actions) and reforms to important existing *EBR* requirements and structures (such as the SEVs and the Environmental Commissioner). This section considers *EBR* amendments that could streamline or "modernize" existing provisions and processes, reduce uncertainties, and clarify the *EBR*'s application.

Leave to Appeal

The *EBR* provides third parties with the right to appeal certain instruments provided certain conditions are met. These include a standing requirement and a two-part leave test.

Standing

Under the *EBR*, a party who seeks leave to appeal an instrument is required to demonstrate an "interest" in the proposal. Section 38(3) states that the "interest" requirement can be met by a person who has previously sent comments on a proposal.

Leave Test

Once the standing requirement has been met, an applicant must obtain leave to appeal from the appropriate appellate body by satisfying a two-part test established in *EBR* section 41:

> *Leave to appeal a decision shall not be granted unless it appears to the appellate body that,*
>
> *(a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and*
>
> *(b) the decision in respect of which an appeal is sought could result in significant harm to the environment.*

The purpose of the leave to appeal requirement was to ensure that third-party appellants were able to establish that their case had "preliminary merit."[521]

In *Lafarge*, the Ontario Divisional Court observed that "[o]n its face, the *EBR* leave test is 'stringent.'"[522] Other commentators have criticized the s. 41 leave test for two primary reasons.

First, some have questioned why members of the public, particularly those who may be directly impacted by the issuance of the instrument, should have lesser appeal rights than instrument holders.[523]

Second, the leave test has been described as combining "multiple substantive claims in litigation and regulatory proceedings."[524] As one commentator observed:

> *Finding that a decision is unreasonable would typically be the finding of a substantive judicial review hearing. Finding the chance of significant environmental harm would typically be the finding of an environmental assessment review. It is quite striking that both are needed simply to get a hearing under environmental rights legislation.*[525]

The stringency of the *EBR* leave test is confirmed by statistical outcomes of leave applications: Third-party appeals are rarely sought and rarely granted. Between 1995 and 2014, for example, only 285 leave applications were brought and hearings were granted for approximately 20% of the leave applications.[526] Between 2015 and 2018, the number of leave applications was even lower. In those years, there were only 14 leave applications, of which less than a third were granted leave.[527]

These statistics confirm an access to justice truism: The high legal threshold imposed by s. 41 makes it onerous for prospective appellants to seek and gain leave to appeal. In these circumstances, it is important to ask if the objective of the leave test— screening out meritless leave applications — can be achieved through other means.

The LCO notes that the Ontario Land Tribunal has amended its Rules of Practice and Procedure to authorize, on its own initiative and without a hearing, dismissal of a matter on grounds that it is frivolous, vexatious, or commenced in bad faith.[528] The LCO believes this procedure is sufficient to address the need to screen unmeritorious *EBR* leave applications. The LCO recommends, therefore, that the *EBR* be amended to delete its existing s. 38 standing requirements and s. 41 leave to appeal provisions.

The LCO makes two further recommendations regarding *EBR* leave to appeal provisions:

First, s. 40 of the *EBR* requires that a leave application be filed within 15 days after notice of the decision is posted on the Registry, or 15 days after another person files an appeal under another statute. In the past, several commentators have expressed concerns that the 15-day deadline poses a significant barrier for applying for leave to appeal.[529] The Environmental Commissioner has recommended extending the deadline for seeking leave to appeal from 15 to 20 days.[530] The LCO believes this recommendation remains valid and supports extending the deadline for filing an application for leave to appeal to 20 days.

Second, and more importantly, the LCO is concerned about the use of alternate compliance approaches, such as site-specific standards and technical standards, which are not subject to third-party appeal under the *EBR*. Although, these alternate standards are subject to the *EBR's* notice and comment provisions, the public cannot challenge the adequacy of the standards before an independent expert tribunal.

Many years ago, the Task Force noted that "notice and comment alone do not make government accountable for the decisions it ultimately makes."[531] The LCO agrees. We have already discussed how alternative compliance tools have the potential to evade important environmental accountability provisions. We have also noted that in some cases the Environment Ministry is using alternative measures to permit air emissions at drastically higher levels than the provincial air standards. As a result, the LCO believes the public should have third-party appeal rights to challenge these standards before the OLT. The LCO, therefore, recommends that the public be afforded the right to appeal site-specific standards and technical standards under the *EBR*.

Similarly, the recent proposed expansion of the EASR regime to higher risk activities (such as the transportation of hazardous waste, asbestos waste, and biomedical waste) also represents a significant roll-back of public participation rights under the *EBR*. These higher-risk activities will no longer be subject to the *EBR*'s notice or comment provisions or third-party appeal rights. The LCO believes that the EASR regime should be subject to public notice and comment and third-party appeal rights. These measures are necessary to ensure access to justice and government accountability.

The LCO Recommends:

39. Section 38 of the *EBR* establishing a standing requirement to commence a leave to appeal application should be deleted.
40. Section 41 of the *EBR* establishing a leave to appeal test for third parties should be deleted.
41. The deadline for filing an application for leave to appeal should be extended from 15 to 20 days.
42. The use of site-specific standards and the technical standards should be subject to third-party appeal rights under the *EBR*.
43. The EASR regime should be subject to notice and comment and third-party appeal rights under the *EBR*.

Judicial Review and Remedies

The *EBR*'s emphasis on political accountability has meant that the availability of judicial review and remedies is restricted under the Act.

Judicial Review

Judicial review is a constitutionally protected right of the courts to ensure administrative decision-makers act within the scope of their statutory powers. [532] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Supreme Court of Canada reiterated that "judicial review functions to maintain the rule of law while giving effect to legislative intent."[533] By giving effect to legislative intent, judicial review ensures that decisions made by administrative decision-makers are lawful, reasonable, and fair.

Section 118(1) of the *EBR* contains a broad privative clause that restricts judicial review of most governmental activity under the Act, except as provided in s. 118(2).[534] A privative clause is a statutory provision that restricts the court's authority to overturn administrative decisions on judicial review.

Earlier in this report, the LCO recommended that the *EBR* be amended to allow judicial review of administrative decisions that violate the RTHE and that causes or is likely to cause significant harm to the environment. The LCO believes that section 118(1) should be amended to account for this recommendation.

An exception in section 118(2) specifies that judicial review is only permitted where the minister or the minister's delegate "failed in a fundamental way to comply" with the public participation requirements under Part II respecting a proposal for an instrument.[535] The effect of this provision is to bar *EBR* judicial review of Acts and regulations.

The LCO does not believe there is a valid rationale for restricting judicial review to instruments. As written, section 118 (2) immunizes many important provincial government environmental decisions from oversight by the courts and undermines government accountability. The LCO, therefore, recommends that section 118 (2) be amended to allow judicial review of decisions in relation to Acts and regulations, in addition to instruments. Notably, this recommendation is consistent with the 2021 *Greenpeace #2* decision, in which Ontario's Divisional Court appeared to ignore section 118(2) and granted judicial review where the Minister of Municipal Affairs and Housing failed to comply with the *EBR*'s public participation requirements before amending the *Planning Act*.[536]

The LCO Recommends:

44. Section 118(1) of the *EBR* should be amended to allow judicial review of an administrative decision that violates the right to a healthy environment and that causes or is likely to cause significant harm to the environment.

