Canadian Environmental Law Association
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January 13, 2023 **BY EMAIL**

Ramani Nadarajah
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Law Commission of Ontario
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Toronto, ON M3J 1P3

Dear Ms. Nadarajah:

**RE: ENVIRONMENTAL ACCOUNTABILITY IN ONTARIO: CONSULTATION PAPER**

Please find attached the submission of the Canadian Environmental Law Association (CELA) to the Law Commission of Ontario (LCO) regarding the *Environmental Accountability in Ontario: Consultation Paper* (September 2022).

CELA's overall conclusion is that the LCO's review of Ontario's *Environmental Bill of Rights* (*EBR*) provides an important opportunity to identify public interest reforms which update legislation and address long-standing gaps in the *EBR* and its implementation. In CELA's view, a comprehensive *EBR* reform package, consisting of statutory, regulatory, policy, and administrative changes, should be recommended by the LCO in its final report.

Please be advised that the CELA submission has been endorsed by the following non-governmental organizations:

Anne Bell
Director of Conservation and Education
Ontario Nature

Derek Coronado
Coordinator,
Citizens Environment Alliance of Southwestern Ontario

If you have any questions about the CELA submission, please contact the undersigned.

Yours truly,

**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**

Richard D. Lindgren
Counsel

Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

# SUBMISSIONS TO THE LAW COMMISSION OF ONTARIO

# BY THE CANADIAN ENVIRONMENTAL LAW ASSOCATION

# RE: ENVIRONMENTAL ACCOUNTABILITY IN ONTARIO

Prepared by: Richard D. Lindgren, Counsel

January 13, 2023

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***Executive Summary****: Enacted in 1993, Ontario's Environmental Bill of Rights contains various tools that Ontario residents can use to ensure environmental protection, enhance governmental accountability, and participate in environmental decision-making. However, the legislation has remained largely unchanged since its enactment. The past three decades of experience under the Environmental Bill of Rights have demonstrated the public interest need for various statutory, regulatory, policy and administrative reforms. Accordingly, the Law Commission of Ontario's review of the Environmental Bill of Rights should recommend long overdue procedural and substantive changes which strengthen the legislation and better achieve the important purposes of the statute. Among other things, these EBR amendments should: (a) establish additional legal accountability mechanisms, including the public trust doctrine, the right to a healthy and ecologically balanced environment, rights of nature, environmental justice requirements, and the removal of current constraints on judicial review; (b) require environmental decision-making by the Ontario government to conform with more detailed and prescriptive Statements of Environmental Values issued under the EBR; (c) update and expand the incomplete environmental principles currently codified in the EBR; (d) improve public access to information and enhance public participation rights, including the establishment of intervenor funding and the deletion of the existing leave-to-appeal test under the EBR; and (e) restore the specific mandatory duties, powers, and responsibilities of the Environmental Commissioner that existed in the EBR prior to the enactment of Bill 57 in 2018.*

## PART I - INTRODUCTION

This submission contains the response of the Canadian Environmental Law Association (CELA), to the specific questions contained in the discussion paper[1] released by the Law Commission of Ontario (LCO) in relation to environmental rights, responsibilities, and accountability.

At the outset, CELA commends the LCO for undertaking this important project, and we welcome this opportunity to convey our comments to the LCO for consideration when preparing its final report.

To assist the LCO and other readers, this submission by CELA reproduces all 16 sets of questions in the discussion paper, and then sets out CELA's response, analysis, and recommendations for each question.[2]

### (a) Overview

As noted by a leading legal commentator:

> Enacting specific environmental rights legislation allows for the most comprehensive articulation of the substantive and procedural elements of the right to a healthy

[1] LCO, *Environmental Accountability in Ontario: Consultation Paper* (September 2022).

[2] This submission incorporates and expands upon CELA's submissions that were filed in 2016 when Ontario's Environment Ministry conducted an *EBR* consultation exercise that raised almost all the same questions set out in the current LCO discussion paper.

> environment, including mechanisms and processes for ensuring access to information, participation in environmental governance, and access to justice (through both judicial and non-judicial avenues).[3]

Accordingly, CELA has been actively involved for decades in the development and implementation of Ontario's *Environmental Bill of Rights* (*EBR*). In the early 1990s, for example, CELA served as a member of the Minister's Task Force that assisted in drafting and consulting on the *EBR*.

After the *EBR* was enacted in 1993, CELA lawyers have provided summary advice, public education, and client representation in relation to various *EBR* tools, including applications for review, applications for investigation, and third-party appeals of instrument decisions (including the landmark *Lafarge* case[4] which confirmed the legal effect of the Environment Ministry's Statement of Environmental Values, as discussed below). CELA has also initiated or participated in judicial review proceedings arising under the *EBR*. In addition, CELA filed an application for review of the *EBR* that the Ministry granted in 2011 but no changes to the legislation resulted from the Ministry's sparse consultation in 2016 about potential *EBR* reform. As noted by Auditor General of Ontario's 2022 report on the *EBR*, the Ministry has still not completed this review process.[5]

In these circumstances, the Auditor General's 2022 report has identified several unresolved *EBR* concerns that require careful consideration during the unfinished Ministry review:

> If and when a full review of the Act is conducted, to determine whether it is meeting its intended purpose, consideration of the following key issues, among others, would assist in this endeavour:
>
> - not all ministries that make environmentally significant decisions, or all environmentally significant acts, have been made subject to the *EBR* Act. While the *EBR* Act states that the Lieutenant Governor in Council (Cabinet) may make regulations to prescribe ministries and acts, it is silent about who is responsible for identifying which ministries and acts should be prescribed.
>
> - Exceptions in the *EBR* Act permit prescribed ministries to shield some environmentally significant proposals from public participation, by negating the requirement for ministries to consult the public before making those decisions.
>
> - The requirements associated with the Statements of Environmental Values are inadequate to ensure that they are meaningfully considered to improve environmental decision-making.

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[3] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 213.
[4] *Dawber v. Ontario (Director, Ministry of the Environment)*, (2007), 28 CELR (3d) 281; affd. (2008), 36 CELR (3d) 191 (Ont. Div. Ct.); leave to appeal refused (Ont. C.A. File No. M36552, November 26, 2008).
[5] Auditor General of Ontario, *Operation of the EBR* (December 2022), page 5.

- Vaguely worded requirements in the *EBR* Act risk subjective interpretation and therefore inconsistent, and sometimes poor, implementation of various provisions. This prevents meaningful public participation.

- The *EBR* Act's stringent leave to appeal provisions limit Ontarians' ability to hold government accountable.

