ENVIRONMENTAL ACCOUNTABILITY IN ONTARIO

Consultation Paper

September 2022

LCO
CDO

LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

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The Law Commission of Ontario (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.

The LCO evaluates laws impartially, transparently and broadly. The LCO's analysis is informed by legal analysis; interdisciplinary research; contemporary social, demographic and economic conditions; and the impact of technology.

The LCO is located at Osgoode Hall Law School, York University, Toronto.

More information about the LCO is available at www.lco-cdo.org.

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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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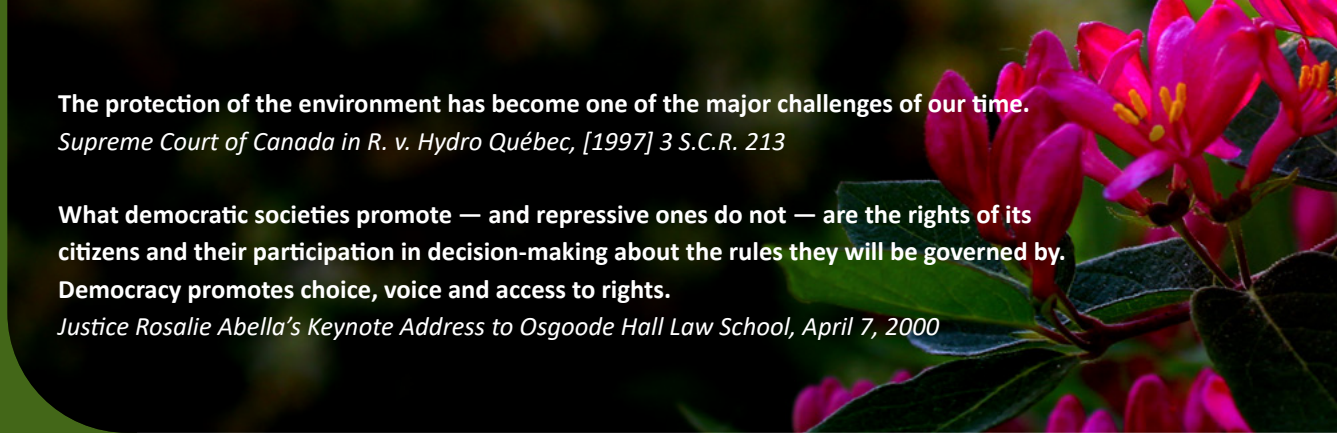

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The protection of the environment has become one of the major challenges of our time.
Supreme Court of Canada in R. v. Hydro Québec, [1997] 3 S.C.R. 213

What democratic societies promote — and repressive ones do not — are the rights of its citizens and their participation in decision-making about the rules they will be governed by. Democracy promotes choice, voice and access to rights.
Justice Rosalie Abella's Keynote Address to Osgoode Hall Law School, April 7, 2000

Introduction

1.1. Introduction to the Environmental Accountability Project

The Law Commission of Ontario (LCO) initiated its Environmental Accountability project to consider legal strategies and law reform options to improve environmental accountability in Ontario.

Broadly speaking, this project considers how well Ontario's ***Environmental Bill of Rights, 1993 (EBR***) is working; whether the ***EBR*** should be updated; and whether Ontario should adopt one or more contemporary environmental accountability strategies, including "environmental justice" initiatives, the "right to a healthy environment," and measures to address Indigenous environmental accountability.

The LCO's Environmental Accountability project will conclude with an independent, evidence-based, and comprehensive analysis of these issues. The LCO's final report will recommend reforms to laws, policies, and/or practices where it is appropriate to do so.

1.2. About the LCO

The Law Commission of Ontario (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.

The LCO is also undertaking projects addressing AI, ADM and the Justice System, the Indigenous Last Stages of Life, consumer protection, and protection orders.

More information about the LCO is available at www.lco-cdo.org.

1.3. Catalysts for Reform

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

The ***EBR*** was enacted over 25 years ago. Since then, the environmental, policy, and legal landscape in Ontario has changed considerably. New issues have emerged, including important developments in the relationship between the Crown and Indigenous Peoples; the growing recognition of environmental justice; and the adoption of the right to a healthy environment by most member states of the United Nations. These new 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.

The section below summarizes the major catalysts driving the LCO's project.

1.3.1. Reconsidering the Effectiveness of the Environmental Bill of Rights

The preamble of the ***Environmental Bill of Rights, 1993*** (***EBR***) states that:

> *… [t]he people of Ontario have as a common goal the protection, conservation, and restoration of the natural environment for the benefit of present and future generations.*[1]

The ***EBR***'s preamble further 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." Thus, an underlying premise of the ***EBR*** is that the public and the government share responsibility for protecting the environment.

The ***EBR*** sought to achieve its objectives by enhancing public participation rights in government decision-making process on environmental matters. It was anticipated that this would improve accountability and transparency leading to better environmental outcomes. During the legislative process to enact the ***EBR***, the then Environment Minister, Bud Wildman, declared:

> *…the legislation is a landmark bill which will meet the needs of the public, industry, environmental groups and the government. We see this as an important building block in the creation of a sustainable economy that will set new and higher standards of environmental protection both now and for years to come.*[2]

Reports by the Auditor-General of Ontario, the Commissioner of the Environment (Environmental Commissioner), and recent court decisions, however, raise serious concerns about how participatory rights under the ***EBR*** are being implemented. These reports document non-compliance by government ministries, the erosion of the scope of the ***EBR*** through changes to the approvals process, a lack of public access to information, and other factors which suggest that the ***EBR*** may be failing to live up to its intended purpose.

1.3.2. Pressing Environmental Issues

Since the ***EBR*** was enacted over twenty-five years ago, environmental issues have remained at the forefront of public concerns, particularly with respect to climate change. A report released this year by the 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 that "[w]ithout urgent, effective and equitable mitigation actions, climate change increasingly threatens the health and livelihoods of people around the globe, ecosystem health and biodiversity."[3]

In the Ontario context, the impacts of climate change can no longer be regarded as a remote threat.[4] Climate change is causing extreme weather, damaging property, and has caused millions of dollars in insurance claims.[5] Temperature variability has caused damage to the boreal forests in Northern Ontario and made evergreen trees lose their "cold hardiness."[6] Climate change has impacted Ontario's crop production and altered the types of crops that can be grown.[7] This, in turn, will impact Ontario's food security, including production, access, and price.[8] The rising water temperature in Ontario lakes and rivers will affect cold-water fish potentially causing significant loss of lake trout and brook trout.[9] The increase in temperature is causing:

> *…milder winters, hotter summers, and moisture stress which "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.*[10]

Ontarians' health, particularly the most vulnerable, 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."[11] The Ontario Ministry of the Environment, Conservation and Parks (Environment Ministry) has noted Indigenous communities will be impacted given that the pace of climate change is anticipated to be faster in the Far North than Southern Ontario.[12]

The province is also facing other pressing environmental challenges. The Auditor General of Ontario, for example, concluded in recent reports that the province is failing to protect species at risk,[13] was not taking sufficient action to prevent and reduce the adverse impacts of hazardous spills[14] and had not taken concrete action to reduce waste generation in the industrial, commercial, and institutional sectors.[15]

Polling data reveals that Canadians and Ontarians are concerned about the state of the environment.[16] A majority of Ontarians believe temperatures are hotter due to climate change and 67% say that the forest fires in 2021 have made them feel that climate change is a more urgent issue that needs to be addressed.[17] These polls underscore the strong public interest in environmental protection and suggest the need for strong accountability structures with respect to government performance.

1.3.3. The Need to Consider Emerging Strategies to Ensure Environmental Accountability

Since the enactment of the ***EBR,*** several new or more widely recognized environmental accountability strategies have been adopted or are under development in Canadian provinces and internationally. In many respects, these strategies represent fundamental reconsiderations or restructuring of the ***EBR'***s public participation model. These strategies include:

Reconciliation and Indigenous Legal Orders

The Task Force that developed the ***EBR*** did not have Indigenous representation, nor was there discussion of public participation and accountability mechanisms as they relate to Indigenous communities. Moreover, the ***EBR*** predates important development in the relationship between the Crown and Canada's Indigenous Peoples, including but not limited to the Government of Canada's 2021 enactment of the *United Nations Declaration on the Rights of Indigenous Peoples Act* (*UNDRIP Act*).[18] As a result, the ***EBR*** did not reflect wider developments or recognition of Indigenous rights and reconciliation between Indigenous Peoples and the Crown.

Environmental Justice

Environmental justice considers how environmental risk and harm affect members of society differently and their access and influence over environmental decision-making.[19]

At the time of the enactment of the ***EBR***, environmental justice was not a prominent concept in Canada and was not addressed in the Task Force report. Environmental justice has since become an important social movement and a theoretical framework for assessing whether environmental risks and burdens are distributed fairly in society.[20]

Right to A Healthy Environment

The "right to a healthy environment" has become an increasingly prominent strategy to promote environmental accountability.

The ***EBR's*** preamble includes a reference to a right to a healthy environment but does not provide a substantive right to a healthy environment that can be enforced by the public.