45. Section 118(2) of the *EBR* should be extended to apply to Acts and regulations.

Remedies

Section 37 of the *EBR* limits the remedies available on judicial review to declaratory relief. The section also explicitly provides that failure to comply with the public participation rights under Part II of the *EBR* does not affect the validity of any policy, Act, regulation, or instrument.

In *Greenpeace #2* the Divisional Court interpreted this provision as precluding the applicants from challenging the validity of the legislative provision at issue.[537] The Court noted, however, that section 37 does not preclude the Court from granting declaratory relief for the Minister's failure to post notice of the proposed amendments to the *Planning Act*.[538]

All else being equal, the LCO would be reluctant to recommend expanding *EBR* remedies. Given the long-standing record of *EBR* non-compliance, however, the LCO believes law reforms are necessary. The LCO has concluded, therefore, that restrictions on remedies available on judicial review significantly undermine government accountability. Section 37 narrowly limits the court's discretion to order appropriate remedies in the event of systemic or fundamental non-compliance with the *EBR*'s statutory requirements. Although court declarations against government are generally respected, declaratory relief may be inadequate in the face of systemic non-compliance with the *EBR*.

To ensure government accountability, the LCO believes it is necessary for courts to have all available remedies available on a judicial review to address non-compliance with the *EBR*. Given that judicial review remedies are fundamentally discretionary, the LCO anticipates that courts will be circumspect in using these powers.

The LCO Recommends:

46. Section 37 of the *EBR* which limits the remedies available on a judicial review should be revoked.

Paramountcy

The *EBR* does not contain a paramountcy provision that would give it primacy over other statutes in the event of a conflict or inconsistency. Nor was this an issue addressed by the Task Force.

Muldoon and Lindgren assert that despite the lack of an express paramountcy provision in the *EBR*, there is an implied paramountcy.[539] Section 3 of the *EBR*, for example, states that Part II of the *EBR*, which deals with public participation rights, "sets out minimum levels of public participation that must be met" before the government makes certain environmentally significant decisions.[540]

At the same time, other provisions in the *EBR* allow proposals to be exempt from the Act's public participation requirements if there are other "substantially equivalent processes" to the *EBR*. As a result, Muldoon and Lindgren contend that the *EBR*'s public participation requirements have paramountcy over decision-making processes that do not meet the Act's minimum requirements.[541]

The LCO believes that the *EBR* would benefit from an express paramountcy provision. It would provide clarity on how to interpret the *EBR* when it conflicts with the public participation requirements in another provincial statute. However, if another statute provides more enhanced public participation requirements than the *EBR*, the LCO recommends the former should prevail. For example, if another statute imposes a public notice requirement for an instrument that is more than the minimum thirty-day requirement under section 22 of the *EBR*, the former should prevail.

The LCO Recommends:

47. The *EBR* should be amended to include a provision that provides that if there is conflict between the public participation rights under the *EBR* and another statute, the statute that provides the greatest level of public participation governs to the extent of the conflict.

Exceptions to the EBR

The *EBR* provides a limited number of exceptions to its Part II public participation requirements. These exceptions fall within four categories:

- Emergencies (s.29).
- Proposals that have been or will be considered under a public participation process that are substantially equivalent to the *EBR*'s process (s.30).
- Instruments that would be a step towards implementing a project approved in accordance with a statutory decision (s.32).
- Proposals that give effect to the budget or economic statements presented to the Ontario legislature (s.33).

The LCO believes the exceptions for emergencies and budget proposals from the *EBR*'s public participation requirements are appropriate. It is also reasonable to exempt emergencies from the *EBR*'s public participation requirement as the failure to do so may cause delay and pose danger to human health and the environment. Finally, the LCO agrees that it is reasonable to exempt proposals that give effect to budget or economic statements given that these types of proposals are subject to a long-standing parliamentary convention of budget secrecy.

That said, the LCO believes that the exceptions provided for a "substantially equivalent process" (s. 30) and for "instruments to implement a project in accordance with a statutory decision" (s.32) require clarification and statutory amendments.

Substantially Equivalent Process

The Task Force did not want the enactment of the *EBR* to create duplicative public participation processes. Therefore, it recommended that if a statute contains public participation provisions that were in substantial compliance with the *EBR*, the requirement for notice and comment through the Registry should not apply.[542]

Section 30 of the *EBR* reflects this recommendation. The exception is allowed provided the minister believes that the environmentally significant aspects of the proposal have been or will be considered in a public participation process that is a "substantially equivalent process" to that of the *EBR*. Under section 30(2), if the minister intends to rely on the exception, the minister must give notice of that decision to the public and to the Auditor General.

In *Greenpeace #1*, the Environment Minister sought to justify the decision to not post the regulation revoking the *Cap and Trade Program Regulation* on the Registry by asserting that the recent Ontario election was substantially equivalent to the process prescribed in the *EBR*. Although the Ontario Divisional Court declined to order declaratory relief in the matter, two of the three-panel members categorically rejected the Minister's position.[543]

The LCO believes when the minister decides to rely on s.30 and not give notice of a proposal, it would be helpful for the minister to post notice of a proposal to rely on the s.30 exception for public comment. Given that s.30 authorizes the minister to deprive persons of their public participation rights, the LCO believes that it is important that the minister first obtain input from interested or affected persons before making this decision.[544]

Furthermore, when providing notice of the decision under section 30(2), the minister should also provide reasons explaining how the scope and content of the alternate public participation process are substantially equivalent to the *EBR* process. This should include whether, and to what extent, the environmentally significant aspects of the proposal were or will be considered by the alternate public participation process.

A requirement for a minister to provide reasons would enhance transparency and accountability in the government's decision-making process and help ensure that the exception afforded by s.30 is not misused. The minister's reasons may also be helpful to the court and the public in the event of a judicial review.

The LCO Recommends:

48. The *EBR* should be amended to require the minister post notice of a proposal to rely on s.30 for public comment.

49. Section 30(2) of the *EBR* should be amended to require that the minister give reasons explaining: (i) how the scope and content of the alternate public participation process is substantially equivalent to the public participation process prescribed by the *EBR*; and (ii) whether and to what extent the environmentally significant aspects of the proposal were or will be considered by the alternate public participation process.

Instruments Implemented in Accordance with a Statutory Decision

The Task Force wanted to ensure that the *EBR*'s public consultation provisions did not apply to a decision made under a statute that contained public participation provisions. Consequently, the Task Force recommended an exception for instruments that are intended to implement a decision made by a tribunal under other statutes which provided public participation opportunities or where a decision has been made under the *Environmental Assessment Act* (*EAA*).[545] The Task Force's recommendations are reflected in sections 32(1)(a) and (b) of the *EBR*.

The Task Force recommended these provisions be included in the *EBR* to prevent "duplication or layering of existing legislative requirements respecting public participation at each step of the approval process."[546] The Task Force wanted to ensure that the applicants for environmentally significant instruments were not put in a position of "double jeopardy."[547] Additional

public consultation for every instrument "would make decision-making unnecessarily complex, costly and promote delay."[548] The Task Force was also concerned about the potential for inconsistent decisions.[549]

Section 32(1)(a) of the *EBR* reflects the Task Force's recommendation in part. This section allows the minister to exempt a proposed instrument from the *EBR*'s public participation requirements if the proposed instrument would be a step towards implementing a project approved by a tribunal under another statute and if public participation opportunities were provided.