- The *EBR* Act requires the Environment Ministry to inform the public of appeals and leave to appeal applications only in the case where notice has been delivered directly to the Minister, which does not always occur.[6]

CELA notes that these and other key concerns are raised in the LCO's discussion paper for public feedback. Given our extensive *EBR* experience and the public interest perspective of our client communities, CELA has carefully reviewed the issues raised and questions posed in the LCO's discussion paper. We have also considered previous reports, analysis, and recommendations prepared by the *EBR* Task Force, Environmental Commissioner of Ontario (ECO), Auditor General of Ontario, and various legal commentators on the *EBR* track record to date.

Our overall conclusion is that while the enactment of the *EBR* represents an important milestone in Ontario's environmental history, the *EBR* is very much a product of its age and societal values and environmental challenges have continued to evolve and expand since the early 1990s. On this point, we concur with the LCO's observation that times have materially changed:

> 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 (page 6).

CELA also agrees with the Auditor General of Ontario that the wide-ranging problems that have emerged under the *EBR* since the 1990s are attributable, in part, from the current wording of the legislation:

> The Office of the Auditor General of Ontario has identified several major issues hindering the effective operation of the *EBR* Act in meeting its intended purpose. These issues stem, at least in part, from the wording of the Act itself.[7]

Among other things, this means that fixing the *EBR* regime will take more than administrative updates, technical improvements to the Registry system, or minor housekeeping changes to the legislation. Instead, numerous statutory amendments should be undertaken in relation to the key tools under the *EBR*, including the public participation regime (Part II), reporting by the Auditor

[6] Auditor General of Ontario, *Operation of the EBR* (December 2022), pages 12-13.
[7] Auditor General of Ontario, *Operation of the EBR* (December 2022), page 12.

General (Part III), applications for review (Part IV), applications for investigation (Part V), and access to the courts (Parts VI and VIII). The nature and scope of CELA's recommended *EBR* amendments are outlined below.

More fundamentally, it is imperative for the LCO to revisit the *EBR*'s initial attempt to strike an appropriate balance between political and legal accountability mechanisms for governmental decision-making in relation to environmental laws, regulations, policies, and instruments. Moreover, the Task Force itself recommended that certain *EBR* provisions (e.g. the reform of the public nuisance rule, the new civil cause of action to protect public resources, etc.) should be actively monitored over time and revisited if warranted.[8] In short, the Task Force recognized that its *EBR* proposals were not cast in stone, and that the operational experience under the *EBR* should be reviewed and, where necessary, addressed through appropriate legislative amendments.

Moreover, it is our view that the limited efficacy of political accountability under the *EBR* has been amply demonstrated in recent decades, as described below. Accordingly, CELA submits that the *EBR* should be amended to include further and better legal accountability tools that residents may use in the courts or before administrative tribunals to advance the important purposes, principles, and provisions of the *EBR*. This submission outlines CELA's recommendations on the types of legal accountability mechanisms that should be enhanced or added to the *EBR*.

## PART II - CELA RESPONSE TO CONSULTATION QUESTIONS

***(a) 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?***

**CELA Response:** The political accountability mechanisms in the current *EBR* should be retained and enhanced, but the *EBR* must be amended to place greater emphasis on legal accountability mechanisms which facilitate broader public access to the courts and administrative tribunals.

**CELA Analysis:** In its 1992 report, the *EBR* Task Force recommended that the *EBR* should "promote greater accountability of government for its decisions and protection of the environment."[9] However, the Task Force acknowledged that "political accountability is at the foundation" of its proposed *EBR*,[10] which contained various political accountability mechanisms (e.g., the ECO office, Statements of Environmental Values, applications for review or investigation, etc.) while only incrementally increasing public access to the courts or tribunals for legal accountability purposes.

After more than a quarter-century of experience under the *EBR*, CELA submits that it is appropriate (if not overdue) to reconsider the basis, rationale, and efficacy of the Task Force's

[8] *Report of the Task Force on the Ontario EBR* (July 1992), pages 107 to 108 [*EBR* Task Force Report].
[9] *EBR* Task Force Report, page 15.
[10] *Ibid.*, pages vi, 17-18.

"philosophical"[11] preference for political accountability. Over the decades, annual and special reports from the ECO and the Auditor General have documented countless instances where environmental decision-making by the Ontario government has not been environmentally sound or sufficiently protective, or where the government has failed or refused to properly carry out its obligations under the *EBR*, particularly in relation to public participation rights.

For example, the most recent *EBR* report filed by the Auditor General found that "major problems still persist in the operation of the *EBR*", and that there continues to be governmental decision-making, activities, or initiatives that are not compliant with the *EBR* purposes or provisions, including:

- The Environment Ministry, Municipal Affairs Ministry, Energy Ministry, and other ministries are deliberately ignoring Ontarians' legal rights to be informed and consulted on important environmental decisions;

- the Environment Ministry (the ministry responsible for administering the *EBR*) has still not led by example in complying with and implementing the *EBR* in a manner consistent with the Act's purposes, and the Ministry has done little to educate Ontarians about their *EBR* rights;

- the Environment Ministry has not ensured the *EBR* applies to all environmentally significant decisions;

- various ministries did not enable meaningful public participation, or ensure transparency and accountability, and Ontarians were not given clear or complete information about many environmentally significant proposals and decisions;

- Ontarians were not given timely notice of environmentally significant decisions for 20% of the ministry decisions reviewed by the Auditor General, and some ministries did not provide updated information about the status of some proposals; and

- the Environment Ministry did not comply with the *EBR* in its handling of certain Applications for Investigation.[12]

It is beyond dispute that these and other problems have arisen (and continue to persist) despite the presence of the Task Force's recommended political accountability mechanisms which are embedded within the *EBR*. More alarmingly, the Auditor General's 2022 report reveals that despite receiving internal advice about the need to fix a misleading Registry posting to meet *EBR* requirements, the Environment Minister's office specifically directed staff not to make the necessary corrections.[13] In CELA's view, this finding underscores the need for further and better legal accountability tools to ensure governmental compliance with the *EBR* at all material times.

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[11] *Ibid.*, page 17.
[12] Auditor General of Ontario, *Operation of the EBR* (December 2022), pages 4-7.
[13] Auditor General of Ontario, *Operation of the EBR* (December 2022), pages 4, 6, and 18-19.

Interestingly, the *EBR* Task Force itself recognized that enhancing legal accountability through *Charter*-like constraints on governmental decision-making was another viable option under consideration:

> This approach to protecting individual liberties and rights has its analogy in protection of the environment. Legislatures, it was said, should be prohibited or proscribed from enacting or applying laws that directly or indirectly result in harm to our environment. This approach would necessarily involve giving individual residents the right to engage the court system to strike down laws that harm the environment. In this approach governments would be "sent back to the drawing board" to develop a law or practice that does not harm the environment.[14]

However, since there was no consensus among Task Force members on adopting this rights-based approach, the Task Force ended up developing certain political accountability tools in the hope that better environmental decision-making would occur without public resort to courts or tribunals. The net result is an apparent imbalance between political and legal accountability mechanisms under the *EBR*, which, in turn, seriously impairs the ability of the legislation to meet its stated public interest purposes. In our view, "ballot box" accountability has inherent limitations and is not an adequate substitute for a robust rights-based approach for securing legal accountability for potentially harmful or non-compliant environmental decision-making under the *EBR*.