There have been various proposals over the years to include a right to a healthy environment in Canada's Constitution, but these efforts have not come to fruition. Several Canadian provinces, including Quebec, Yukon, the Northwest Territories and Nunavut have legislated limited environmental rights.[21]

More recently, in February 2022, the Federal Government introduced Bill S-5, *Strengthening Environmental Protection for a Healthier Canada Act*, which includes a right to a healthy environment.[22] However, like the ***EBR***, Bill S-5 does not provide a remedy for a breach of the right and is unenforceable in court.[23]

1.4. Organization of the Consultation Paper

The Consultation Paper asks two sets of questions. First, the paper asks about potential reforms to the ***EBR***. Second, the paper asks 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 sequence of questions in the Consultation Paper does not reflect the LCO's priorities or assumptions about the project. The LCO is seeking input and advice on all questions equally. The LCO acknowledges that the relationship between the ***EBR,*** environmental justice, the right to a healthy environment, and Indigenous legal orders is complicated. For example, one's views about a "right to a healthy environment," could have important implications for the scope of the ***EBR.***

Similarly, readers will note that some consultation questions are technical and detailed, whereas others ask about general principles. Law reform projects (and consultation papers specifically) invariably need to strike a balance between these perspectives. Readers may address all questions or concentrate their responses on one or more areas.

Finally, readers will know that environmental accountability is a complex, controversial, and politicized subject. The LCO is committed to bringing its rigorous, evidence-based and non-partisan approach to this project. The LCO's goal is to move beyond the rhetoric and ask hard but fair questions about Ontario's experience; the desirability, feasibility, and enforceability of reasonable law reform options; and how environmental accountability measures might be balanced against competing rights and economic interests.

The LCO encourages input from all Ontarians representing a full spectrum of political and ideological views and having a range of environmental and economic interests.

This Consultation Paper was prepared by the LCO following considerable research and informal consultations with approximately 40 individuals and groups representing a broad cross-section of perspectives.

A complete list of consultation questions is attached as Appendix A. A glossary of frequently used terms is attached as Appendix B.

A description of the LCO's consultation process is below.

1.5. Relationship to Other Environmental Accountability Initiatives and Reports

The LCO's Environmental Accountability project is the latest of a series of analyses and evaluations of environmental accountability issues in Ontario. Most notably, the Environmental Commissioner has produced a comprehensive series of reports and recommendations assessing the impact and operation of the ***EBR*** since its inception in the early 1990's.

The Canadian Environmental Law Association (CELA), a community clinic funded by Legal Aid Ontario, has also produced reports evaluating environmental laws in Ontario, as have representatives for industry groups and many others.

Finally, many Indigenous communities across Ontario and Canada have developed sophisticated analyses, frameworks, and legal orders for ensuring environmental accountability.

The LCO's objective in this project is not to recreate these reports, but to build on them. Unlike many organizations participating in environmental accountability discussions, the LCO does not advocate on behalf of stakeholders or a particular viewpoint. Our success depends on meaningful engagement with individuals, communities, and organizations across Ontario. The LCO works with legal professionals and organizations, non-governmental organizations (NGOs), industry associations, academics, governments, communities, and the public.

1.6. Project Deliverables, Organization, and Funding

This project will produce an independent, evidence-based, and comprehensive analysis of environmental accountability issues. The LCO's final report will recommend reforms to laws, policies, and/or practices where it is appropriate to do so.

The final report and accompanying materials will be distributed widely. The LCO will also produce a range of user-friendly, accessible, and web-based materials that will explain the project, final report, and recommendations.

All project materials will be available on the LCO's dedicated project website at: [insert project page].

This project is being led by the LCO with the support of LCO's Environmental Accountability Advisory Group. A list of Advisory Committee members is available on the LCO website here.

1.7. Consultation Process and Next Steps

The LCO believes that successful law reform depends on broad and accessible consultations with individuals, communities, and organizations across Ontario.

The release of this Consultation Paper launches an intense period of public consultations. During this period, the LCO will consult with a broad array of stakeholders, including lawyers and legal organizations, environmental NGOs, industry representatives, academics, Indigenous communities, government and justice system leaders, and individual Ontarians interested in environmental issues.

To this end, the LCO will be organizing several consultation processes over the next several months:

Written Submissions

The LCO encourages written submissions. Written submissions can be sent to the LCO's general email address at LawCommission@lco-cdo.org.

The deadline for written submissions is November 25, 2022.

The LCO is committed to sharing ideas and building constructive dialogue. Accordingly, the LCO expects to post written submissions on our project webpage, subject to limited exceptions. Individuals or organizations wishing to provide a written submission may want to contact the LCO for further information prior to their submission.

Meetings/Forums/Workshops/Partnerships

The LCO expects to organize a wide range of meetings, forums, or workshops on environmental accountability issues over the next several months. The LCO is strongly committed to partnering with interested organizations and stakeholders to develop consultation initiatives. Individuals or organizations interested in working with the LCO are encouraged to contact our Project Lead.

Project updates and events will also be posted on the LCO's project page:
https://www.lco-cdo.org/en/our-current-projects/

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Background

Section 2 of the paper provides background information on law reform issues the LCO is likely to consider in this project. This section includes:

- A description of the ***EBR***.
- A description of political versus legal models of environmental accountability.
- A brief history of environmental accountability in Ontario.
- The Task Force on the Ontario Environmental Bill of Rights.

Section 3 of the paper evaluates the effectiveness of the ***EBR***. Section 4 introduces several new environmental strategies, priorities, and issues that have emerged since the enactment of the ***EBR*** in 1993.

2.1. What is the *EBR*?

The ***EBR*** is a complex statute that imposes certain governmental obligations and confers new environmental rights for Ontarians.[24]

The preamble to the ***EBR*** asserts that "the people of Ontario have a right to a healthful environment."

The purposes of the ***EBR***, stated in section 2 of the Act, are as follows:

> *(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.*[25]

The ***EBR*** only applies to government ministries and statutes that are prescribed or in other words "caught by" the ***EBR.***[26] There are currently 16 prescribed ministries under the ***EBR*** which must meet the following requirements under the Act:[27]

- Notify and consult the public through a website known as the Environmental Registry of Ontario (Registry) when developing or changing policies, laws, regulations, and issuing instruments (i.e., permits, licenses, approvals and orders) that may have a significant effect on the environment;
- Develop and implement a "Statement of Environmental Values" (SEV) that explains how the purposes of the ***EBR*** will be considered when making decisions that may significantly affect the environment;
- Respond to applications from Ontarians asking for the review of laws, policies, regulations, or instruments; and
- Investigate alleged contraventions of environmental laws, regulations, or approvals.

The ***EBR*** established new environmental rights for Ontarians and removed some of the pre-***EBR*** barriers for individuals seeking redress for environmental harm. These include:

- The right for individuals to seek leave to appeal decisions of certain instruments which are posted on the Registry. [28]
- Removal of some of the restrictions for bringing a public nuisance action; and[29]
- A "whistleblower" provision that protects employees from reprisals by employers for complying or seeking to enforce environmental statutes.

Finally, 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.[30] To ensure independence and neutrality, the Environmental Commissioner was to be appointed by the Legislature, not the provincial government.[31]

The Environmental Commissioner was required to provide annual reports to the Legislature on the operation of the ***EBR***.[32] 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***.[33] The Environmental Commissioner was given broad powers, including responsibility for providing educational programs to the public about the ***EBR*** and giving advice and guidance to members of the public who wanted to participate in the environmental decision-making process.[34] Notably, the Environmental Commissioner was not provided with any direct enforcement mechanisms, such as issuing orders, to ensure compliance with the ***EBR***.[35]

Importantly, the participatory rights under the ***EBR*** do not guarantee that the public comments will necessarily be accepted and accommodated in government decisions.[36] The ***EBR***, however, requires government ministries to consider relevant comments in their decision-making process.[37] 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.[38]

2.2. Political vs. Legal Models of Environmental Accountability

In broad terms, the ***EBR*** is based on a public participation model of environmental accountability. Public participation in environmental decision-making is a central feature of environmental regulatory regimes in many parts of the world.[39]

In the Canadian context, since the late 1960s and 1970s, there has been a dramatic increase in the use of participatory measures in federal and provincial environmental legislation.[40] These developments are also reflected at the international level, most notably in the adoption of the Aarhus Convention, a multilateral environmental agreement signed by the European Union and numerous other countries.[41] The Aarhus Convention grants the public rights regarding access to information, public participation, and access to justice in the environmental decision-making processes by governments. Public participation is now widely accepted as essential to ensure democratic accountability and legitimacy of government decision-making. [42]

Prior to the ***EBR***, environmental decision-making by the Ontario government was characterized by a lack of clear accountability mechanisms and citizen engagement. Almost five decades ago, one commentator observed:

> *The administrative agency, whether it is, for example, the Ontario Ministry of Environment or the Ontario government's Planning Branch, is admittedly an essential element in our society. Someone must take the initiative for planning, must set standards, supervise the granting of permits, and see that regulations are enforced. Yet, all too often, the citizen has been left out of the decision-making, rule-setting process. In many cases, the citizen is actually forbidden to take part.*[43]

Similar concerns had been expressed earlier in the United States by 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 stated:

> *The administrative agency is neither sinister nor superfluous; indeed, it is an essential institution to regulate the myriad daily activities which require that standards be set, permits granted, and routine rules enforced. But it has become more than merely a useful supplement to private initiatives and participation in the government process. It has supplanted the citizen as a participant to such an extent that its panoply of legal strictures actually forbid members of the public from participating even in the complacent process whereby the regulators and the regulated work out the destiny of our air, water and land resources.*[44]

Sax's premise was that embedding citizen suits into legislation was the most effective mechanism for ensuring environmental protection. The courts were regarded as the preferred institution to resolve environmental disputes because they were immune from political pressure.[45] 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.[46] According to Sax, protection of the environment and natural resources could only be achieved by shifting the balance of power from bureaucrats to judges.[47] The pioneering American statute, the ***Michigan Environmental Protection Act*** (***MEPA***), drafted by Sax and passed in 1970, reflected his theory on the need for courts to protect the environment.[48] ***MEPA*** has since served as the model for citizen suit provisions in numerous U.S statutes and other countries, including Canada.[49]