Some stakeholders have expressed concerns that the exception provided by s. 32(1)(a) does not necessarily ensure that the environmentally significant aspects of an instrument to implement a project have been adequately assessed. For example, a proposal to obtain an official plan amendment or a rezoning approval under the *Planning Act* for a proposed development would need to consider whether it can be adequately serviced by sewage works. However, the environmental risks and impacts of the sewage works are collateral to the land use planning decision and may not be adequately addressed during a hearing before the Ontario Land Tribunal. Instead, these issues would generally be dealt with through specific terms and conditions in an Environmental Compliance Approval – an instrument issued by the Environment Ministry. In the *Planning Act* example, if the Environment Ministry decides to rely on the s. 32(1)(a) exception, there would be no opportunity for public consultation on the Ministry's decision to issue the Environmental Compliance Approval. Consequently, there is potential that the s. 32(1)(a) exception could be improperly used to shield instruments from the *EBR*'s public consultation requirements.

When the Task Force made its recommendation regarding section 32, it stated that the "[e]vironmental protection values consistent with the purpose of the Environmental Bill of Rights should be injected into the initial stage of the decision-making and then carried forward into the issuance of specific instruments."[550] In other words, the Task Force assumed that the environmental impacts of the project or undertaking would be fully assessed by an independent tribunal, prior to approval.

The wording of section 32(1)(a) does not adequately reflect the Task Force's recommendation. To do so, the LCO recommends that the exception in section 32(1)(a) be amended to require that it only apply where a tribunal has considered:

- The potential environmental impacts from the proposed instrument that is the subject of the exception;
- The mitigative measures to address the potential environmental impacts; and,
- The technical details of the equipment and technology that will be used to implement the mitigative measures.

The LCO notes that the *EBR* does not require the minister to post notice of a proposal to rely on the s. 32(1)(a) exception and obtain public comments before relying on this exception. Nor does the *EBR* require the minister to give reasons and post notice of the decision to rely on s. 32(1)(a) exception.

The LCO believes it would be beneficial to have the minister post notice of a proposal to rely on the s. 32(1)(a) exception for public comment and seek public comments from interested and affected members of the public before deciding to rely on the exception. This would help ensure that the minister is able to make an informed decision as to whether the exception is warranted.

In addition, the LCO recommends the minister should provide notice of the decision to rely on the section 32(1)(a) exception, including reasons for that decision. This would promote transparency and accountability in government environmental decision-making. The LCO notes this recommendation is consistent with the 2021 Ontario Divisional Court decision in *Eastern Georgian Bay Protective Society Inc. v. Minister of the Environment, Conservation and Parks*. In this case, the Court stated that it would be helpful, in future cases, for the Minister to confirm that the decision to apply the s. 32(1)(a) exception, followed a review of the prior proceedings and, in particular, both the scope and content of the opportunities for public participation in those prior proceedings.[551]

The LCO Recommends:

50. Section 32(1)(a) of the *EBR* should be amended to require that it only apply where a tribunal has considered: (i) the potential environmental impacts from the proposed instrument that is the subject of the exception; (ii) the mitigative measures to address the potential and actual environmental impacts; and (iii) the technical details of the equipment and technology that will be used to implement the mitigative measures.

51. The *EBR* should be amended to require the minister provide notice of a proposal to rely on the section 32(1)(a) exception.

52. The *EBR* should be amended to require the minister post notice of a decision to rely on the s. 32(1)(a) decision. The notice of decision should provide reasons, including that the minister has reviewed the prior proceedings, the scope and content of the opportunities for public participation in the prior proceedings, and that the exception meets the requirements in s.32(1)(a).

Environmental Assessment Act

Section 32(1)(b) of the *EBR* provides that the minister may exempt a proposed instrument that is deemed a necessary step to implement a project approved under the *Environmental Assessment Act* (*EAA*).

The *EAA* was enacted in 1975 and established an environmental planning process to identify and assess the environmental implications of major projects. Legal and academic commentators have noted that the *EAA* process has played a

> *…crucial role in encouraging broader thinking and facilitating important transitions (e.g., planning for multi-use forests rather than only for lumber and pulp, working to reduce waste rather than focusing only on new landfills, and expanding energy efficiencies and use of renewables rather than accepting electricity demand growth and building more nuclear plants).*[552]

The Task Force expected that the environmental impacts of instruments would be considered and addressed as part of the *EAA* process. The Task Force noted that the *EAA* provided extensive opportunities for public participation before an undertaking was approved.[553] The Task Force assumed that any subsequent decision to implement an approved project would be substantially compliant with the *EBR*'s public participation requirements.[554] Therefore, to avoid duplication, the Task Force recommended that the issuance of instruments that implement, or are pursuant to an *EAA* decision should not be further subject to the *EBR*.[555]

However, the Environmental Commissioner has observed that the public participation requirements under the *EAA* process are not comparable to those provided by the *EBR*.[556] Since the Task Force report, the environmental assessment regime in Ontario has undergone major legislative reforms. One of the consequences of these changes is that public hearings under the *EAA* have become increasingly rare. Since 1996, only two matters under the *EAA* have

proceeded to a public hearing.[557] The Environmental Commissioner has further noted that the virtual elimination of hearings since 1996 has meant that the important oversight role played by the Board [now the Ontario Land Tribunal] in assessing the adequacy of the proponent's studies is gone.[558]

The Environmental Commissioner has also found that Ontario's environmental assessment process, in many cases, only considers the preliminary planning matters for a project. This has meant that important technical issues are not subject to the *EBR*'s public participation and appeal rights:

> *Under Ontario's EA regime, the public is typically invited to comment on general plans and designs for a project, rather than technical details. Though often a source of intense public interest and concern, many technical decisions (such as scheduling of construction, air emission approvals, constraints on water taking or truck traffic, etc.) tend to be pushed beyond the back-end of the EA process, to be covered by permits and approvals under a variety of other legislation. And perversely, an exemption under the EBR allows proponents to obtain all permits and approvals arising from EA processes without being subject to public comment or appeal rights. Both the ECO and the EA Advisory Panel have recommended that this notorious "section 32" exemption needs amendment, because it inappropriately shrouds environmentally significant decisions from public scrutiny.*[559]

The Environmental Commissioner's 2001/02 Annual Report reviewed the *EAA* exception and concluded that the public participation rights on instruments issued through the *EAA* process were, in many respects, deficient when compared to the *EBR*.[560] Subsequently, in a 2005 Special Report to the Ontario legislature, the Environmental Commissioner recommended that s. 32(1)(b) exception not be utilized unless the proponent could demonstrate that the public consultation on the project was substantially equivalent to the that required by the *EBR*.[561] In the alternative, the Environmental Commissioner suggested s. 32(1)(b) be removed from the *EBR*.[562] The Auditor General has also reiterated the concerns that the Environmental Commissioner has repeatedly raised regarding s. 32(1)(b). In the 2021 Annual Report, for instance, the Auditor General recommended that the Environment Ministry review the exceptions in s. 32 and "align that section with the purposes of the *EBR* Act." [563]

The LCO believes that the Task Force's reasons for exempting certain environmentally significant instruments under the *EAA* were well-founded. The Task Force wanted to ensure that proponents were not required to engage in duplicative public consultation processes. However, since then, as the Environmental Commissioner has noted in several reports, the *EAA* has undergone significant amendments, and opportunities for public participation in the environmental assessment process have greatly decreased. Consequently, the LCO believes that the rationale for the exception is no longer valid and that s. 32(1)(b) of the *EBR* should be revoked.