In making this submission, CELA acknowledges that in recent decades, there have been various success stories which illustrate how the *EBR* can be used effectively to inform and empower the public to protect the environment and conserve resources, particularly at the local level.[15] Nevertheless, we conclude that there is considerable room for improvement in the *EBR* regime so that the important purposes of the legislation are more readily achieved in an effective, equitable, and enforceable manner.

In summary, CELA submits that despite the Task Force's laudable intentions, the real-world experience in Ontario over the past three decades amply demonstrates that the political accountability mechanisms in the *EBR* have not fully prevented acts or omissions which result in environmental degradation or resource depletion, nor have they deterred governmental non-compliance with *EBR* requirements.

Accordingly, CELA strongly recommends that political accountability mechanisms under the *EBR* need to be supplemented by stronger judicial accountability mechanisms:

> Although the Environmental Commissioner has done an excellent job, Ontario's experience indicates that attempting to achieve accountability primarily through a watchdog mechanism is not an adequate substitute for ensuring effective judicial remedies. The Environmental Commissioner has repeatedly identified systemic non-compliance with elements of the *EBR* by the provincial government, but these revelations have not resulted

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[14] *Ibid*.

[15] See, for example, ECO, *Celebrating the 10th Anniversary of the EBR and the ECO* (2004). See also ECO, *The EBR: Your Environment, Your Rights* (rev. January 2015); and ECO, Annual Report 2015-16, Chapters 2.3 and 3.1.1.

> in changes in behaviour as hoped. Therefore, stronger mechanisms for ensuring accountability are required.[16]

A similar conclusion was reached in a comprehensive review of the first few years of experience under Ontario's *EBR*:

> When legislators review the Ontario experience, they will likely determine that complex administrative and institutional reforms established in an environmental rights law, like OEBR, must be subject to greater judicial scrutiny and less government discretion if they are to avoid the problems catalogued in the first three years of OEBR's operation.[17]

As discussed below, the current *EBR* mechanisms for judicial accountability (e.g., section 84 cause of action) have been ineffective or underutilized over the past three decades. Moreover, for the above-noted reasons, CELA concludes that there is a clear imbalance between political and judicial accountability within the *EBR*. Therefore, CELA recommends that it is necessary to undertake appropriate statutory reforms to enhance public access to the courts under the *EBR*.

In particular, CELA submits that it is now time to rectify this imbalance by implementing *EBR* amendments that entrench or expand legal accountability mechanisms while retaining and improving the current political accountability provisions. The new or amended legal accountability components should not be confined to ensuring better compliance with procedural rights under the *EBR* but must also address more substantive matters, particularly the right to a healthful environment (RTHE), environmental justice, public trust doctrine, and rights of nature, as described throughout the remainder of this submission.

**CELA Recommendation 1:** To achieve its purposes more effectively, the *EBR* should be amended to:

- revise and strengthen existing political accountability tools in the *EBR* (e.g., Parts II, III, IV, and V); and

- entrench new or amended legal accountability tools in the *EBR* (e.g., Parts I, II, VI, and VIII) to provide greater public access to the courts and tribunals to obtain appropriate relief in relation to substantive and procedural rights in the environmental context.

***(b) 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?***

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[16] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at pages 247 to 248.
[17] See Joseph Castrilli, "Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences" (1998), 9 Vill. Env. LJ 349, at page 436.

**CELA Response:** The nature, scope, and implementation of SEVs should be strengthened and improved through various amendments to the *EBR* and the SEVs themselves, including adapting certain elements of the *Federal Sustainable Development Act*.

**CELA Analysis:** The *EBR* Task Force described the development and application of SEVs as "the best method of ensuring that the purposes of the *EBR*" are influencing government decision-making with respect to the environment.[18] Accordingly, section 11 of the *EBR* imposes a positive legal duty on prescribed Ministers to "take every reasonable step" to ensure that the Ministries' SEVs are considered whenever environmentally significant decisions are being made by the Ministries. However, the implementation of this Ministerial duty – and the substantive content of the SEVs – has been highly controversial and largely unsatisfactory for as long as the *EBR* has been in force.

(i) Current SEV's Have Not Resulted in Better Environmental Decision-Making

The ECO's Special Report on *EBR* reform correctly concluded that "SEVs are vague and outdated, and have little impact in the ministries."[19] Although SEVs have been revised since the ECO's Special Report in 2005, the current SEVs still amount to little more than a verbatim recital of *EBR* purposes and vague or high-level environmental commitments, with little or no operational direction on how these purposes and principles are to be put into practice during governmental decision-making in relation to Acts, regulations, policies, or instruments. Accordingly, CELA submits that section 7 of the *EBR* should be updated to recognize that SEVs are now in existence and, more importantly, to specify the minimum content requirements for SEVs, as discussed below.

In any event, the ECO again concluded in 2016 that the current generation of SEVs "have not been effective in changing environmental outcomes to date."[20] CELA concurs with the ECO's finding, which provides further evidence that the Task Force's optimistic predictions about political accountability (and corresponding improvements in the transparency, quality, or credibility of decision-making) have not materialized to date.

(ii) SEVs are Applicable to Instrument Decisions

CELA notes that the Environment Ministry's current SEV does not mention its applicability to decisions respecting prescribed instruments, despite findings to the contrary by the Environmental Review Tribunal and the Ontario Divisional Court in the precedent-setting *Lafarge* litigation.[21] Incredibly, despite the outcome of the *Lafarge* case, the Environment Ministry's current SEV still

[18] *EBR* Task Force Report, page 23.
[19] ECO Special Report, page 3. See also ECO, 2005-2006 Annual Report, pages 188 to 189.
[20] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 3. See also ECO, 2015-16 Annual Report, Chapter 1.5.
[21] *Dawber v. Ontario (Director, Ministry of the Environment),* (2007), 28 C.E.L.R. (3d) 281; affd. (2008), 36 CELR (3d) 191 (Ont. Div. Ct.); leave to appeal refused (Ont. C.A. File No. M36552, November 26, 2008). See also CELA, *Third-Party Appeals under the Environmental Bill of Rights in the Post-Lafarge Era: The Public Interest Perspective* (February 2, 2009).

stipulates that the SEV principles will only be applied when the Ministry "develops Acts, regulations, and policies."[22] The ECO has similarly reported that Ministry of Natural Resources and Forestry "continues to assert that SEV documentation and/or consideration is not required for certain instruments."[23]

To remedy this situation, CELA recommends that section 11 of the *EBR* should be amended to clearly stipulate that SEVs are applicable to governmental decisions about prescribed instruments, and corresponding changes should be made to all SEVs issued under the *EBR*.