At the time, a key concern expressed about establishing environmental rights for citizens was that it could open the floodgates to litigation.[50] However, a study of the impact of ***MEPA*** found the Act had not overburdened the courts as opponents had feared.[51] 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."[52] 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."[53]

2.3. History of Environmental Rights in Ontario

Environmental accountability in Ontario was influenced by developments in the United States.[54]

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.[55] The public was not afforded any opportunity to provide input into the government's decision to issue permits, licenses, or orders.[56] 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 would be impacted.[57] Formal consultation on regulations and policies was rare and occurred on an ad-hoc basis at the discretion of the responsible minister.[58]

This approach increasingly came to be viewed by Ontarians as lacking in political legitimacy.[59] 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.[60] Furthermore, there was a growing recognition that the public's knowledge and awareness of local conditions, which had previously

been regarded as irrelevant, was just as essential to environmental decision-making as scientific expertise.[61]

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 should have the right to a healthy environment and that the government has a corresponding duty to protect the environment from degradation.[62] These provisions were to be supported by other mechanisms, including:

- Access to government information.
- An environmental ombudsman.
- Liberal standing rules.
- Restrictions of cost awards against plaintiffs for environmental cases.
- Shifting the burden of proof in environmental litigation.
- Expanded rights to seek judicial review.[63]

2.4. The Task Force on the Environmental Bill of Rights

In December 1990, the then Minister of the Environment, Ruth Grier, established an Advisory Committee on the Ontario Environmental Bill of Rights. The Advisory Committee included stakeholders from labour, business, environmental groups, First Nations, municipalities, agriculture and staff from various ministries. The Advisory Group was asked to examine the basic principles of an Environmental Bill of Rights and how they could be applied in Ontario. [64]

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, composed of representatives from business, government, and environmental groups, was directed by its terms of reference to achieve consensus on its recommendations.[65]

The Task Force 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.[66] 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.

The EBR was proclaimed in February 1994. At the time, the Act was hailed as "one of the most comprehensive environmental access to justice laws in Canada."[67] The ***EBR*** established important mechanisms to improve public participation, transparency, and accountability in environmental decision-making. The Act did not establish a substantive right to a healthy environment but 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 the requirement of government ministries to develop and implement a Statement of Environmental Values (SEV), discussed below.

3

Evaluating the *EBR*

The ***EBR*** came into effect almost thirty years ago. The passage of time means the ***EBR*** can be evaluated against its original objectives to assess its effectiveness in promoting environmental accountability for Ontarians.

Reports by independent legislative officers and recent court decisions suggest that provincial government ministries have failed to comply with the ***EBR***'s requirements and its intended objectives have been undermined. These evaluations raise important questions about the viability of the political accountability model underlying the ***EBR***.

3.1. Non-Compliance with the *EBR*

The most comprehensive evaluations of the ***EBR*** have been provided by the Office of the Environmental Commissioner of Ontario. The Environmental Commissioner, whose office was established in the original ***EBR,*** has a statutory responsibility to oversee the operation and implementation of the ***EBR***. The Environmental Commissioner has fulfilled this responsibility through annual and special reports to the provincial legislature.

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."[68] 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.*[69]

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 numerous companies' Permits to Take Water.[70]

Notwithstanding these positive comments, 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.[71] The Environmental Commissioner also expressed concern about the public's access to information on the Registry.[72]

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;[73] were not providing Ontarians with adequate time, information, and opportunity to comment;[74] and were failing to assess and report the environmental effects of proposals that were posted on the Registry.[75]

Over the years, the Environmental Commissioner and others have expressed these or similar concerns repeatedly, raising significant questions about the effectiveness of the legislation.

3.2. Narrowing the Scope of the *EBR*

Since its enactment, the scope of the ***EBR*** has been narrowed through changes to the approvals process.

For example, in 2010, the Environment Ministry commenced a Modernization of Approvals initiative to expedite its environmental approvals program. This initiative included two significant changes to environmental approvals. These changes have had a significant impact on public participation rights under the ***EBR.***

The first change modified the process for obtaining certain environmental approvals. As a general matter, approval from the provincial Environment Ministry is 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 instruments known as Environmental Compliance Approvals. These instruments usually include legally binding conditions intended to prevent and minimize adverse environmental impacts.

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 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.

The Modernization of Approvals initiative modified this process by introducing a self-registration process for certain activities deemed to be less complex and a lower risk to the environment. 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 was that the new two-tiered approval process exempted the self-registration program from the ***EBR***'s public consultation requirements and eliminated third-party appeal rights for these approvals, as appeal rights are contingent upon posting instruments on the Registry.

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.[76]

A 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 are heard regarding specific facilities.[77]

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.[78] In her 2016 report, the Auditor General noted:

> *In most cases, the Ministry must post the details of individual applications for Environmental Approvals 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.*[79]

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.[80]

3.3. Court Decisions

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

The first case in 2019, ***Greenpeace v. Ontario (Minister of the Environment)*** (***Greenpeace #1***), considered the Government of Ontario's cancellation of the province's cap-and-trade program, aimed at reducing greenhouse gas emissions, without undertaking public consultation.[81]

After the Applicants commenced a judicial review of the Environment Minister's decision, the government passed the ***Cap-and-Trade Cancellation Act*** which had the effect of repealing the regulation that was the subject of the court challenge.[82] The new Act also 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. However, 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.[83] In a strongly worded dissent, Justice Corbett observed that:

> *…[a] close look at that [privative] 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.*[84]

"In a democracy characterized by the Rule of Law," Justice Corbett declared, "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."[85]

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 power to issue a Minister's Zoning Order under the ***Planning Act***.[86] These amendments, included in Bill 197, the ***COVID-19 Economic Recovery Act***, were passed without public consultation.[87] 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.[88] However, 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.*[89]

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***.[90]

These court decisions were followed by a further apparent non-compliance in 2022 when the Ministry of Municipal Affairs and Housing posted notice of Bill 109, the ***More Homes for Everyone Act, 2022***, on the Registry but enacted legislation before the comment period expired, thereby obviating the opportunity for public comments.[91]

4

Emerging Models of Environmental Accountability

The ***EBR's*** public participation model was considered ground-breaking at the time. Section 3 outlined many of the issues and questions about the effectiveness of this model and the operation and scope of the ***EBR*** that have arisen in the last thirty years.

These ***EBR*** questions and issues, while important, do not address several contemporary and potentially-far-reaching law reform questions or strategies to improve environmental accountability in Ontario. For example, since the enactment of the ***EBR,*** there have been several new (or at least more widely recognized) environmental accountability strategies that have been adopted or are under development in Canada, other provinces, and internationally. In many respects, these strategies represent fundamental reconsiderations or restructuring of the ***EBR***'s public participation model.

Most notably, the Task Force lacked Indigenous representation and did not discuss accountability mechanisms as they relate to Indigenous Peoples. Nor does the ***EBR*** acknowledge Indigenous legal orders or perspectives as a principle, or even criteria, governing environmental accountability in Ontario.

Similarly, wider questions regarding environmental justice, the right to a healthy environment, and the rights of nature were not addressed in the ***EBR*** or the Task Force report.

In light of these developments, the LCO believes that any contemporary consideration of environmental accountability should ask questions about whether these law reform options are appropriate or viable in Ontario today.

5

Consultation Issues – Environmental Bill of Rights

As noted earlier, this Consultation Paper asks two sets of related questions.

First, the paper asks about potential reforms to the ***EBR***. Some of these questions are far-reaching, others are technical. Many of these questions are directed to the operation and effectiveness of the ***EBR***'s public participation model.

Second, the paper asks potentially more far-reaching and challenging questions, including new principles to govern environmental accountability in Ontario and 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 sequence of questions does not reflect the LCO's priorities or assumptions about the project. The LCO is seeking input and advice on all questions equally.

5.1. Political versus Legal Accountability

The Task Force articulated several goals for the ***EBR*** but deemed enhancing government accountability for environmental decision-making the most important.[92] At its core, the ***EBR*** was designed to address "the predicament created when government does not meet its share of the responsibility" to protect the environment satisfactorily."[93]

In designing the ***EBR***, the Task Force largely relied on the political accountability model.[94] It described this approach as "one that does not use the courts to control government conduct but rather empowers individual residents of the province to play a role in protecting the environment."[95] This meant that the ***MEPA***-type access to the courts was not adopted. Instead, the Task Force opted to establish procedural rights to enhance public participation in the government decision-making process. Access to the courts was left as "an exercise of limited last resort."[96]

The tension between political accountability and legal accountability is a recurrent theme in the ***EBR***. Paul Muldoon and Richard Lindgren, co-authors of the text, ***The Environmental Bill of Rights: A Practical Guide,*** have noted that both models have limitations:

> *…[T]he judicial model could transfer too much power from elected officials in legislatures to unelected judges in the courts…*
>
> *In effect, the courts could become the focus of environmental decision making, and this could lead to a more costly, time-consuming system because of court delays and make the outcome of disputes far less predictable. Although the EBR was designed to make environmental decision making accessible, reliance on the courts would make it an exclusive club for those who could afford lawyers and endure the complex nature and delays of litigation.*

The political accountability model also has limitations. "Ballot-box accountability" is often more theoretical than real. While elected political may at times be more accessible, political accountability may not be effective in all instances. In addition, it is the courts' role in a democratic society to oversee the workings of government, to enforce laws, and to reconcile societal values in a fair and impartial manner.[97]

The ***EBR***'s emphasis on political accountability has meant opportunities for the public to seek legal accountability for government actions (or inactions) are limited. At the same time, the failure of government ministries to comply with the ***EBR*** raises important questions about the continued viability of the political accountability model.