The LCO Recommends:

53. Section 32(1)(b) of the *EBR* should be revoked.

The *EBR*'s public consultation exceptions generally apply to both projects that are either approved or exempted under the *EAA.* In the 2005 Special Report, the Environmental Commissioner also commented on s. 32(2) of the *EBR,* which allows an exception for instruments that implement undertakings that have been exempted from an environmental assessment under the *EAA*. The Environmental Commissioner stated that while the initial exemption of the project from the *EAA* may be reasonable, further exempting instruments that carry out the undertaking from the *EBR* means "that many important environmentally significant decisions are made without any formal public consultation."[564] The Environmental Commissioner, therefore, suggested that section 32(2) be eliminated to allow these instruments to be subject to the *EBR*.[565]

The LCO notes that the Environmental Commissioner's comments reflect the Task Force's concerns about the *EAA* exemptions. In its report, the Task Force states that exemptions under the *EAA*, which are generally made without advance notice to the public or an opportunity for consultation, should be subject to the public participation requirements under the *EBR*.[566] The LCO agrees and believes that section 32(2) is fundamentally at odds with the public participation requirements under the *EBR*. Therefore, the LCO recommends section 32(2) be revoked.

The LCO Recommends:

54. Section 32(2) of the *EBR* should be revoked.

Public Nuisance

The Task Force acknowledged that political accountability would not always be sufficient to meet the *EBR*'s objectives. Accordingly, they believed the public should have a limited right to sue when governments fail to protect public resources.[567] As a result, the Task Force recommended an incremental liberalization of the standing rule in respect of public nuisance that caused harm to the environment. The Task Force recommended abolishing the common law requirement that a plaintiff suffer "special damages."[568] The Task Force believed, however, that the requirement for a direct personal or pecuniary loss should continue to apply.[569]

These recommendations were enacted in the *EBR*. Section 103 provides that where a plaintiff has suffered direct economic loss or personal injury from a public nuisance, the action is not barred because the Attorney General has not consented to the action or because other persons have suffered loss or injury of the same kind or degree. The Task Force recommended that these incremental reforms to public nuisance be evaluated after a few years to assess their impact on access to justice for environmental claims.[570] This evaluation does not appear to have occurred. The LCO recommends that an evaluation be done in consultation with members of the private bar and other interested stakeholders on whether section 103 has improved access to justice for environmental claims and whether additional reforms are required.

The LCO Recommends:

55. The provincial government should evaluate whether *EBR* s.103 has improved access to justice for environmental claims and whether additional reforms are required.

Harm to Public Resource

Prior to the *EBR*, only the government had the ability to institute civil claims to recover damages against those who had caused harm to public resources.[571] The Task Force wanted this right to be extended to Ontarians so that they could "engage the justice system for protection of a public resource where government fails to meet its responsibility."[572] Accordingly, the Task Force recommended a new civil cause of action for significant harm to a public resource be incorporated into the *EBR* to address instances where the government failed to act. However, the Task Force took a cautious approach by recommending that the new cause of action be limited to significant environmental harm resulting from the contravention of prescribed provincial statutes, regulations, or instruments. As a result, no matter how egregious the environmental harm, the Task Force believed that no cause of action should lie unless it was already being regulated.[573]

Section 84 of the *EBR* implemented this recommendation and creates a limited cause of action for Ontario residents alleging harm or imminent harm to a public resource. Under section 84, Ontarians may sue persons, including corporations. The effect of the provision is to hold government to account only if it was already protecting the public resource but doing so insufficiently.

A court can award a broad range of remedies if a section 84 action is successful, including an injunction to stop the activity causing environmental harm, or an order that the parties negotiate a restoration plan.[574] If the parties cannot agree on a restoration plan, or if the court is not satisfied with the plan, the court can develop a restoration plan with the assistance of court-appointed experts.[575] The court, however, cannot award damages to a plaintiff.[576]

Section 84 includes several limitations, including the precondition that a plaintiff must first pursue an application for investigation with the appropriate government ministry before commencing an action. The policy rationale for this requirement was to ensure that the responsible ministry was first allowed to take appropriate action.[577] The Task Force believed it was necessary for the plaintiff to first attempt to "prod government to meet its responsibility" before bringing a section 84 action.[578] If the ministry refuses to act, or has provided an unreasonable response, the plaintiff could then proceed with a section 84 action.

The *EBR* also provides several defences against a s.84 action, including where the defendant satisfies the court that it complied with an interpretation of the instrument that the court considers reasonable.[579] As one legal commentator has noted, "[t]his defense appears to allow for mistake of law or reasonable but erroneous interpretation of the law, even though courts have not historically accepted such a defense."[580] The *EBR* also recognizes the availability of a due diligence defence for a section 84 action.[581] Thus, if the defendant can establish that all reasonable care was taken to prevent environmental harm, liability can be avoided. Finally, the defendant can also avoid liability if the alleged contravention of an Act, regulation, or instrument was statutorily authorized.[582] In addition to these three specific defences, the *EBR* does not limit other defences which are otherwise available.[583] The broad range of available defences make it challenging for a plaintiff to succeed in a section 84 action.

Surprisingly, section 84(7) of the *EBR* prohibits a plaintiff from bringing an action under s.84 as a class proceeding. This recommendation was not made by the Task Force. In fact, given that the Task Force viewed class proceeding reform as integral to the *EBR*, this provision seems somewhat unusual.[584]

These limitations, coupled with the high costs of litigation and the possibility of adverse costs if an action is unsuccessful, are likely to deter potential plaintiffs from pursuing section 84 litigation. Perhaps not surprisingly, section 84 litigation has rarely been commenced in Ontario. The Environmental Commissioner has expressed concern about the strict test for bringing a s.84 action but has cautioned that given "the current architecture of the Act, any potential amendment to the action in harm to a public resource in s.84 will be very complex and necessarily lead to other changes in related sections of the *EBR*."[585]

The LCO believes that incorporating a statutory cause of action for the right to a healthy environment into the *EBR* is far preferable to rectifying the deficiencies with section 84. As a result, we recommend this section be deleted.

The LCO Recommends:

56. Section 84 of the *EBR* establishing a statutory cause of action for harm to a public resource should be deleted.

13. Other Legal Strategies to Promote Environmental Accountability

The environmental accountability legal strategies discussed so far in this report are not the only contemporary legal accountability strategies considered by the LCO. We also considered whether the "public trust doctrine" and "the rights of nature" are appropriate law reform options.