(iii) Enhancing Accountability and Ensuring Conformity with SEV Principles

The ECO has often reported difficulty in obtaining adequate documentation from the Environment Ministry to demonstrate how it has considered SEV principles when making instrument decisions.[24]

Accordingly, the ECO concluded that the issue of SEV compliance requires both legislative reform (e.g., requiring Registry decision notices to explain precisely how the SEV was applied) as well as substantive improvements in SEV content.[25] CELA fully agrees with the ECO's conclusion, and we submit that various reforms are necessary to strengthen and improve SEV content, implementation, and compliance.

For example, section 10 of the *EBR* should be amended to impose a specific duty upon Ministers to undertake a public review and revision of their SEVs every five years, rather than merely "from time to time." This kind of regular review would help ensure that the SEVs remain current and effective. In addition, Ministers should develop (with public input) appropriate guidance materials, procedures, and protocols which explain how *EBR* purposes are to be considered and applied during the Ministries' environmental decision-making (including decisions to issue or amend prescribed instruments).

Most importantly, the SEVs require clearer goals, prescriptive detail, and measurable targets, which should be required through statutory amendments to the SEV provisions in the *EBR*.[26] To avoid further uncertainty (or more litigation), CELA recommends that section 11 of the *EBR* should be amended to clarify that all ministry decisions in relation to Acts, regulations, policies, and prescribed instruments "shall conform with" the relevant SEV. This stringent conformity test has been used in other environmental statutes in Ontario,[27] and is particularly appropriate in the *EBR* to ensure that SEV commitments are implemented by prescribed ministries in a transparent and accountable manner. In the alternative, CELA submits that the *EBR* should be amended to

[22] Environment Ministry SEV, section 3.
[23] ECO, 2015-16 Annual Report, page 43.
[24] ECO, 2014-15 Annual Report, page 28; ECO, 2015-16 Annual Report, page 43.
[25] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 3.
[26] ECO Special Report, page 3.
[27] See, for example, *Clean Water Act*, Part III. See also *Planning Act*, subsection 3(5)(b), which requires all planning decisions to conform to provincial land use plans.

provide that all Ministry decisions "shall be consistent with" the relevant SEV, which is the test used under the *Planning Act* to ensure consistency with the 2020 Provincial Policy Statement.[28]

On this point, CELA notes that the 1992 supplementary recommendations of the *EBR* Task Force indicated that the word "considered" in section 11 should be replaced by "applied"[29] to help ensure that the SEVs have a tangible effect on environmental decision-making. Nevertheless, the *EBR*, as passed by the Ontario Legislature in 1993, included only the ministerial obligation to merely "consider" SEVs, which, in our view, goes a long way in explaining the unsatisfactory SEV track record over the decades. However, instead of inserting the word "applied" in section 11 at the present time, CELA submits that it is preferable to utilize "conformity" (or "consistency") since it is a well-established decision-making standard under the *Planning Act*, as noted above.

For accountability purposes, prescribed ministries should also be required by the *EBR* to prepare "SEV conformity" documentation (perhaps in a prescribed form) that fully explains how the legislative, regulatory, policy, or instrument decision conforms to the SEV, and such documentation should be posted as part of the decision notice on the Registry. This documentation must not simply contain check boxes or boilerplate language, but must clearly set out explanatory, evidence-based reasons that are justifiable, transparent, and intelligible. If the decision is not in conformity (or inconsistent) with the SEV, then concerned persons should have the option of seeking judicial review of the governmental decision for accountability purposes. In the alternative, an *EBR* right of appeal could be created to enable persons to bring SEV non-conformity complaints to the Ontario Land Tribunal (OLT) by revising and expanding the current appeal mechanism that is limited to instrument decisions.

For instrument decisions, CELA further submits that this new statutory obligation for SEV conformity (or consistency) should be triggered regardless of whether a proposed instrument falls within an "exception" (e.g., sections 29 to 33) that dispenses with the general obligation to post public notice of the proposal on the Registry for comment purposes.

(iv) The *Federal Sustainable Development Act*

The *Federal Sustainable Development Act* (*FSDA*) was enacted in 2008 to "provide the legal framework for developing and implementing a Federal Sustainable Development Strategy that makes decision making related to sustainable development more transparent and subject to accountability to Parliament."[30]

Among other things, the *FSDA* requires the federal Environment Minister to publicly develop and periodically review the Strategy,[31] and sets out various principles that should be reflected in the Strategy (e.g., precautionary principle, ecosystem approach, pollution prevention, intergenerational equity, polluter pays principle, promotion of equity, Indigenous engagement, etc.).[32] As described below in relation to Consultation Question 12, Ontario's *EBR* currently omits

[28] *Planning Act*, subsection 3(5)(a).
[29] *EBR Task Force: Supplementary Recommendations* (December 1992), page 8.
[30] *Federal Sustainable Development Act*, S.C. 2008, c.33, section 3.
[31] *Ibid*., section 9.
[32] *Ibid*., section 5.

several of these important principles, and CELA recommends that they should be added to the *EBR* at the earliest possible opportunity.

The current Strategy sets out the federal government's sustainable development priorities, goals, targets, and implementation measures to be utilized by various federal ministries, agencies, and institutions for the 2022 to 2026 timeframe.[33] These matters are more extensive and detailed than the simplistic "green" platitudes that are contained in current SEVs under the *EBR*. Notably, the Strategy requires monitoring of, and reporting upon, various performance indicators to assess progress in achieving the federal goals and targets and to identify whether further adjustments or updates are necessary.[34] This key monitoring/reporting/corrective action feedback loop is conspicuously missing from the current suite of SEVs under the *EBR*. CELA therefore recommends that section 7 of the *EBR* should be amended to require SEVs to include measurable targets, appropriate monitoring indicators, and reporting obligations so that the prescribed ministries' success (or lack of success) in achieving *EBR* purposes and principles can be publicly tracked, evaluated, and corrected if necessary.