Consultation Question 1:

Does the EBR's emphasis on political accountability remain appropriate, or should there be greater emphasis on legal accountability?

If you believe the EBR should include legal accountability mechanisms, should that accountability focus on ministries' compliance with EBR procedural requirements, or should legal accountability be broader, potentially including provisions to ensure the EBR achieves its stated purpose?

5.2. Statement of Environmental Values

5.2.1. Scope

The Task Force recommended that each government ministry be required to prepare a Statement of Environmental Values (SEV) that explained how the ***EBR*** purposes would be applied whenever that ministry makes environmentally significant decisions. The Task Force also recommended that each ministry should be required to explain how the SEV would be integrated with other considerations in its decision-making, such as social, economic and scientific considerations.[98] In essence, the Task Force expected the SEVs would operate both as a mission statement and a strategic plan for government ministries by establishing specific goals and the means to achieve them.[99] The Task Force believed that the SEVs would provide the best method of ensuring that the purposes of the ***EBR*** were carried through to influence government decision-making on the environment.[100]

It is important to note that the Task Force did not expect the SEVs would ensure that the ***EBR***'s purposes were embodied in ministries' decisions.[101] Rather, the SEVs were intended to ensure that the ***EBR's*** purposes were considered by ministries in their decision-making process.[102] The goal of the SEVs, therefore, was to create a "new attitude" in government when environmentally significant decisions were made."[103]

The implementation of the SEVs have been criticized by courts, the Environmental Commissioner, and the provincial Auditor General.

Section 11 of the ***EBR*** states that the minister shall take every reasonable step to ensure that the SEV is considered whenever decisions that might significantly affect the environment are considered. The interpretation of section 11 of the ***EBR*** on government decision-making has been a matter of considerable debate.

The Environment Ministry has taken the position that the SEVs are intended to guide the development of Acts, regulations and policies, but not instruments. The Ministry's position was the subject of a challenge

before the Ontario Divisional Court in the 2008 case of ***Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)***.[104] In that case, the Court was asked to determine whether the Environment Ministry's SEV applied to instruments issued by the Ministry. The applicants, a group of residents and environmental groups, asserted that two decisions of the Environment Ministry granting waste and air approvals to a cement manufacturing facility were unreasonable because they did not apply the principles in the Ministry's SEV. Specifically, the decision failed to take an ecosystem approach, which included an assessment of the cumulative impacts of emissions and a precautionary approach, regarding the uncertainty of risk.[105]

The Ministry argued that the SEV was intended to be a mission statement that applied to the development of legislation, but not instruments.[106] In fact, the Ministry's SEV was drafted to specifically restrict its application to Acts, regulations, and policies.[107] However, the Divisional Court, in a unanimous decision, rejected the Ministry's interpretation and held that the SEV applied to instruments. The Court noted that this interpretation was consistent with the Environmental Review Tribunal's past jurisprudence on SEVs.[108]

The Environmental Commissioner and provincial Auditor General have also been critical of provincial ministries' failure to implement the SEVs. In 2017, the Environmental Commissioner noted that the SEVs have only been "minimally effective" in changing environmental outcomes due, in part, to the failure of ministries to share with the public how the SEVs were considered in decision-making.[109] The Environmental Commissioner stated that if the ministries publicly shared this information, the public would be able to hold ministries accountable for how the SEVs were considered in decision-making."[110] In 2021, the Auditor General similarly concluded that government ministries could not consistently demonstrate that they used their SEVs in their environmental decision-making process.[111]

There are several potential law reform options for improving SEVs. For example, SEVs are somewhat analogous to the sustainable development strategies (SDSs) that federal departments and agencies are required to develop under the 1995 amendments to the ***Auditor General Act.*** Federal SDSs are more detailed than ***EBR*** SEVs. It is notable, however, that assessments of SDSs impact and effectiveness have been mixed at best.[112]

SEVs could also potentially be strengthened as an accountability tool by:

- Amending the ***EBR*** to require that the SEVs be reviewed and updated within a specified time.
- Amending the ***EBR*** to require that the SEVS be considered and applied when ministries make environmentally significant decisions regarding a policy, Act, regulation, or instrument.
- Requiring completion and posting of a SEV consideration form on the Registry be undertaken whenever a notice of final decision is posted on the Registry.

Consultation Question 2:

Should SEVs be strengthened to improve the provincial government's environmental accountability? For example,

• Should Ontario adopt the model of sustainable development strategies in the Federal Sustainable Development Act?

• What other measures are required to ensure that the SEVs are strengthened and integrated into environmental decision-making?

5.3. Judicial Review and Remedies

Section 118(1) of the ***EBR*** contains a broad privative clause that restricts judicial review of government actions.[113] Under the ***EBR***, judicial review is only permitted where the Minister or his delegate fails to comply in a "fundamental way" with the public participation requirements under Part II relating to instruments.[114] The ***EBR*** does not specify what constitutes a "fundamental" non-compliance. Muldoon and Lindgren have suggested that a failure to post a notice on the Registry, the failure to comply with the mandatory time requirements for public comment, improperly invoking the emergency powers, or a failure to provide adequate notice are circumstances where there may be grounds to seek judicial review.[115]

It is important to note judicial review under the ***EBR*** can only be sought for instruments, and not the SEVs. The Task Force specifically rejected judicial review of the SEVs.[116] Instead, the Task Force concluded that the SEVs could be enforced through public reporting on the government's compliance with the ***EBR*** by the Environmental Commissioner.[117]

Section 37 of the ***EBR*** places further restrictions on the scope of judicial review under the ***EBR***. This section 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.[118] 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***.

There are several law reform measures that could potentially improve legal accountability under the ***EBR***. These include:

- Expanding the scope of judicial review to include the SEVs.
- Modifying or repealing the privative clause in section 118(1).
- Modifying or repealing section 37.

Consultation Question 3:

Are the EBR's restrictions on judicial review and restricted remedies appropriate? For example,

• Should the privative clause in section 118(1) be modified or repealed?

• Should section 37 be modified or repealed to incentivize government compliance?

• If a legal accountability framework is adopted, what legal remedies should be available for non-compliance with the EBR?

5.4. Access to Information

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

> *…[i]n 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.*[119]

The Task Force noted that government policies regarding public participation were "varied and discretionary."[120] The Task Force, therefore, recommended setting up formal procedural mechanisms for providing the public with access to information. This included:

- Giving the public notice of the government's intention to make an environmentally significant decision on an electronic registry;
- Providing an opportunity to comment on the proposed decision; and
- Ensuring notice of the decision after it had been made.[121]

Since its introduction, the Registry has improved access

to information, including technical information about proposals for approval of facilities.[122] Despite these improvements, concerns remain about provincial ministries failing to post major proposals such as proposed changes to legislation on the Registry;[123] the failure to provide the public with complete information about proposals;[124] and inadequate time for public comment.[125]

The Environment Ministry has sometimes required individuals to submit a request under the ***Freedom of Information and Protection of Privacy Act*** (***FIPPA***) for information pertaining to matters posted on the Registry.[126] This has been the subject of criticism by both the Information and Privacy Commissioner and the Environmental Commissioner.[127] The ***EBR*** generally requires the public to provide comments within a 30 day-period, even though it usually takes much longer to obtain information under ***FIPPA***.[128]As a result, the public's right to comment may be lost if they are required make a formal ***FIPPA*** request to obtain information.[129] This situation is particularly challenging if and when applicants seek leave to appeal an instrument, as applications must be filed within 15 days after notice of the decision has been posted on the Registry.

There are several mechanisms that could improve access to information under the ***EBR***. For example,

- The ***EBR*** could include provisions requiring the government to provide access to information in a reasonable, timely, and affordable way.
- The ***EBR*** could require the public be provided adequate time to comment when government ministries post major proposals on the Registry.

Consultation Question 4:

Should access to information be improved under the EBR? If so, how?

5.5 Public Trust Doctrine

In contrast to the ***Michigan Environmental Protection Act*** (discussed in section 2.2 above), the ***EBR*** does not include the public trust doctrine as a mechanism to ensure government accountability.

The essence of this doctrine is that governments do not "own" public resources, such as rivers or forests, but instead have a positive duty to hold and manage these resources in trust for the benefit of the public at large. If and when governments fail to discharge this duty, the public trust doctrine holds that the trust beneficiaries (the public) should have access to legal remedies.[130]

Some legal experts believe the public trust doctrine has significant potential to provide a firmer legal foundation for government environmental accountability.[131] To be effective as a legal tool, however, the legislation would have to meet three requirements:

- It must define the scope of the public trust (i.e., what resources would be protected from environmental harm);
- It must establish a substantive right for the public to ensure compliance with the trust; and
- It must provide for remedies for breach of the public trust.[132]

The Task Force did not recommend incorporating the public trust doctrine in the ***EBR***. Nevertheless, some legal commentators believe that goals of the SEVs may be similar to the public trust doctrine insofar as both are intended to ensure government environmental accountability.[133] However, unlike the public trust doctrine, the SEVs do not impose a legal duty on government which can be enforced through the courts.[134]

Incorporating or adopting the public trust doctrine within the ***EBR*** would raise numerous challenging issues. For example, policymakers would need to determine:

- Which environmental resources would be subject to the public trust;
- Potential defences and defendants;

- The effect of government authorization of the impugned activity;
- The threshold test to be met before the doctrine could be invoked;
- The forum for adjudicating public trust doctrine issues; and
- Appropriate legal remedies.[135]

Consultation Question 5:

Should the public trust doctrine be included in the EBR affirming the government's obligation to protect the natural environment? If so, how should the law address:

- *Type of resources subject to the public trust doctrine*
- *Potential defences and defendants*
- *Threshold test to invoke the public trust doctrine*
- *Most effective forum for adjudicating the public trust doctrine*
- *Legal remedies*

5.6. Commissioner of the Environment

The Task Force recognized that the SEVs and other measures in the ***EBR*** would have limited impact without additional tools and strategies to hold the government to account.[136] Accordingly, the Task Force recommended a new independent legislative officer, the Environmental Commissioner, whose mandate would be to monitor the government's compliance with the ***EBR***.