Public Trust Doctrine

The public trust doctrine is a mechanism for legal accountability that is being increasingly utilized by Canadian litigants in environmental law cases. The doctrine's origins can be traced to ancient Roman law which recognized that the air, running water, the sea, and seashore are communal and available for public use.[586] The doctrine was eventually adopted into English and American common law.[587] The underlying premise of the doctrine is that governments have a fiduciary duty to manage certain natural resources for the benefit of current and future generations.[588] When governments fail to uphold this duty to the public, the doctrine holds that the public should have access to court remedies.[589]

The Task Force and the Public Trust Doctrine

The Task Force considered the public trust doctrine in its report. The Task Force noted that the public trust doctrine was regarded as "the starting point for a power of individuals residents to use our courts to call government to account, if it violated that trust."[590] The Task Force also observed that the doctrine had been included in the *EBR* private member's bill that was introduced in the Ontario legislature in 1989.[591] In fact, virtually all *EBR* private member bills that were introduced over the course of a decade in Ontario included the public trust doctrine.[592] Yet in its report, the Task Force decided to rely on SEVs as the primary mechanism for ensuring government accountability.[593]

SEVs cannot be considered a viable replacement for the public trust doctrine. Muldoon and Lindgren note that while the goals of SEVs and the public trust doctrine may be similar, they differ in some fundamental respects. The public trust doctrine imposes a legal duty on government to protect and manage public resources, whereas SEVs do not.[594] Furthermore, the public trust doctrine can be enforced through the courts, whereas SEVs are subject only to political accountability through reports by the Environmental Commissioner.[595]

The U.S. Experience

A 1892 United States Supreme Court's decision, *Illinois Central Railroad v. Illinois*, is regarded as the foundational case on American public trust law.[596] In that case, the Illinois state legislature had passed the *Lake Front Act*, granting Illinois Central Railroad Company title to a large tract of waterfront lands to build a harbour. The grant included approximately one thousand acres of submerged lands under Lake Michigan which was used by the public for navigation and fishing. Four years later, the Illinois state legislature repealed the Act. Subsequently, the State of Illinois brought an action to determine who owned title to the submerged lands. The central issue was whether the state legislature could repeal the Act granting title of the submerged land to the railroad company. The U.S. Supreme Court upheld the revocation of the grant based on the public trust doctrine. The Court found that while the State held title to the submerged lands, it was held in trust for the benefit of the public.[597] By giving ownership of the submerged lands to the railway company, the State had violated this trust.[598] Consequently, the Court determined the grant was revocable.[599]

In the U.S., the public trust doctrine was initially confined to navigation, commerce and fishing.[600] However, since *Illinois Central*, the scope of the doctrine has been expanded through case law and statute to encompass state parks, wilderness preserves, beaches and wildlife.[601]

Despite the rapid growth of the public trust doctrine in the U.S., legal scholars have cautioned that the benefits of the doctrine are largely procedural. Professor Anna Lund, a law professor at the University of Alberta, has studied both the American and Canadian experience with the public trust doctrine. She maintains that American cases that utilize the public trust doctrine "pose essentially the same question – to what extent can the government dispose of public trust resources in a manner that restricts the public's right to access and use the resources?"[602] Professor Lund asserts that under a "procedural-focused approach," U.S. courts will scrutinize the decision to ensure that it is made by a "sufficiently representative, accountable and open body and that adequate consideration is given to the public trust interests at stake and any less-harmful alternatives. Only in cases of flagrant abuse will the judicial branch strike down the offending decision on substantive grounds." [603]

The Canadian Experience

i) Case Law on the Public Trust Doctrine

While the public rights of navigation and fishing are well established in Canadian law,[604] the courts have not formally adopted the public trust doctrine, notwithstanding many efforts by Canadian litigants to do so.[605]

This is due to several factors, including the challenge of defining the nature of the public trust.[606] This difficulty has been exacerbated by viewing the public trust through the lens of classic trust law – such as the need for certainty of the subject matter of the trust, the beneficiaries, and the objects of the trust – and applying it to ecological resources. The limitation of this approach is reflected in the 1972 decision *Green v. Ontario*, which appears to be the first reported case in Canada to consider the public trust doctrine.[607]

In *Green*, the plaintiff brought an injunction to stop a cement company from excavating sand on a property that had been leased from the Government of Ontario. The terms of the lease expressly allowed the cement company to excavate an unlimited quantity of sand. Two years later, the Province of Ontario, pursuant to the *Provincial Parks Act*, established a provincial park immediately adjacent to the leased lands. Section 2 of the Act provided that "[a]ll provincial parks are dedicated to the people of the Province of Ontario and others who may use them for their healthful enjoyment and education, and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act and regulations."[608] The plaintiff asserted that the excavation activities constituted a breach of the statutory public trust that had been established by section 2 of the *Provincial Parks* Act.

While the case was dismissed on the basis that the plaintiff lacked standing, Justice Lerner also considered the public trust argument. Justice Lerner concluded the lands were not subject to a public trust because the *Provincial Parks Act* allowed the province to increase, decrease, or even close the park.[609] Essentially, since there was no certainty of the subject matter of the trust, Justice Lerner determined that there was no public trust. Justice Lerner also found that the beneficiaries were not readily ascertainable and the discretionary powers afforded under the Act were inconsistent with the existence of a trust.[610] Finally, Justice Lerner remarked that the action was "vexatious and frivolous" because the plaintiff had to have known about the existence of the lease which predated the establishment of the provincial park.[611]

The *Green* decision has been criticized for inappropriately applying classic trust law and principles to environmental law.[612] As one legal commentator observed, the application of classic trust law to the protection of public resources will pose "barriers to claimants seeking to uphold the trust … further muddying the waters of the doctrine."[613]

The Supreme Court of Canada's 2004 decision in *British Columbia v. Canadian Forest Products Ltd.* (*Canfor*) has raised expectations that there may be future judicial recognition of the public trust doctrine in Canada.[614] In *Canfor,* the issue was the proper valuation of damages caused by a fire that swept through nearly 1,500 acres of forest in the interior of British Columbia. The Government of British Columbia sought compensation against Canfor for three categories of loss, i) expenditures for firefighting and forest restoration costs, ii) loss of stumpage revenue for harvestable trees, and iii) the loss of environmentally protected trees. The trial judge awarded damages under the first heading, but dismissed the other two categories of loss.