**CELA Recommendation 2:** The *EBR* should be amended to specify that:

- prescribed ministries shall publicly review and update their respective SEVs every five years;
- SEVs shall be applied whenever ministries are making environmentally significant decisions about proposed Acts, policies, regulations and instruments;
- Ministers shall take every reasonable step to ensure that environmentally significant decisions about proposed Acts, policies, regulations, and instruments conform with (or are consistent with) SEVs;
- documentation that clearly explains how environmentally significant decisions by prescribed ministries conform with (or are consistent with) SEVs shall be posted as part of decision notices placed on the Registry;
- SEVs shall, at a minimum, include provisions that set out clear goals, prescriptive detail, and specific measurable targets and monitoring indicators that are publicly developed and reported upon by prescribed ministries;
- If a governmental decision does not conform (or is inconsistent) with the applicable SEV, then the decision should be judicially reviewable or subject to a statutory appeal to the OLT.

***(c) 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?***

[33] Environment and Climate Change Canada, *Achieving a Sustainable Future* (2022).
[34] *Ibid*., Annex 2.

***• 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?***

**CELA Response:** The current *EBR* provisions in relation to judicial review and court remedies should be repealed or amended because they are inappropriate, unduly restrictive, and ultimately unnecessary in light of recent jurisprudence.

**CELA Analysis:** CELA recommends that the general *EBR* prohibition against judicial review (section 118(1)) should be deleted in its entirety. CELA strongly submits that this undue constraint on judicial review is inappropriate and unduly impedes access to environmental justice. In our view, if the Ontario government has failed or refused to meet its mandatory legal obligations under the *EBR* in relation to Acts, regulations, policies, or instruments, then residents should be given standing under the *EBR* to seek judicial review of the non-compliance, and to request appropriate orders from the court to address or remedy the non-compliance.

In short, if the rule of law is to fully apply to environmentally significant decision-making that is caught by the *EBR*, then the important right to seek judicial review should not be arbitrarily limited to instrument decisions (see section 118(2)). CELA further notes that the privative clause in section 118(2) does not confer wide-open standing to challenge all instrument decisions, but instead only permits judicial review where there has been a "fundamental failure" by the decision-maker to comply with the requirements of Part II of the *EBR*. This key term is not defined in the *EBR*, which creates considerable uncertainty as to when this provision is – or is not – applicable to hold decision-makers accountable for decisions about instruments.

For example, it is unclear whether "fundamental failure" simply refers to procedural non-compliance under Part II of the *EBR* (e.g., failure to post a Registry notice, failure to provide the minimum 30-day comment period, etc.), or whether it includes the substantive refusal by prescribed ministries to properly consider or apply the environmental principles in their respective SEVs when making instrument decisions.

In summary, CELA submits that the prohibitions in subsections 118(1) and (2) represent an anachronism that should be deleted from the *EBR*, particularly given the indisputable track record of governmental non-compliance under the *EBR* that has not been prevented by political accountability mechanisms. CELA further submits that since there has been a relatively small number of judicial review applications that have been brought under the *EBR* to date,[35] removing section 118 is unlikely to open up the floodgates to countless judicial review applications. We also note that the Divisional Court recently declined to give effect to section 118 in granting judicial review on reasonableness grounds where a legislative enactment (not an instrument) was at issue.[36] In our view, the general analytical framework established in the leading *Vavilov*[37] judgment of the Supreme Court of Canada is more than sufficient to provide direction when judicial review applications of governmental decision-making are brought under the *EBR*.

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[35] See, for example, *Greenpeace Canada v. Minister of the Environment (Ontario)*, 2019 ONSC 5629 (Div. Ct.).
[36] *Greenpeace Canada v. Ontario*, 2021 ONSC 4521 (Div. Ct.).
[37] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

CELA's recommended statutory right of judicial review under the *EBR* should be subject to Ontario's *Rules of Civil Procedure*, and applicants should be entitled any relief available under the *Judicial Review Procedure Act* (e.g., declaration, injunction, mandamus, certiorari, etc.). The right itself could be framed as follows:

> Any Ontario resident may bring an application for judicial review in the Superior Court of Justice where the Government of Ontario has:
>
> (a) failed to comply with its duties under this Act or regulations;
>
> (b) contravened, or failed to enforce, a prescribed statute, regulation, or instrument;[38]
>
> (c) made a decision about an Act, regulation, policy, or prescribed instrument that does not conform with the applicable Statement of Environmental Values;
>
> (d) implemented or authorized activities, physical works, or facilities that contravene the right to a healthy and ecologically balanced environment established under this Act; or
>
> (e) failed to fulfill its duty under this Act as trustee of the environment.[39]

Since the Divisional Court has general jurisdiction under the *Judicial Review Procedure Act* to issue orders in nature of certiorari to quash or set aside unlawful or unreasonable decisions, then the continued existence of section 37 in the *EBR* can no longer be justified. In essence, this section provides that governmental failure to comply with Part II of the *EBR* "does not affect the validity of any policy, Act, regulation, or instrument, except as provided in section 118." As noted above, CELA submits that section 118 itself should be deleted and further submits that section 37 should also be deleted on the grounds that it improperly shields governmental decision-making, diminishes environmental accountability, and constrains the issuance of appropriate judicial remedies in the *EBR* context.

For example, in the *Greenpeace #2* decision,[40] the Divisional Court found that the Minister of Municipal Affairs and Housing acted "unreasonably and unlawfully" when making an environmentally significant change to the *Planning Act* via Bill 197 (e.g., to enhance Ministerial zoning orders) without undertaking public consultation under Part II of the *EBR*. The Court issued declaratory relief to this effect, but the impugned changes to the *Planning Act* were left intact (and

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[38] Annual reports by the ECO and the Auditor General have documented many instances where Applications for Investigation filed by Ontario residents under Part V of the *EBR* were not handled reasonably, or were not adequately investigated, by prescribed ministries. In CELA's view, governmental accountability under Part V would be significantly enhanced if judicial review is available to challenge decisions that unreasonably refuse applications for investigation, or that grant applications for investigation but unreasonably result in no governmental enforcement or abatement action despite findings of environmental non-compliance with applicable legal requirements. This latter scenario recently occurred when a CELA client filed an application for investigation regarding offences under the *Ontario Water Resources Act*, and the Environment Ministry confirmed the proponent's non-compliance but took no enforcement or mandatory abatement steps to address the situation.

[39] This proposal has been adapted from sections 16 and 17 in the *Canadian Environmental Bill of Rights* that was proposed in a private member's bill (Bill C-202) in 2015.

[40] *Greenpeace Canada v. Ontario*, 2021 ONSC 4521 (Div. Ct.), para 99.

remain currently available to be used by the Minister despite the blatant *EBR* non-compliance) due to the presence of section 37 of the *EBR*.

In CELA's view, it is reasonable to anticipate that if section 37 is deleted, then enabling the Court to quash or set aside an impugned decision (and typically remitting the matter back to the decision-maker for further consideration in accordance with the law) will enhance governmental accountability and have a significant deterrent effect on governmental conduct that does not comply with *EBR* requirements.