The Environmental Commissioner was central to the political accountability model. The Task Force assumed the Environmental Commissioner would provide "objective, non-partisan analysis" and this, in turn, would lead to political accountability.[137] The Task Force felt the establishment of the Office of the Environmental Commissioner of Ontario was preferable to permitting the judicial review of the application or non-application of the SEVs.[138]

Once the ***EBR*** was enacted, it became clear that the Environmental Commissioner was not content to simply conduct a process evaluation of the Act. Instead, the Environmental Commissioner's Office 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 Legislature in the 2009 ***Green Energy and Green Economy Act***. The Act required the ECO to report annually to the Legislature on the province's progress on climate change and energy conservation.[139]

In 2019, the Government of Ontario passed the ***Restoring Trust, Transparency and Accountability Act,*** (***RTTA Act***), making significant changes to the Environmental Commissioner's role. Under Schedule 15 of the Act, the Environmental Commissioner's responsibilities were transferred to the Office of the Auditor General of Ontario and the Commissioner's title was changed to Commissioner of the Environment. Although these changes seemingly appear to be administrative, a careful review suggests otherwise.[140]

As a result of the ***RTTA Act***, the Environmental Commissioner is no longer an independent officer appointed by the Ontario Legislature. Instead, the Environmental Commissioner is now an employee of the Auditor General and is expected to perform the duties assigned by the Auditor General.[141] 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 Ontario government's environmental programs, a responsibility that had previously been undertaken by the Office of the Auditor-General.[142]

Further, the requirement that the Environmental Commissioner report on the Ontario government's progress in reducing energy conservation and reducing greenhouse emissions is no longer mandatory. Rather, the Auditor General has the discretion to determine whether the Environmental Commissioner will continue reporting on these issues.[143]

The Environmental Commissioner's public education mandate was also transferred to Ontario's Environment Minister.[144] In November 2021, the Auditor General commented on this change, noting that "[u]nder the ***EBR*** Act, the Environment Ministry is required to provide educational programs about the ***EBR*** Act to the public, but it is still not doing so."[145] The Auditor General also found that the Ministry did little to "actively reach out and educate the public, and did not have any specific funds budgeted for educational programs.[146] The transfer of responsibilities to the Environment Ministry has also raised concerns that public trust and confidence in the ***EBR*** may be undermined, given that the Environment Minister and his staff are usually the respondents in legal proceedings brought by members of the public under the Act.[147] As one legal commentator observed:

> *…it is unrealistic to expect… 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.*[148]

Finally, applications under the ***EBR*** (including applications for review of environmental statutes, regulations, policies and instruments and applications for investigation) no longer must be filed with the Environmental Commissioner. Instead, they now are filed only with the appropriate government ministries, prompting concern that the Environmental Commissioner will be unable to oversee ministries' response to applications under the ***EBR***.[149]

It has been argued the transfer of the Environmental Commissioner's responsibilities to the Auditor General's office fundamentally altered the role of the Environmental Commissioner as envisaged by the Tasks Force. The Task Force considered it necessary to entrench the Environmental Commissioner under the ***EBR*** as an independent officer of the Legislature. This was done to assist the Environmental Commissioner fulfill her or his central role in ensuring political accountability under the ***EBR***.[150]

The Task Force anticipated the Environmental Commissioner would play two roles: First, as an environmental auditor responsible for overseeing the functions and administration of the ***EBR***. Second, as a policy advocate with a public education role.[151] The combination of these roles is regarded as having contributed to the Office of the Environmental Commissioner of Ontario's efficacy and high profile on a broad range of critical environmental issues, including highlighting the "systemic non-compliance with the ***EBR*** by the provincial government."[152]

The significant changes implemented by the ***RRTA*** raise concerns about whether the Environmental Commissioner will continue to play an important role in ensuring environmental accountability in Ontario.[153]

Among the law reform options to consider are:

- Restoring the Environmental Commissioner's role and responsibilities as they existed prior to the ***RTTA Act***.
- Enshrining a mandate for the Environmental Commissioner to report on substantive government environmental performance, including climate change.
- Amending the ***EBR*** to specifically require government ministries to respond to the recommendations in the Environmental Commissioner's Annual and Special Reports.

Consultation Question 6:

Should the Environmental Commissioner's powers be strengthened to ensure government accountability? If so, what amendments or changes are required to the role of the Environmental Commissioner to help strengthen government accountability?

5.7 Public Participation and Access to Justice

5.7.1. Intervenor Funding

There were certain assumptions made by the Task Force in designing the ***EBR***. It relied on the availability of other legal mechanisms for access to justice in respect of environmental harm, including class proceedings and intervenor funding for environmental claims.

Class proceedings legislation had just been passed at the time of the Task Force Report. The Task Force viewed this reform as an integral element of the ***EBR*** which, although in different legislation, would work together.[154] The new class action procedure was seen as an important means for increasing access to justice and allowing "otherwise uneconomical claims into the court system for redress."[155] It would also act as a deterrent to widespread environmental harm.

At the time of the Task Force's Report, intervenor funding for public interest litigants to participate in environmental hearings was available in Ontario as a pilot project and had just been renewed for a further four-year period. The Task Force expressly stated that its recommendations should be read in the context of the continuing availability of this tool for increasing public access to environmental tribunals.[156]

Shortly after the ***EBR*** was enacted, the Environmental Commissioner indicated that although there was resistance to the concept of funding public participation, she intended to discuss this issue with industry and government.[157] However, funding for public participation never materialized under the ***EBR,*** and intervenor funding expired more than twenty-five years ago.

5.7.2. Reforms to 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 an enhanced right to sue those who harm the environment.[158] As a result, the Task Force recommended an incremental liberalization of the standing rule in respect of environmental public nuisances. More specifically, they recommended abolishing the common law requirement that a plaintiff suffer a "special damage." They believed, however, that the requirement for a direct personal or pecuniary loss should continue to apply.[159]

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.[160] This evaluation does not appear to have occurred.

5.7.3. Third-Party Party Appeals

Although the ***EBR*** liberalized the standing requirement for public nuisance, other provisions limited access to justice. For instance, the ***EBR*** does not provide the public with an automatic right to appeal an instrument. Instead, section 38 of the Act states that prospective third-party applicants must establish they have standing to bring an appeal.

Under the ***EBR***, a party who seeks leave to appeal an instrument is required to demonstrate an "interest" in the proposal. Section 38(3) provides a liberal interpretation of the term and states that the "interest" requirement can be met by a person who has previously sent comments on a proposal. In practice, these sections can be onerous, however, particularly for low-income individuals or marginalized communities without access to the Registry.

Once the standing requirement has been met, an applicant must also obtain leave to appeal from the appropriate appellate body by satisfying a two-part test. Section 41 of the ***EBR*** states that:

> *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.*

In other words, this test requires the third-party applicant to establish a prima facie case that the decision was not reasonable and that it could result in significant harm to the environment.[161]

There are reasons to believe these provisions are too restrictive. Between 2009 and 2019, there were on average only five applications for leave to appeal per year. Leave was granted only in 21% of those cases.[162]

The low number of applications for leave to appeal has raised questions about whether the s. 41 leave test unduly restricts access to justice. This may be particularly true now, as the Ontario Land Tribunal's new Rules of Practice and Procedure allows the Tribunal, on its own initiative, to dismiss a matter without a hearing where it determines the matter is frivolous, vexatious, or commenced in bad faith.[163]

Finally, the ***EBR*** specifies that an application for leave to appeal must be filed within 15 days after the notice of decision is posted on the Registry. The Environmental Commissioner has expressed concerns that the deadline is too tight, and that it should be increased to 20 days.[164]

Consultation Question 7:

Is it necessary to improve access to justice under the EBR? If so, how should the law, policies, or rules address

- *Standing rules in section 38*
- *Public nuisance standing under section 103*
- *Intervenor funding*
- *Leave to appeal*
- *Other amendments or reforms to promote access to justice*

5.8. Harm to Public Resource

The Task Force recommended a new cause of action for harm to a public resource but took a cautious approach. It recommended limiting the cause of action to environmental harms 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.[165]

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. The effect of the provision is to hold government to account only if it was already protecting the public resource but doing so insufficiently.

Section 84 includes several limits on legal actions, including the precondition that a plaintiff must first pursue an application for investigation with the appropriate government ministry. The policy rationale for this requirement was to ensure that the responsible ministry with the regulatory mandate over such matters was first allowed to take appropriate action.[166] If the ministry refuses to act, or has provided an unreasonable response, the plaintiff may then proceed with a section 84 action.