At trial, the Government of British Columbia had sought compensation in its capacity as a landowner of a tract of forest, but by the time the case reached the Supreme Court of Canada, it asserted that damages for ecological harm were being sought on behalf of the public.[615] The Supreme Court found there was no legal barrier for the Crown to sue for environmental damages on the basis of public nuisance, negligence or other torts such as trespass.[616] However, the Supreme Court stated such a claim would raise "important and novel policy questions."[617] These included the Crown's potential liability for inaction in the face of threats to the environment, and the potential for imposing on private defendants an indeterminate liability for ecological or environmental damage.[618] In addition, the Supreme Court noted that the Government of British Columbia had not advanced this argument at trial and the evidentiary record was insufficient to support the claim for environmental damages.[619] In its discussion on the basis for liability for environmental harm, the Supreme Court referred to the public trust doctrine. The Supreme Court observed that the "notion that there are public rights in the environment that reside in the Crown has deep roots in the common law."[620]

Although the Supreme Court's comments were *obiter*, the *Canfor* decision was regarded as "opening the door' to the further development of the public trust doctrine in Canada.[621] Nevertheless, Canadian courts have remained reluctant to endorse the public trust in subsequent cases, as demonstrated by two recent decisions: *Burns Bog Conservation Society v. Canada (Attorney General) et al.* and *LaRose et al. v. Her Majesty the Queen et al.*[622]

In the 2012 *Burns Bog* case, the Federal Court rejected the plaintiff's claim that the federal government owed a fiduciary or a public trust duty to protect Burns Bog, an ecologically significant area, from potential damage by a highway construction.[623] In granting the federal government's motion for summary judgment, the Federal Court distinguished the case from *Canfor* where the provincial government owned the lands for which environmental damages were being sought.[624] In contrast, the federal government did not own Burns Bog. Consequently, the Federal Court found that there was no basis in law to impose a trust obligation on the

federal government.[625] The Federal Court also noted that Canadian courts have not recognized a public trust duty obligating the federal government to take "positive steps" to protect the natural environment.[626] Finally, the Federal Court rejected the plaintiff's arguments that the federal government owed a fiduciary obligation to the Canadian public or to Burns Bogs itself.[627] The Federal Court of Appeal upheld the decision, indicating that the judge made the correct decision, in resorting to "the basis principles of fiduciary and trust law."[628]

More recently, the public trust doctrine was considered by the Federal Court in the 2020 *La Rose* decision. In that case, the plaintiffs, a group of young Canadians, sought to apply the doctrine in a class action lawsuit that alleged that the federal government's failure to address climate change constituted a violation of their *Charter* rights.[629] The plaintiffs also sought a declaration that the federal government had failed to discharge its public trust obligation to protect air resources. In granting the motion to strike the plaintiff's claim, the Federal Court declared that "the public trust doctrine is a concept that Canadian Courts have consistently failed to recognize."[630] Furthermore, the Court observed that given the breadth of the public trust doctrine, recognition of this principle would not be consistent with the judiciary's incremental development of the common law.[631] The Federal Court reviewed other cases which had considered the public trust doctrine, including *Canfor*, and found that while there is a "notion" that public rights in the environment reside in the Crown, "these authorities do not approach the breadth of the rights and actionable interests that the Plaintiffs claim could exist at common law."[632] The plaintiffs' appeal to the Federal Court of Appeal was not successful in relation to the public trust doctrine.[633]

ii) Canadian Statutes that Recognize the Public Trust Doctrine

Yukon, the Northwest Territories, and Nunavut have explicitly codified the public trust doctrine in environmental legislation.

Yukon's *Environment Act* recognizes that the Government of Yukon is a trustee of the public trust and has a statutory duty to conserve the natural environment in accordance with the public trust.[634] The public trust is defined in the Act as "the collective interest of the people of the Yukon in the quality of the natural environment and the protection of the natural environment for the benefit of present and future generations."[635] Under the Act, any adult resident or a corporate entity can bring an action in Yukon's Supreme Court when there are reasonable grounds to believe that the Government of the Yukon has failed to meet its responsibilities as trustee of the public trust to protect the natural environment from actual or likely impairment.[636] Significantly, the Act removes the classic trust requirements for the need for certainty of the subject matter of the trust and beneficiaries.[637]

The Northwest Territories *Environmental Rights Act* adopted essentially the same definition of "public trust" as the Yukon's legislation.[638] This definition was subsequently adopted in Nunavut as well.[639] Both the Northwest Territories and Nunavut allow residents to protect the public trust by commencing an action against anyone causing environmental harm.[640]

In the few cases that have considered the public trust doctrine in the Territories, the courts' have focused largely on the procedural elements of the case, rather than engaging in a comprehensive or substantial review of the public trust claim.[641] For instance, in the case of *McLean Lake Residents' Assn. v. Whitehorse (City)*, the Supreme Court of Yukon considered whether the Yukon Government failed to fulfill its obligations as a trustee to protect the environment.[642] The McLean Lake Residents Association brought an action that challenged the government's decision to approve a screening report that would validate the construction of a quarry on the McLean Lake watershed. Although the Court discussed the Government's obligation as

a trustee of the public trust to protect the natural environment, its decision hinged on the standard of review. In concluding that the government met its obligation, the Court noted that its task was not to favour one interpretation over another, but to consider whether the decision was supported by reasons. [643]

In Canada, the public trust doctrine has not been endorsed by the courts. Despite the shift in strategy by litigants to avoid classic trust law and to rely on fiduciary law, Canadian courts remain reluctant to embrace the public trust doctrine.[644] As one legal commentator has noted, "[i]f public interest litigants seek to utilize the public trust doctrine successfully, careful crafting will be necessary to establish an approach that the conservative Canadian courts will be willing to … adopt."[645]

In these circumstances, the LCO believes further research and analysis is necessary to determine if the public trust doctrine should be incorporated into the *EBR*.

The LCO Recommends:

57. Further research and analysis is necessary to determine if the public trust doctrine should be incorporated into the *EBR*.

Rights of Nature

In recent decades, the "rights of nature" has emerged as a new approach to protecting the environment.[646] The "rights of nature" doctrine represents a fundamental cultural shift in how we regard nature. It rejects the anthropocentric view of nature as a commodity and emphasizes the interconnectedness and interdependence of ecosystems and humans.[647]

Since 2006, there has been global recognition of the legal "rights of nature" in constitutions, statutes, ordinances and court decisions.[648] However, the idea of nature having inherent rights is not new.[649] It has been historically recognized by other cultures in many parts of the world. Indigenous cultures, for example, "cultivate complex understandings of human responsibilities toward the natural world."[650] A central element of the legal system of many Indigenous cultures is "a set of reciprocal rights and responsibilities between humans and other species, as well as between humans and non-living elements of the environment."[651]

The case for extending legal rights to nature was articulated several decades ago by Christopher Stone, a law professor at the University of Southern California, in his seminal law journal article titled "Should Trees Have Standing?- Towards Legal Rights For Natural Objects." Professor Stone believed that nature should be recognized as having a "legally recognized worth and dignity in its own right, and not merely to serve as a means to benefit us."[652] As a result, Professor Stone maintained that that forests, oceans, rivers and the natural environment as a whole should be granted legal rights.[653] Under this new paradigm, ecosystems would be conferred legal status and entitled to legal representation by guardians who could take legal action to protect the ecosystem from environmental harm.[654]

In February 2021, the rights of nature received formal acknowledgment for the first time in Canada when legal personhood was granted to the Muteshekau shipu (Magpie River) in Quebec. The Minganie Regional County Municipality and the Innu Council of Ekuanitshit passed joint resolutions recognizing the river as having certain fundamental rights, including the right to sue.[655]

The resolutions were passed to prevent environmental degradation of the river by further hydroelectric development.[656]

More recently, on April 19, 2023, a resolution was passed by the Assembly of First Nations, Quebec-Labrador conferring legal personhood on the St. Lawrence River, Canada's second largest river.[657] While it remains unclear whether these resolutions will be upheld in court, the move reflects a growing global trend to grant legal personhood to nature which has occurred in Ecuador, Columbia, India, New Zealand, and the United States.