**CELA Recommendation 3:** The *EBR* should be amended to:

- delete sections 37 and 118;
- create a statutory right for persons to seek judicial review of governmental decision-making under the *EBR* in relation to prescribed Acts, regulations, policies, and instruments; and
- specify that all judicial remedies available under the *Judicial Review Procedure Act* may be ordered by the court in applications for judicial review under the *EBR*.

***(d) Consultation Question 4: Should access to information be improved under the EBR? If so, how?***

**CELA Response:** Public access to information related to proposed Acts, policies, regulations, and instruments has been a systemic problem under the *EBR* for decades. Accordingly, various amendments are now required to ensure that Ontario residents obtain free, full, and timely disclosure of all relevant information so that they can meaningfully exercise their public participation rights under Part II of the *EBR*.

**CELA Analysis:** The nature, scope, and sufficiency of the textual information contained in Registry notices can vary considerably, as some notices are drafted in a comprehensive and informative manner, while others simply set out sparse or inadequate descriptions of the proposal or its potential environmental impacts.[41] As noted by the ECO, this inconsistency can be addressed, at least in part, by providing more detailed guidance to ministry staff and by using better standardized templates for Registry notices.[42]

In addition, there have also been significant variations or inconsistencies in the ministries' provision of additional information to assist the public in reviewing and commenting on proposals. For example, while some *EBR* notices for regulatory proposals have attached the draft regulatory text for public consultation purposes, most Registry notices do not. In our experience, it is exceptionally difficult to comment on overgeneralized descriptions of regulatory proposals in the absence of the actual regulatory language that is under consideration by prescribed ministries. This

[41] ECO, 2014-15 Annual Report, page 13; ECO, 2009-2010 Annual Report, page 184; ECO, 2006-2007 Annual Report, page 159; and ECO, 2005-2006 Annual Report, page 172.
[42] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 4. See also ECO, 2015-16 Annual Report, page 22.

same concern applies to governmental proposals to pass or amend environmentally significant policies or legislation.

In the context of proposed instruments, Registry notices rarely include or append the full text of the draft instruments or the full text of proposed amendments to existing instruments. This approach undermines the ability of the public to meaningfully comment on the proposed issuance of the instrument or the adequacy of the proposed terms or conditions to be imposed within the instrument. Too often prescribed instruments (and their terms and conditions) are not available to the public until after the issuance decision has been made by ministry officials.

Accordingly, CELA recommends that Part II of the *EBR* should be amended to require Registry notices to include, append, or link to all relevant information and documentation, including the full draft text of the proposed law, regulation, policy, or instrument.

When seeking prescribed instruments, proponents typically file detailed applications and supporting documentation (e.g., hydrogeological reports, air pollution modelling, technical studies, etc.). These materials are usually not attached or linked to the Registry notice but will undoubtedly be reviewed and relied upon by ministry decision-makers if the requested instrument is issued. To facilitate meaningful public review/comment opportunities, CELA submits that all instrument applications and supporting documentation should be readily available to Ontarians as of right. CELA's additional comments on access to information are set below in relation to Consultation Question 7 regarding third-party appeal rights under the *EBR*.

We also note the ECO has previously found that some Ministry staff remain uncertain or unaware that interested members of the public are entitled to review the proponent's supporting documentation without being forced to file freedom-of-information (FOI) requests.[43] This situation is particularly problematic in the context of third-party appeals, where the current *EBR* leave-to-appeal timeline (15 days) is shorter than the prescribed time (30 days) for the Ministry just to acknowledge receipt of an FOI request and advise whether (or when) the requested records will be disclosed (30 days).

To avoid this scenario, CELA submits that instrument applications and supporting documentation should be included or linked to the Registry notice about the proposal. In the alternative, if the application or supporting documentation is not web-posted, then the Registry notice should inform members of the public about their right to request free and full disclosure of these materials from the ministry. If these materials are requested after the initial Registry notice, then the running of the public comment period should be suspended (or extended) until such time that the requestor receives the records. Similarly, where these materials are requested during the leave-to-appeal period after the decision notice is posted on the Registry, then the running of the leave-to-appeal timeline should be suspended (or extended) until such time that the requestor receives the records. In our view, this approach should prompt prescribed ministries to quickly disclose the materials and thereby enable Ontarians to exercise their public participation rights under Part II of the *EBR*.

**CELA Recommendation 4:** Part II of the *EBR* should be amended to specify that:

[43] ECO, 2009-10 Annual Report, page 177.

- Registry notices shall include, append, or link to all information and documentation that is relevant to the proposal, including the full draft text of the proposed law, regulation, policy or instrument (e.g., the proponent's application and supporting documentation);

- in the alternative regarding instruments, Registry notices shall inform the members of the public that they can request free and full disclosure of all materials filed by the proponent, and that the public comment period (or leave-to-appeal period, if applicable) will be suspended (or extended) until such time that the requested materials have been provided by the prescribed ministry to the requestor.

***(e) 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***

**CELA Response:** The core components of the public trust doctrine should be expressly entrenched in the *EBR* and properly reflected in all SEVs of prescribed ministries.

**CELA Analysis:** CELA submits that it is time to expressly entrench the public trust doctrine into the *EBR*. In essence, this doctrine posits that governments do not "own" public resources, but instead have a positive (or fiduciary) duty to hold and manage public resources in trust on behalf of the public at large. Where it is alleged that governments have failed to properly discharge this duty, then the trust beneficiaries – members of the public – should be entitled to go to court to seek appropriate remedies.[44] Thus, "given its potential utility, the public trust doctrine should be incorporated into environmental rights legislation."[45]

CELA notes that the public trust doctrine has been included in environmental rights legislation passed or proposed in other Canadian jurisdictions (e.g., Yukon, Northwest Territories, Nova Scotia, and British Columbia). However, it remains absent from the *EBR* at the present time.

(i) The Overdue Need to Entrench the Public Trust Doctrine in the *EBR*

The public trust doctrine was considered by the *EBR* Task Force.[46] However, the doctrine was not included in the *EBR*, presumably because the Task Force anticipated that SEV requirements and other political accountability mechanisms would effectively prevent environmentally unsound decisions by the Ontario government in relation to public resources. As described above, however,

[44] Paul Muldoon & Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond-Montgomery, 1995), pages 122 to 123.
[45] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 229.
[46] *EBR* Task Force Report, pages 84 to 85.

it appears to CELA that these existing *EBR* provisions have been inadequate to achieve this important societal objective.