The ***EBR*** also provides a defence against an s. 84 action if the defendant satisfies the court that it complied with an interpretation of the instrument that is reasonable.[167] 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 the courts have not historically accepted such a defense."[168]

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 s. 84 actions.[169]

Section 84(7) of the ***EBR*** also 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.[170]

Perhaps not surprisingly, s. 84 actions have rarely been commenced and the LCO has not found any case that has proceeded to trial. The Environmental Commissioner has concluded that s. 84 is "essentially useless."[171]

Law reform issues and questions to consider include:

- Amending the ***EBR*** to modify the test for bringing a civil action for harm to a public resource so that it is less of a barrier to a plaintiff.
- Amend or delete section 84(7).

Consultation Question 8:

Should the right to sue for harm to a public resource be modified? If so, how?

5.9. Exemptions to the *EBR*

The ***EBR*** exempts proposals from its public consultation requirements under certain conditions. These include:

- Proposals for statutes, regulations and policies that are predominantly financial or fiscal in nature;
- Emergencies;
- Proposals that have been or will be considered under substantially equivalent processes;
- Instruments intended to implement an undertaking that have been approved or exempted under the *Environmental Assessment Act*; and
- Proposals that give effect to the budget or economic statements provided to the Ontario Legislature. [172]

Since the inception of the ***EBR***, government ministries have relied on omnibus bills to make substantive changes to environmental laws without providing an opportunity for public notice and comment.[173] The use of omnibus bills to enact, amend, or repeal multiple statutes has been criticized for precluding parliamentary scrutiny and debate on proposed legislation. [174]

In addition, government ministries have occasionally disregarded ***EBR*** exception provisions and enacted regulations to exempt the application of the Act for a specified time to address government priorities.[175] This occurred most recently in April 2020, when the provincial government passed Ontario Regulation 115/20 under the ***EBR***. The regulation made two major exemptions to environmental rights under the ***EBR***. The first provided that environmentally significant government proposals, including statutes, regulations, policies, and instruments did not have to be posted on the Registry for public consultation. This provision had the effect of eliminating third-party appeal rights for instruments. The second stated that ministries did not have to consider the SEVs when making environmentally significant decisions. The government claimed that the exemption was intended to allow it to respond expeditiously to issues related to COVID-19. The exemptions were in place for more than ten weeks from April 1, 2020, to June 15, 2020.

The regulation was criticized by the Environmental Commissioner for being unnecessarily broad. The Environmental Commissioner noted that the exemption also applied to proposals unrelated to COVID-19, resulting in the elimination of public participation rights:

> *…members of the public lost their right to seek leave to appeal ministries' decisions on 197 environmentally significant permits and approvals that were proposed during the exemption period – permits and approvals that, for example, would allow industrial facilities to discharge pollutants to the air and water in Ontario communities – and that were unrelated to COVID-19.*[176]

The loss of public participation rights could have been avoided, the Environmental Commissioner observed, had the Environment Ministry drafted a more "targeted exemption that only applied to urgent decisions that were related to the pandemic."[177]

5.9.1. Exemption of the Ministry of Finance

The ***EBR*** provides that proposals for policies, Acts, or regulations are exempt from the public notice and comment provisions of the ***EBR*** if they are predominantly financial or administrative in nature.

Approximately one year after the ***EBR*** was enacted, the provincial government enacted Ontario Regulation 482/95 permanently exempting the Ministry of Finance from the requirements of the ***EBR***. The move was unexpected given that the Ministry of Finance had previously been included among the 14 prescribed ministries and had, in fact, finalized its SEV.

The exemption was criticized by the Environmental Commissioner and was the subject of a special report to the Legislative Assembly of Ontario.[178] In her report, the Environmental Commissioner noted that the Ministry of Finance played a central role in the province's efforts to achieve a healthy and sustainable environment. The Environmental Commissioner further noted that the Ministry's core mandate was to recommend taxation, fiscal, economic, and regional policies, all of which have the potential to have significant environmental effects. The Environmental Commissioner pointed out that most governments in industrialized countries were taking steps to integrate economic and environmental considerations in government policies. This was reflected in the use of "green taxes" and other economic instruments to further their environmental agenda.[179]

Under the ***EBR***, the provincial Ministry of Finance's key responsibility was to ensure that its SEV was considered when making environmentally significant decisions. Exempting the Ministry of Finance meant that it no longer had to consider environmental factors in its decision-making. The resulting decisions, the Environmental Commissioner cautioned, "will potentially ignore or undervalue important environmental factors. In the long run, the people of Ontario and the environment will suffer."[180]

Consultation Question 9:

Should additional ministries, including the Ministry of Finance, be subject to the EBR?

5.9.2. Substantially Equivalent Process Exemption

Section 30 of the ***EBR*** allows a proposal to be exempt from the ***EBR's*** public participation requirements if the proposal has been considered in a public participation process that is "substantially equivalent" to the ***EBR*** process. The Act, however, does not provide guidance on the meaning of the term "substantially equivalent." [181]

In ***Greenpeace #1,*** referenced above, the government claimed that the 2018 provincial election was a consultation process that met ***EBR*** requirements. The government asserted that including a promise to repeal the provincial cap-and-trade program in its election platform was "substantially equivalent" to the process required by the ***EBR***. The government argued, therefore, that it was not required to provide

notice of its intention to repeal the cap-and-trade program on the Registry. The Court rejected the government's position noting that the ***EBR*** "provides for a comprehensive process that goes well beyond the blandishments of the campaign trail."[182]

Consultation Question 10:

Are specific criteria required for section 30 of the EBR? If so, how should they be defined?

5.10 Environmental Assessment Exemption

Section 32 of the ***EBR*** allows for an exemption to public participation rights under Part II of the ***EBR*** for instruments that are a step towards implementing undertakings that have been approved or exempted under Ontario's ***Environmental Assessment Act*** (***EAA***).

The Task Force recommended this exemption to ensure consistency between the new law and existing regulatory frameworks.[183] The Task Force wanted to ensure that the ***EBR*** did not duplicate comparable public participation processes under other environmental statutes. Furthermore, at that time, the ***Intervenor Funding Project Act*** was in effect and had enhanced public participation in the environmental assessment and planning process.[184]

Since the Task Force made its recommendations, Ontario's environmental assessment regime has undergone significant reforms which have imposed barriers to public participation rights.[185]

In a special report to the Ontario Legislature, the Environmental Commissioner stated that the "EAA consultation processes are not consistently comparable to those provided by the ***EBR***."[186] The Environmental Commissioner expressed concerns that government ministries were applying the section 32 exception broadly and thereby "depriving the public of their right to notification and comment on many instruments that affect Ontario's environment."[187]

The Environmental Commissioner recommended it would be preferable that instruments implementing an environmental assessment undertaking not be subject to a section 32(1)(b) exception unless the proponent can demonstrate that public consultation on the undertaking was similar to that provided by the ***EBR***.[188] The Environmental Commissioner also suggested the exemption could simply be removed from the ***EBR*** to ensure that the public notice was provided in all instances as this would allow for the consideration of new technical information for undertakings that had been approved under the ***EAA*** many years ago.[189]

Consultation Question 11:

Should section 32 of the EBR be amended? If so, how?

6

Consultation Issues – Emerging Environmental Accountability Strategies and Priorities

This section of the Consultation Paper goes beyond the parameters of the current ***EBR*** to address several potentially more far-reaching and challenging environmental accountability strategies and issues, including questions about new principles to govern environmental accountability in Ontario. These include:

- New governing principles for the *EBR*.
- Environmental justice.
- The right to a healthy environment.
- Indigenous issues and legal orders in Ontario's environmental accountability framework.

6.1. Purpose and Governing Principles

Section 2(1) of the ***EBR*** states that the purposes of the Act are to protect, conserve and where reasonable restore the integrity of the environment; provide sustainability to the environment; and protect the right to a healthful environment. Section 2(2) of the ***EBR*** adds additional purposes, including pollution prevention and biodiversity conservation.

Since the ***EBR*** was enacted 30 years ago, new environmental principles have emerged and been recognized by courts and legislators.[190] These include the following principles or priorities:

- The precautionary principle which holds that where there is evidence of serious harm to the environment or human health, lack of scientific certainty should not be used by decision-makers to postpone mitigative measures.
- The polluter-pays principle which states that those who cause pollution should bear the responsibility for the costs of the damage.
- The principle of environmental justice which requires measures to prevent, minimize or mitigate the impacts of pollution on low-income and marginalized communities who bear a disproportionate burden of pollution.
- The principle of intergenerational equity which states that there should be fairness among present and future generations in the use and conservation of the environment and natural resources.
- The principle of non-regression which prohibits any weakening of existing environmental laws.

This "menu" of potential priorities/principles is long and complex. At this stage, the LCO is seeking advice on whether the ***EBR*** should adopt any of these or other principles or priorities as legislative objectives.

Consultation Question 12:

Do the purposes and governing principles of the EBR remain appropriate? Are there other principles or purposes that should be explicitly recognized in the EBR? If so, why?

6.2. Indigenous Peoples

The themes of Aboriginal rights, Indigenous sovereignties, and reconciliation with Indigenous Peoples were not considered and addressed at the time of the ***EBR***'s development. As a result, the ***EBR*** does not reflect important developments in relation to Indigenous Peoples and the Crown over the past quarter of a century. These developments include:

- The legal recognition of the Crown's duty to consult and accommodate where the rights of Indigenous Peoples may be affected;[191]
- The tabling of the report and calls to action of the Truth and Reconciliation Commission;[192] and,
- Canada's legislative recognition of the ***UNDRIP Act.***[193]

The ***UNDRIP Act,*** enacted on June 21, 2021, imposes obligations on the Federal government: to ensure all federal laws are consistent with the United Nations Declaration on the Rights of Indigenous Peoples; to prepare an action plan to achieve the objectives of the Declaration; and to file annual progress reports with Parliament. British Columbia has also adopted legislation recognizing ***UNDRIP*** as the basis of its framework for reconciliation with Indigenous Peoples.[194] This initiative is consistent with the recommendations from the Truth and Reconciliation Commission, which called upon all levels of government to fully adopt and implement the ***UNDRIP*** as the framework for reconciliation.[195] To date, Ontario has taken no formal legal measures regarding the adoption of ***UNDRIP*** in the province.