Proponents of granting legal rights to nature assert that it provides a more effective and robust legal environmental governance model for addressing the global ecological crisis.[658] They maintain that it would liberalize the approach to standing and permit access to the courts when ecological harm has not resulted in personal damages to individuals. In a 1972 U.S. Supreme Court case, *Sierra Club v. Morton*, Justice Douglas, in dissent, acknowledged the advantage of this approach.

> *The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.* [659]

Notwithstanding these developments, the rights-based approach to nature raises several complex issues: How could the wishes of the client be ascertained given that it is impossible to ascertain whether an ecosystem wanted to be preserved or developed?[660] Who would bear the costs for setting up this new legal order? Who would be responsible for appointing the guardian? What is the appropriate scope of the guardian's role and responsibilities? Could the guardian be held potentially liable for the failure to take appropriate action? How would you ensure this new legal framework was recognized by the courts? These are just some of the issues that have yet to be resolved.

Given the legal uncertainties of this novel approach to environmental protection, the LCO believes it is premature to make recommendations regarding the rights of nature. The LCO notes, however, that giving legal rights to nature is gaining global momentum.[661] These developments should be monitored and analyzed to assess the full implications of entrenching the rights of nature into the *EBR*.

The LCO Recommends:

58. Further research and analysis is necessary to determine if the rights of nature should be incorporated into the *EBR*.

Appendix A: List of Recommendations

The Right to a Healthy Environment

1. The *EBR* should be amended to state that every person residing in Ontario has a right to a healthy environment. The right to a healthy environment should be broadly defined to include, but not limited to, the right to environmental quality that protects human health, ecological health, and environmental sustainability.
2. The right to a healthy environment should be enforceable against both government and private actors.

Environmental Protection Actions

3. The *EBR* should be amended to allow a person to commence an environmental protection action in a court of competent jurisdiction against a person who contravenes any provision in a provincial Act, regulation or instrument that causes or is likely to cause significant harm to the environment.
4. The *EBR* should provide that every person residing in Ontario has the right to commence an environmental protection action regardless of whether they are directly affected by the matter.
5. Once the plaintiff establishes a *prima facie* case of significant harm to the environment, or the likelihood of significant harm to the environment, the onus is on the defendant to prove that their action or inaction, did not, or is not likely to result in significant harm to the environment.
6. Compliance with an instrument or a standard should not be recognized as a statutory defence to a RTHE action.
7. The remedies for an environmental protection action should include injunctive relief, declaratory relief, the issuance of an order to negotiate a restoration plan, and any other order the court considers appropriate, but not monetary damages.
8. There should be a one-way costs rule for a plaintiff who brings an environmental protection action.
9. Costs in an environmental protection action should be awarded against the plaintiff only if the court is of the opinion that the action is frivolous, vexatious, or otherwise misused.
10. The *EBR* should be amended to allow a person to bring a judicial review application of a government ministry decision that violates the right to a healthy environment and that causes or is likely to cause significant harm to the environment.

Environmental Justice

11. The *EBR* should be amended to:
    a. Include "environmental justice" in the *EBR*'s purpose section and provide a broad definition of the term.
    b. Require government ministries to consider whether a proposed environmentally significant Act, regulation, policy, or instrument will cause a community to suffer disproportionate exposure to environmental and health hazards.
    c. Make specific efforts to reach out to the community and provide for enhanced public comment rights.
    d. Require government ministries to report regularly on their progress in addressing environmental justice in Ontario.
12. The Environment Ministry should make efforts to gather and combine demographic, geospatial, and environmental data to identify communities within the province that may face disproportionate exposure to environmental and health hazards.

The Purpose of the *EBR*

13. The *EBR*'s purpose section should be updated to reflect other important environmental principles including, but not limited, to the polluter pays principle, the precautionary principle, the environmental justice principle, and the principle of intergenerational equity.

Ensuring Public Participation and Public Accountability

Statements of Environmental Values

14. The *EBR* should require that the provincial government establish a comprehensive and coordinated government-wide strategy describing how the purposes of the *EBR* will be integrated into the environmental decision-making process and to provide periodic progress reports.
15. Ministry SEVs should identify specific goals and targets describing how the purposes of the *EBR* will be considered and applied in the government decision-making process, including an implementation strategy for meeting the targets.
16. Government ministries should provide an annual progress report on their actions and results in meeting the commitments established in their SEVs.
17. The *EBR* should impose a specific duty on ministers to undertake a periodic public review of their SEVs at least every five years to revise and update them as deemed appropriate.
18. Government ministries should be required to explain how SEVs were considered and applied when environmentally significant decisions are made in relation to polices, Acts, regulations, and instruments.
19. The information referenced in recommendation 18 should be included in the notice of decision posted on the Registry pursuant to section 36 of the *EBR*.
20. Section 11 of the *EBR* should be amended to specify that government ministers are required to consider and apply their ministry's SEV when environmentally significant decisions are made in relation to policies, Acts, regulations and instruments.

Office of the Environmental Commissioner

21. There should be a separate stand-alone Office of the Environmental Commissioner.
22. The Environmental Commissioner should be appointed as an independent officer of the legislature and be accountable directly to the legislature.
23. The Environmental Commissioner should only be removable from office by the legislature for cause.
24. The *EBR* should be amended to provide that the Environmental Commissioner has the authority to comment on:
    a. Proposed government bills, regulations, policies and instruments as they relate to the environment.
    b. The implementation of government laws, regulations, policies and instruments as they relate to the environment.
    c. The province's progress in addressing energy conservation, the reduction of greenhouse gas emissions, and environmental sustainability more broadly.
25. Government ministries should provide written responses to the Environmental Commissioner's special and annual reports within a specified timeline.
26. The *EBR* should be amended to require the Environmental Commissioner review the receipt, handling, and disposition of applications for review and applications for investigation.
27. The *EBR* should be amended to provide that the Environmental Commissioner may provide educational programs about the *EBR* to the public; and provide advice and assistance to the public on how to participate in government environmental decision-making processes.
28. The Environmental Commissioner should have the power to access information and records from government ministries that the Environmental Commissioner thinks are necessary to perform their duties under the *EBR*.
29. The Environmental Commissioner should have the power to examine any person under oath on any matter relevant to the *EBR.*

30. It should be an offence for a person: (i) to obstruct the Environmental Commissioner in the performance of their duties under the *EBR*; (ii) to conceal or destroy a document the Environmental Commissioner has requested; (iii) or to make a false statement to, or mislead, or to attempt to mislead the Environmental Commissioner in the performance of their duties under the *EBR*.
31. Any person convicted who knowingly commits an offence under the *EBR* should be liable to a fine or imprisonment for a term of not more than one year, or both.
32. The *EBR* should be amended to require government ministries provide electronic links to proposed instruments and supporting documentation.
33. The *EBR* should be amended to require government ministries to provide electronic links to the text of proposed policies, Acts and regulations once they are approved for public consultation.

Access to Information

34. The *EBR* should be amended to recognize the public's right to reasonable and timely access to information.
35. The public should be allowed to seek a fee waiver of all or part of *FIPPA* fees where the information requested relates to the environment.
36. A government-wide policy should be developed and implemented to ensure proactive disclosure of environmental information.