Accordingly, CELA submits that the public trust doctrine should now be codified in the *EBR* as follows:

> The Government of Ontario is the trustee of Ontario's environment within its jurisdiction and has the obligation to preserve and protect it in accordance with the public trust for the benefit of present and future generations.[47]

CELA further adds that to enhance the profile, effectiveness, and enforceability of the public trust doctrine, the salient aspects of this public trust should also be incorporated and operationalized in all SEVs of prescribed ministries. As described above in relation to Consultation Question 2, the *EBR* should be amended to require legislative, regulatory, policy and instruments to conform (or be consistent) with SEVs. If SEV content is expanded to include public trust requirements, and if prescribed ministries properly comply with such requirements, then the need to commence judicial review applications to enforce the public trust doctrine should be significantly reduced. On the other hand, if there is evidence that a governmental decision conflicts with, or is contrary to, the public trust, then Ontarians should be able to commence civil litigation to enforce the provincial government's trust duties with respect to public resources.

(ii) Public Trust Definitions

"Public trust" should be defined in the *EBR* as: "the provincial government's responsibility to preserve and protect the collective interest of Ontarians in the quality of the environment for the benefit of present and future generations."[48] This trust duty should be enforceable via judicial review applications brought by residents of Ontario, as described above in relation to Consultation Question 3. However, in the alternative, it would also be possible to create a statutory right in the *EBR* to enforce the public trust duty via actions in the Superior Court of Justice. Given the constitutional independence, inherent jurisdiction, and extensive remedial powers of Ontario's Superior Court, CELA submits that it would be appropriate for public trust claims to be adjudicated in the civil courts rather than in administrative tribunals (e.g., the OLT) that are under the purview of the executive branch of the provincial government.

If entrenched in the *EBR*, the public trust provisions should adopt or cross-reference the current *EBR* definition of "harm."[49] However, CELA would caution against attempting to legislatively establish any specific harm threshold or criteria (such "significant", "unacceptable", "irreversible", or "serious") in the *EBR* before the public trust doctrine can be enforced in the civil courts. *De minimis* harm to a public resource would be an insufficient basis for judicial review applications (or actions) under the *EBR*, but the government-caused harm must be negative, adverse, or injurious. Similarly, the alleged harm to the public resource could be either actual or imminent so that the judicial review application may be either reactive or preventative in nature. CELA is

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[47] See Bill C-202, subsections 6(b), 9(2) and 9(3). See also subsection 4(b) in Bill C-219.
[48] *Ibid*.
[49] *EBR*, section 1: "harm means any contamination or degradation and includes harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration or radiation."

otherwise content to allow the forthcoming public trust jurisprudence in Ontario to flesh out the nature, type, or magnitude of the harm to public resources that warrants judicial intervention pursuant to the *EBR*.

The subject matter of the trust is the natural environment of Ontario, and it includes the ecological functions and interrelationships therein as well as the various items that are listed in the definitions of "public land" and "public resources" in section 82 of the *EBR*. In legal proceedings that are commenced to enforce the public trust, the respondent (or defendant) would be His Majesty the King in right of Ontario. No specific defences should be defined or recognized in the *EBR* in relation to judicial review applications based on the public trust doctrine, just as the *Judicial Review Procedure Act* is silent on what issues or arguments may be made by governmental respondents to defend their decisions.

If private persons or corporations cause harm to the natural environment, then residents can address such situations by either using an updated version of the cause of action in section 84 of the *EBR* or, alternatively, invoking and enforcing a new *EBR* right to a healthy and ecologically balanced environment, as described below. Creating legally enforceable rights of nature in the *EBR* is another option that is available to address environmental harm caused by private persons, corporations, or governments, as indicated below in relation to Consultation Question 16.

**CELA Recommendation 5:** The *EBR* and all SEVs should be amended to fully entrench the necessary elements of the public trust doctrine.

***(f) Consultation Question 6: Are amendments or changes required to the role of the Environmental Commissioner to help strengthen government accountability?***

**CELA Response:** The current duties, roles, and responsibilities of the Auditor General and Commissioner of the Environment should be modified to re-establish the key aspects of Part III of the *EBR* that existed prior to the passage of Bill 57 in 2018.

**CELA Analysis:** As a result of enacting Schedule 15 of Bill 57 in late 2018, the Ontario government amended Part III of the *EBR* to terminate the long-standing Office of the ECO and to transfer some – but not all – the ECO's powers, responsibilities, and duties to the Auditor General of Ontario and the newly revamped Commissioner of the Environment. Like the former ECO, the Auditor General is an independent officer who reports directly to the Ontario Legislature, but the Commissioner of the Environment is now an employee of the Auditor General.

At the time, CELA and numerous other groups jointly opposed the abrupt and unjustifiable termination of the ECO Office,[50] and we continue to be concerned about the efficacy of the Bill 57 changes to Part III of the *EBR*. This concern should not be construed as criticism of the Auditor General or the new Commissioner of the Environment, both of whom have commendably performed their new duties and powers under the *EBR*. However, as a matter of law, these current duties and powers are far narrower and more discretionary than those that were exercised by the ECO prior to Bill 57 and should therefore be revisited and revised.

[50] Letter dated November 15, 2018 to Premier Ford from CELA *et al*.

For example, former section 57 of the *EBR* imposed several mandatory duties upon the ECO to, *inter alia*, review and collect information on *EBR* implementation matters, provide guidance to ministries on *EBR* compliance, and provide public education, advice, and assistance to Ontario residents about the *EBR*. Similarly, the ECO was duty-bound to submit annual and special reports to the Ontario Legislature on *EBR* tools, energy conservation, and greenhouse gas emissions (see former sections 58, 58.1 and 58.2).

In contrast, the Auditor General is now only generally obliged to file an annual report on the "operation" of the *EBR* to the Ontario Legislature, but "operation" is undefined, and section 51 otherwise prescribes no mandatory content requirements for such reports. Similarly, this provision goes on to state that these annual reports "may" (not "shall") include reviews of energy conservation progress, reductions in greenhouse gas emissions, or other "appropriate" matters. Given the existential threat posed by climate change upon Ontario's environment and communities, CELA submits that these key issues should not be left to the individual discretion of the Auditor General and must instead be required by law under the *EBR* for governmental accountability purposes.

It is also unclear to CELA why Bill 57 abolished the ability of the Auditor General to file special reports with the Ontario Legislature if warranted. The former ECO issued some key special reports from time to time under the *EBR*, and we are unaware of any compelling reasons why the Auditor General should be deprived of the same power to file special reports. CELA therefore submits that section 51 of the *EBR* should be amended to restore the discretionary authority to file special reports, particularly if a time-sensitive environmental issue arises that should not await the year-end release of the annual report.

In addition, Bill 57 imposed a new duty on the Environment Minister to provide public education about the *EBR* (see section 2.1). However, in her 2020 report[51] to the Legislature, the Auditor General found that although the Minister has the legal duty to provide public education, virtually no proactive steps were undertaken to satisfy this important duty, thereby leaving many Ontarians in the dark about their *EBR* rights. Similarly, in her 2022 report,[52] the Auditor General criticized the Environment Ministry for making only limited progress in implementing its *EBR* communications plan, much of which is internet-based and includes occasional social media posts.