Nor does the ***EBR*** reflect Indigenous law and perspectives around environmental governance and stewardship and the resolution of disputes.[196] Moreover, the original ***EBR*** did not consider some of the practical challenges for Indigenous people to engage in public participation under the ***EBR***. For example, consider the issue of ***EBR*** notice and standing. It is essential for an individual who wants to exercise public participation rights under the ***EBR*** to have access to the Registry to obtain notice about a proposal. These notices are only accessible through the Internet. Indigenous communities in Northern Ontario, however, often lack access to reliable and affordable high-speed internet access.[197] This can affect not only the right to obtain notice and provide comments, but also the ability to bring an application for leave to appeal an instrument.

Additionally, the ***EBR*** requires a party who wants to seek leave to appeal an instrument to demonstrate an "interest" in the proposal. Section 38(3) of the ***EBR*** provides a liberal interpretation of the term and states that the "interest" requirement can be met by a person who has previously sent comments on a proposal. Meeting this threshold may be difficult for some Indigenous communities, given the lack of funding and provision of internet services.

The LCO acknowledges that Indigenous communities across Ontario and Canada have developed sophisticated environmental analyses, frameworks, and legal orders for ensuring environmental accountability. The LCO will develop a dedicated Indigenous strategy to learn more about these efforts and if, or how, they may relate to ***EBR*** reform.

Consultation Question 13:

Should the EBR be modified to meet new obligations regarding the rights of Indigenous Peoples? If so,

- *How can Indigenous law and perspectives be recognized and applied in the context of the EBR?*
- *What are the barriers for Indigenous people participating in the EBR process and how should they be addressed?*
- *Are there additional methods of providing notice that would bring forward Indigenous rights and interests?*
- *What are the best ways to meet Indigenous consultation and engagement requirements?*

6.3. Right to a Healthy Environment

The only reference to a right to a healthy environment (RTHE) in the ***EBR*** is contained in the preamble. Since a preamble only serves as an interpretative aid to a statute, the ***EBR*** does not provide for a substantive right to a healthy environment that can be enforced by the public. [198]

Some Canadian legal scholars have maintained that the right to a healthy environment is a fundamental human right, which deserves constitutional protection.[199] Entrenching the right to a healthy environment in the Canadian Constitution, they contend, can promote government accountability by providing citizens with access to the courts for a violation of the right.[200] It is also believed that this approach would provide the greatest level of environmental protection as statutes and government actions would have to conform.[201] Some also argue that enshrinement of a right to a healthy environment could also potentially advance environmental justice by ensuring a basic standard of environmental quality is applied equally to everyone.[202]

There have been various proposals over the years to include a right to a healthy environment in Canada's Constitution. These efforts at constitutional reform have been unsuccessful.[203] Consequently, in contrast to the citizens of many other countries, Canadians do not have a constitutional right to a healthy environment.

Some Canadian provinces, including Quebec, Yukon, the Northwest Territories and Nunavut have legislated environmental rights.[204] However, like the ***EBR***, their effectiveness is considered quite limited.[205] Efforts to legislate environmental rights in other provinces, such as British Columbia, Alberta, and Saskatchewan have, thus far, been unsuccessful. [206]

In the federal context, the right to a healthy environment has received formal acknowledgment in Bill C-28, which proposed amendments to the ***Canadian Environmental Protection Act.*** The Bill, which was introduced in the House of Commons on April 13, 2021, followed several private member bills that would have recognized a right to a healthy environment in federal law. Bill C-28, however, was not voted on before the end of the 2021 legislative session and did not come into force.

On February 9, 2022, the Federal Government introduced Bill S-5***, Strengthening Environmental Protection for a Healthier Canada Act***. In most respects, Bill S-5 is similar to Bill C-28 and includes a right to a healthy environment. However, Bill S-5, like the ***EBR***, fails to provide a remedy, in the event of a breach of the right. Moreover, the right may be balanced with other factors, including social, economic, health and scientific factors.[207]

On July 8, 2022, the United Nations General Assembly (UNGA) adopted a resolution declaring access to a clean, healthy, and sustainable environment as a universal human right.[208] The text of the resolution is similar to the Human Rights Council resolution that was adopted the previous year.[209] Significantly, the UNGA resolution notes that while "the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by women and girls and those segments of the population that are already in vulnerable situations, including indigenous peoples, children, older persons and persons with disabilities."[210] 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."[211] To date, the right to a healthy environment is recognized by more than 80% (156 of 193) of member states of the United Nations.[212]

The right to a healthy environment was considered by the Task Force. The Task Force agreed that the public had a right to a healthful environment and believed it was implicitly recognized under Ontario's environmental laws. In its deliberations, the Task Force considered whether the ***EBR*** should incorporate environmental rights in a framework similar to the ***Canadian Charter of Rights and Freedoms***. The Task Force queried whether the Legislature should be prohibited from enacting laws that harmed or had the potential to harm the environment. However, this approach was not adopted because the Task Force thought that it would create too much "uncertainty while the courts considered government decisions with respect to the environment."[213]

There is empirical evidence that a constitutional right to a healthy environment can improve government accountability, enhance public participation in environmental decision- making and improve environmental performance.[214] While a legislative right is unlikely to have the same impact as a constitutional right, some legal experts believe a legislative right can still improve environmental protection.[215] A legislated right to a healthy environment is also arguably an important mechanism to address the adverse impacts of environmental degradation caused by private actors when governments fail to act.

Consequently, the inclusion of the right to a healthy environment in the ***EBR*** warrants consideration. That said, this is a very complex law reform issue, as there are many important questions about how such a right could or should be recognized or implemented. For example,

- How would the right be defined?
- How could or should the right be operationalized?
- What level of environmental quality should be protected?
- Who would be the beneficiary of such a right?
- Should the right be enforced against government or private actors, or both?
- Appropriate legal remedies?

Consultation Issue 14:

Should the EBR be amended to include a substantive RTHE? If so, how should the law address the following issues:
- *Definition*
- *Adjudication forum*
- *Applicability and Enforceability*
- *Standing*
- *Evidential standard*
- *Defences*
- *Remedies*

6.4. 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.[216] At the risk of oversimplification, environmental justice analysis seeks to evaluate the impact of environmental risks and harms from a geographic, racial, and/or class perspective to determine whether risks and harms are shared equally. Environmental justice analysis also asks whether there is differential access and influence over environmental decision-making.[217]

Studies show that low-income and marginalized communities in Canada, including Indigenous communities, are disproportionately impacted by pollution. A United Nations Special Rapporteur's report in 2020, for example, concluded that poor communities in Toronto and Hamilton faced a disproportionate burden of exposure to industrial pollution.[218]

Indigenous Peoples were found to face greater exposure to hazardous substances than the rest of the population. 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.[219] Over half of the community members either had or were suspected to have Minamata disease, a neurological disease linked to mercury exposure.[220]

The Aamjiwnaang First Nation in Sarina was described in the Special Rapporteur's report as facing conditions that were "profoundly unsettling."[221] The community is almost entirely 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."[222] 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 chronic exposure to toxic chemical pollution.[223] There have also been other

studies in the area which have found changes in the "sex ratios and reproductive ability of fish, bird and turtle populations" which are thought to be the result of exposure to endocrine-disrupting chemicals.[224] 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.[225] According to the Environmental Commissioner, there is "strong evidence that pollution is causing people in Aamjiwnaang adverse health effects which neither the federal nor provincial government have properly investigated."[226] Accordingly, the Environmental Commissioner has recommended, that "environmental justice to be part of the Ontario government's pursuit of reconciliation with Indigenous people."[227]

The Environmental Commissioner has stated that the Indigenous people and communities are disproportionately impacted by pollution.[228] This has exposed them to serious health effects and resulted in what is known as air pollution "hot spots."[229] The Environment Commissioner has, thus, recommended the Ministry ensure all forms of environmental approvals consider the cumulative effects of pollution from regulated activities.[230]

The Environment Ministry has since developed a cumulative effects assessment policy which came into effect on October 1, 2018.[231] However, the policy has been characterized by some as 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.[232] Moreover, the policy does not apply to existing facilities, but only covers new and expanding facilities.[233] Consequently, there are concerns that the policy will be ineffective in preventing the deterioration of air quality in pollution hot spots in the province.[234] The 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.[235]

At the federal level, there have been recent efforts to advance environmental justice through private member bills that were introduced in the House of Commons. These include Bill C-219, ***Canadian Environmental Bill of Rights*** [236] and Bill C-230, ***National Strategy to Redress Environmental Racism Act.*** [237]

Bill C-219 is the latest in a series of private bills that were introduced in the Federal Parliament to enact a Canadian environmental bill of rights.[238] The Bill states that every enactment in the bill must be interpreted in accordance with environmental law principles including:

> *the principle of environmental justice according to which there should be a just distribution of environmental benefits and burdens among Canadians, without discrimination on the basis of any ground prohibited by the Canadian Charter of Rights and Freedoms.*[239]

Environmental justice concerns are also addressed in Bill C-230. The Bill marks the first time that environmental racism has been addressed in proposed legislation in Canada.[240] The Bill's preamble acknowledges that a disproportionate number of people who live in environmentally hazardous areas are members of Indigenous, racialized or other marginalized communities. The Minister of the Environment is required by the Bill to develop a national strategy to advance environmental justice and to assess, prevent and address environmental racism.[241] The study must include an examination of the link between race, socio-economic status and environmental risk;[242] information and statistics relating to the location of environmental hazards; [243] and measures to address environmental racism.[244] In developing the strategy, the Minister is required to undertake consultation with Indigenous and other communities. Furthermore, the Minister is required to table the national strategy in the Federal Parliament and publish it on the Department of Environment's website.