Application for Review

37. Section 61(2) of the *EBR* which allows a review of the need for a new policy, Act or regulation should be extended to apply to instruments.

Streamlining Processes, Reducing Uncertainty, and Clarifying the Law

Leave to Appeal

38. Government ministries should be required to post an information notice of the decision to undertake a review to consider or reconsider a policy, Act, regulation and instrument and provide the public with an opportunity to provide comments during the review process.
39. Section 38 of the *EBR* establishing a standing requirement to commence a leave to appeal application should be deleted.
40. Section 41 of the *EBR* establishing a leave to appeal test for third parties should be deleted.
41. The deadline for filing an application for leave to appeal should be extended from 15 to 20 days.
42. The use of site-specific standards and the technical standards should be subject to third-party appeal rights under the *EBR*.
43. The EASR regime should be subject to notice and comment and third-party appeal rights under the *EBR*.

Judicial Review and Remedies

44. Section 118(1) of the *EBR* should be amended to recognize judicial review of an administrative decision that violates the right to a healthy environment and that causes or is likely to cause significant harm to the environment.
45. Section 118(2) of the *EBR* should be extended to apply to Acts and regulations.
46. Section 37 of the *EBR* which limits the remedies available on a judicial review should be revoked.

Paramountcy

47. The *EBR* should be amended to include a provision that provides that if there is conflict between the public participation rights under the *EBR* and another statute, the statute that provides the greatest level of public participation governs to the extent of the conflict.

Exceptions to the *EBR*

48. The *EBR* should be amended to require the minister post notice of a proposal to rely on s.30 for public comment.
49. Section 30(2) of the *EBR* should be amended to require that the minister give reasons explaining: (i) how the scope and content of the alternate public participation process is substantially equivalent to the public participation process prescribed by the EBR; and (ii) whether and to what extent the environmentally significant aspects of the proposal were or will be considered by the alternate public participation process.
50. Section 32(1)(a) of the *EBR* should be amended to require that it only apply where a tribunal has considered: (i) the potential environmental impacts from the proposed instrument that is the subject of the exception; (ii) the mitigative measures to address the potential and actual environmental impacts; and (iii) the technical details of the equipment and technology that will be used to implement the mitigative measures.
51. The *EBR* should be amended to require the minister provide notice of a proposal to rely on the section 32(1)(a) exception.
52. The *EBR* should be amended to require the minister post notice of a decision to rely on the s. 32(1)(a) decision. The notice of decision should provide reasons, including that the minister has reviewed the prior proceedings, the scope and content of the opportunities for public participation in the prior proceedings, and that the exception meets the requirements in s.32(1)(a).
53. Section 32(1)(b) of the *EBR* be revoked.
54. Section 32(2) of the *EBR* be revoked.

Public Nuisance

55. The provincial government should evaluate whether *EBR* s. 103 has improved access to justice for environmental claims and whether additional reforms are required.

Harm to Public Resource

56. Section 84 of the *EBR* establishing a statutory cause of action for harm to a public resource should be deleted.

Other Legal Strategies to Promote Environmental Accountability

57. Further research and analysis is necessary to determine if the public trust doctrine should be incorporated into the *EBR*.
58. Further research and analysis is necessary to determine if the rights of nature should be incorporated into the *EBR*.

Endnotes

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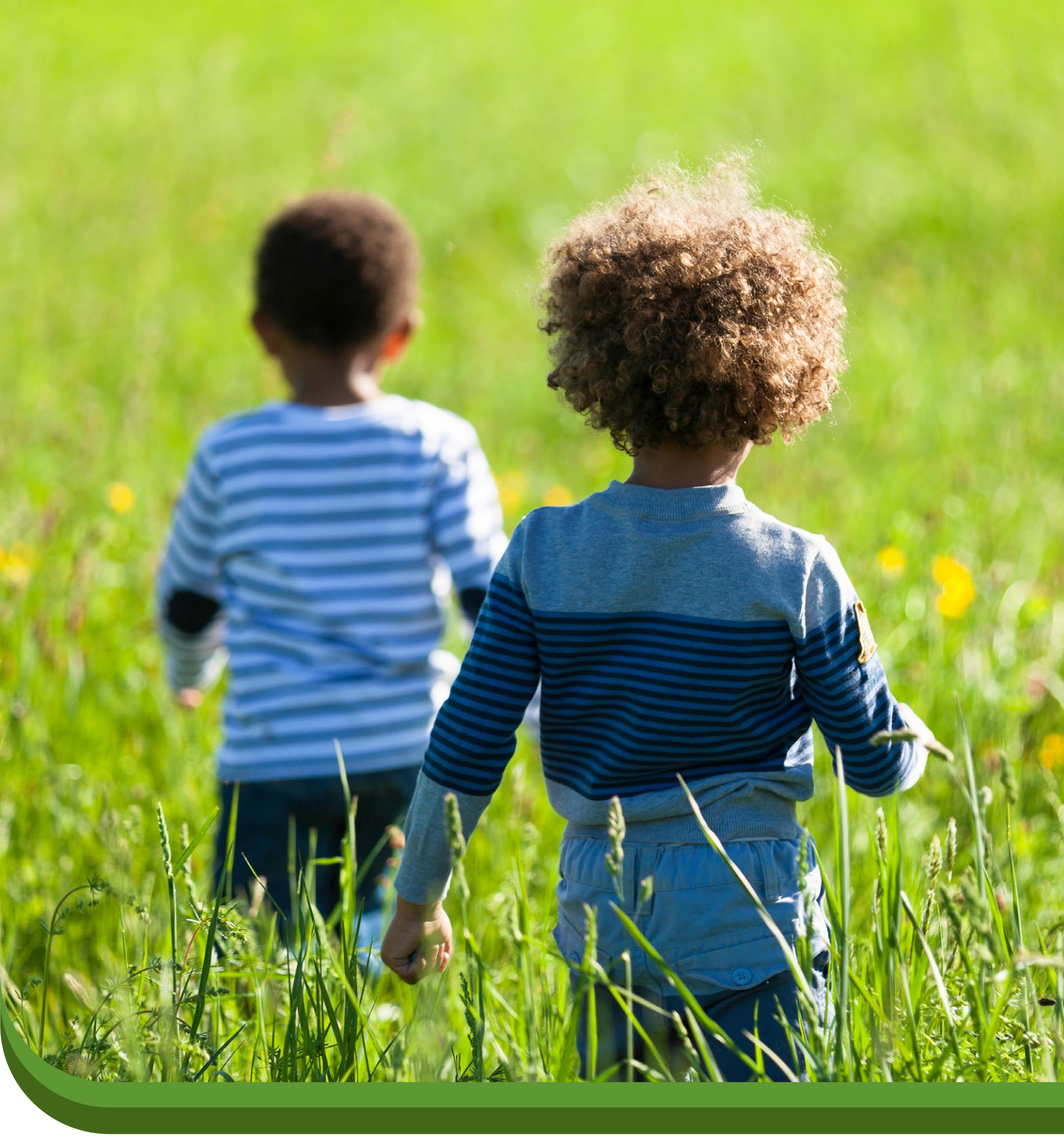

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