Although both bills have received strong support from civil society organizations, they have not yet been enacted into law.

Consultation Question 15:

Should the EBR address environmental justice? If so, should the EBR impose a statutory duty on government ministries to ensure engagement with low-income and marginalized communities in environmental decision-making?

6.5. Rights of Nature

Over the last decade, the "rights of nature" has emerged as a new approach to protecting the environment. 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.[245]

The establishment of legal rights for nature is an important component of this new concept. The idea of nature having inherent rights is not new. It has been historically recognized by other cultures in many parts of the world. Indigenous cultures, for example, "cultivate complex understanding of human responsibilities toward the natural world."[246] 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."[247]

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." Stone asserted that forests, oceans, rivers and the natural environment as a whole should be granted legal rights.[248] This would allow lawsuits to be commenced on behalf of various elements of nature, without necessitating evidence of personal, property or economic injury.[249] 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.[250]

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.[251] The resolutions were passed to prevent environmental degradation of the river by further hydroelectric development.[252]

While it remains unclear whether the 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.

The "rights of nature" doctrine raises many questions, including who would be responsible for appointing a guardian, the appropriate scope of the guardian's role and duties, the ramifications, if any, for a guardian's failure to commence a legal action, how damages would be assessed and who would be responsible for paying damages.

Consultation Question 16:

Should the EBR recognize the rights of nature? If so, how?

Consultation Process and Next Steps

The LCO believes that successful law reform depends on broad and accessible consultations with individuals, communities, and organizations across Ontario.

The release of this Consultation Paper launches an intense period of public consultations. During this period, the LCO will consult with a broad array of stakeholders, including lawyers and legal organizations, environmental NGOs, industry representatives, academics, Indigenous communities, government and justice system leaders, and individual Ontarians interested in environmental issues.

To this end, the LCO will be organizing several consultation processes over the next several months:

Written Submissions

The LCO encourages written submissions. Written submissions can be sent to the LCO's general email address at LawCommission@lco-cdo.org.

The deadline for written submissions is November 25, 2022.

The LCO is committed to sharing ideas and building constructive dialogue. Accordingly, the LCO expects to post written submissions on our project webpage, subject to limited exceptions. Individuals or organizations wishing to provide a written submission may want to contact the LCO for further information prior to their submission.

Meetings/Forums/Workshops/Partnerships

The LCO expects to organize a wide range of meetings, forums, or workshops on environmental accountability issues over the next several months. The LCO is strongly committed to partnering with interested organizations and stakeholders to develop consultation initiatives. Individuals or organizations interested in working with the LCO are encouraged to contact our Project Lead.

Project updates and events will also be posted on the LCO's project page: https://www.lco-cdo.org/en/our-current-projects/

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Appendix A:
List of Consultation Questions

Consultation Question 1:

Does the ***EBR***'s emphasis on political accountability remain appropriate, or should there be greater emphasis on legal accountability? If so, should legal accountability focus on ministries' compliance with ***EBR*** procedural requirements, or should legal accountability be broader, potentially including provisions to ensure the ***EBR*** achieves its stated purpose?

Consultation Question 2:

Should Statements of Environmental Values (SEVs) be strengthened to improve the provincial government's environmental accountability? For example,

- Should Ontario adopt the model of sustainable development strategies in the ***Federal Sustainable Development Act***?
- What other measures are required to ensure that the SEVs are strengthened and integrated into environmental decision-making?

Consultation Question 3:

Are the ***EBR***'s restrictions on judicial review and restricted remedies appropriate? For example,

- Should the privative clause in section 118(1) be modified or repealed?
- Should section 37 be modified or repealed to incentivize government compliance?
- If a legal accountability framework is adopted, what legal remedies should be available for non-compliance with the *EBR*?

Consultation Question 4:

Should access to information be improved under the ***EBR***? If so, how?

Consultation Question 5:

Should the public trust doctrine be included in the ***EBR***? If so, how should the law address:

- Types of resources subject to the public trust doctrine
- Potential defences and defendants
- Threshold of harm needed to invoke the public trust doctrine
- Most effective forum for adjudicating the public trust doctrine
- Legal remedies

Consultation Question 6:

Are amendments or changes are required to the role of the Environmental Commissioner to help strengthen government accountability?

Consultation Question 7:

Is it necessary to improve access to justice under the ***EBR***? If so, how should the law, policies, or rules address:

- Section 38 standing rules
- Public nuisance standing under section 103
- Intervenor funding
- Leave to appeal
- Other amendments or reforms to promote access to justice

Consultation Question 8:

Should the right to sue for harm to a public resource be modified? If so, how?

Consultation Question 9:

Should additional ministries, including the Ministry of Finance, be subject to the ***EBR***?

Consultation Question 10:

Are specific criteria required for section 30 of the ***EBR***? If so, how should they be defined?

Consultation Question 11:

Should section 32 of the ***EBR*** be amended? If so, how?

Consultation Question 12:

Do the purposes and governing principles of the ***EBR*** remain appropriate? Are there other principles or purposes that should be explicitly recognized in the ***EBR***? If so, why?

Consultation Question 13:

How should the ***EBR*** be modified to meet new obligations regarding the rights of Indigenous Peoples? For example,

- How can Indigenous law and perspectives be recognized and applied in the context of the ***EBR***?
- What are the barriers for Indigenous people participating in the ***EBR*** process and how should they be addressed?
- Are there additional methods of notice that would bring forward Indigenous rights and interests?
- What are the best ways to meet Indigenous consultation requirements?

Consultation Issue 14:

Should the ***EBR*** be amended to include a substantive RTHE? If so, how should the law address the following issues:

- Definition
- Adjudication forum
- Applicability and Enforceability
- Standing
- Evidential standard
- Defences
- Remedies

Consultation Question 15:

Should the ***EBR*** address environmental justice? If so, should the ***EBR*** impose a statutory duty on government ministries to ensure engagement with low-income and marginalized communities in environmental decision-making?

Consultation Question 16:

Should the ***EBR*** recognize the rights of nature? If so, how?

Appendix B: Glossary

The definition of terms frequently used in this paper are provided below:

Commissioner of the Environment
The Commissioner of the Environment (Environmental Commissioner) is the person responsible for ensuring compliance with the implementation and operation of the *Environmental Bill of Rights, 1993.*

Environmental Activity and Sector Registry
The Environmental Activity and Sector Registry (EASR) is an electronic registration system that allows businesses conducting certain activities to register online and comply with requirements set by regulations instead of obtaining an approval from the Ministry of the Environment, Conservation and Parks.

Environmental Bill of Rights, 1993
The *Environmental Bill of Rights Ontario, 1993* (*EBR*) is an Ontario law which came into effect in February 1994. The ***EBR*** allows the public to participate in the Ontario government's environmental decision-making process.

Environmental Registry of Ontario
The ***EBR*** established the Environmental Registry of Ontario (Registry), a searchable Internet database, on which prescribed ministries are required to post notice when they propose to make new or amend existing: policies, acts, regulations or instruments.

Exceptions
The ***EBR*** allows for certain proposals to be exempt from the public notice and comment requirements. These exceptions apply if a proposal is predominately financial or administrative; if there is an emergency; if the proposal has been, or will be, considered under a substantially equivalent public participation process; if the instrument is intended to implement an undertaking that has been approved or exempted under the ***Environmental Assessment Act***; or if the proposal would give effect to a budget or economic statement provided to the Ontario Legislature.

Instrument
An instrument includes, permits, approvals, licenses and orders issued by the Ontario government to an individual or an organization.

Leave to Appeal
The ***EBR*** allows an Ontario resident to seek leave to appeal (i.e., obtain permission) certain instruments, provided the person can satisfy the two-part test under section 41 of the ***EBR***. The leave to appeal application must be filed within fifteen days with the appropriate appellate body after the instrument decision notice is posted on the Registry.

Notice
If a proposed policy, act, regulation or instrument is subject to public notice and comment under the ***EBR***, notice to the public must be provided through the Environmental Registry.

Prescribed Ministries and Statutes
The government ministries and statutes which are "prescribed" under the ***EBR*** have been identified in regulations enacted under the ***EBR***. For a proposal to be subject to the ***EBR***, it must originate from a prescribed ministry or under a prescribed statute.

Statement of Environmental Values
The ***EBR*** requires a Statement of Environmental Values (SEV) from prescribed ministries setting out how the purposes of the ***EBR*** will be applied to environmentally significant decisions, and how consideration of the ***EBR***'s purposes will be integrated with social, economic and scientific considerations.

Task Force on the Environmental Bill of Rights
The Task Force on the Environmental Bill of Rights (Task Force) was established on October 1991 by the Ruth Grier, the then Minister of the Environment, to draft an environmental bill of rights. The Task Force was composed of representatives from business, government and environmental groups and was directed by its terms of reference to reach consensus on its recommendations.

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