CELA agrees with the Auditor General[53] that "Ontarians cannot exercise their *EBR* Act rights if they are not aware of them," and that other types of engagement (e.g., webinars, presentations, workshops, media ads, printed materials, etc.) should be utilized for public education and outreach regarding *EBR* rights. More fundamentally, since it is unrealistic to expect the Minister to fully inform the public about how to effectively use the *EBR* to hold the Ontario government accountable, CELA maintains that the former ECO duty to provide public information, advice and assistance should be reinstated to the mandatory list of the Auditor General's functions under Part III of the *EBR*.

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[51] Auditor General of Ontario, *Operation of the EBR* (November 2020), Chapter 2, pages 1-3.
[52] Auditor General of Ontario, *Operation of the EBR* (December 2022), page 32.
[53] *Ibid*.

Interestingly, former sections 57 to 58.2 of the *EBR* did not expressly empower the ECO to make recommendations in annual or special reports filed with the Ontario Legislature. Traditionally, the ECO interpreted its reviewing/reporting powers as including the authority to make recommendations, and over the past decades the ECO's reports have included numerous important recommendations on environmental matters and suggested *EBR* reforms. This tradition has been continued in the annual reports filed in recent years by the Auditor General under the *EBR*. However, if a future Auditor General decides not to include recommendations in his/her reports, there is nothing in Part III of the *EBR* that would prevent this unfortunate regression. Accordingly, CELA submits that the *EBR* should clarify and confirm that the Auditor General can include general or specific recommendations in annual and special reports. CELA also agrees with the ECO's recommendation that reporting powers and responsibilities under Part III of the *EBR* should be enhanced and more flexible.[54]

In addition, the *EBR* does not legally require the Environment Ministry (as the Ministry responsible for administration of the *EBR*), or any other prescribed Ministry, to formally respond to, or act upon, any of the well-founded recommendations made by the ECO or the Auditor General. However, we note that the annual reports under the *EBR* now feature very brief replies by prescribed Ministries to the Auditor General's recommendations, although many of these governmental replies consist of questionable assertions, self-serving claims, and non-committal statements about future actions.

The result is that over the past decades, many key ECO and Auditor General recommendations (including those related to *EBR* reform) have languished without implementation, or even a formal acknowledgement or thoughtful response, by prescribed Ministries to the Ontario Legislature. In CELA's view, this continuing practice clearly underscores the limitations of political accountability mechanisms under the *EBR*:

> Thus, accountability for government failures is primarily political. To enable greater political pressure to be brought to bear, the Act establishes the office of the Environmental Commissioner, whose duties include monitoring the statute's implementation and reporting any deficiencies to the Legislature. However, the Environmental Commissioner has few powers and to date, despite the Commissioner's scathing reviews of government inadequacies and reports of blatant violations of the Ontario *EBR*, it seems that the legislature in receipt of those reports is unmoved.[55]

Accordingly, for the purposes of greater certainty, transparency, and accountability, CELA recommends that the *EBR* should be amended to expressly empower the Auditor General to make recommendations in the annual *EBR* reports, and to impose a positive legal duty upon the Environment Ministry (and all other prescribed Ministries) to provide the Ontario Legislature with a detailed written response, with reasons, to the Auditor General's recommendations within 90 days of their public release.

Alternatively, the Ontario Legislature could create a new standing committee (or use an existing committee) to review and report upon the Auditor General's recommendations and responses

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[54] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 3.
[55] Elaine Hughes & David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999), 30 Ottawa L.R. 229, para.80.

thereto by prescribed ministries. This arrangement could be structured in a manner that required ministry officials to testify before the committee on a regular basis about matters raised in the Auditor General's reports. Thus, this reform would be analogous to the obligation upon the federal government to formally respond to parliamentary committee reports regarding reform or renewal of Canadian environmental laws (e.g., *Canadian Environmental Protection Act, 1999*).

**CELA Recommendation 6:** The *EBR* should be amended to:

- provide the Auditor General with all the duties, powers, and responsibilities (including public education, advice, and assistance) that existed in Part III of the *EBR* prior to the Bill 57 changes;

- enable the Auditor General's annual and special reports to contain general or specific recommendations to prescribed ministries or the Ontario government at large; and

- impose a positive legal duty upon all prescribed Ministries to provide the Ontario Legislature (or a designated standing committee) with a detailed written response, with reasons, to the Auditor General's recommendations within 90 days of their public release.

***(g) 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***

**CELA Response:** If certain amendments are enacted, the *EBR* can serve as an effective, equitable and efficient mechanism for advancing access to justice in the environmental context. Among other things, this objective will require new or amended provisions that better facilitate Ontarians' access to the courts and administrative tribunals for environmental protection purposes.

**CELA Analysis:** The Supreme Court of Canada has stated that "ensuring access to justice is the greatest challenge to the rule of law in Canada today."[56] CELA submits that this challenge is especially acute in the environmental context since the existing legal tools in the *EBR* have been largely ineffective in ensuring access to justice in Ontario.

The Supreme Court has also emphasized the importance of access to justice in upholding the rule of law:

> The legality principle encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action (*Downtown Eastside*, at para. 31). Legality derives from the rule of law: "[i]f people cannot challenge government actions in court, individuals cannot hold the state to account — the

[56] *Hryniak v Mauldin*, 2014 SCC 7, para 1.

> government will be, or be seen to be, above the law" (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 40).
>
> Access to justice, like legality, is "fundamental to the rule of law" (*Trial Lawyers*, at para. 39). As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (*B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 230).
>
> Access to justice means many things, such as knowing one's rights, and how our legal system works; being able to secure legal assistance and access legal remedies; and breaking down barriers that often prevent prospective litigants from ensuring that their legal rights are respected (emphasis added).[57]

The LCO's above-noted question on access to justice under the *EBR* includes several sub-issues that are addressed in the following submissions. CELA's overall position is that the *EBR* requires various amendments to enhance public access to justice, which generally encompasses fair, equal, and timely access to independent judicial or administrative adjudicators, as well as access to needed resources, information, or related services (e.g., legal aid), to ensure adherence to the rule of law.

Access to justice is of particular concern to CELA's client communities which are frequently confronted by daunting or intersectional barriers (e.g., financial, linguistic, technical, geographic, etc.) when attempting to initiate and maintain legal proceedings in courts or tribunals. In our view, an amended *EBR* can offer an important opportunity to prevent, reduce, or mitigate these systemic challenges in relation to environmentally harmful projects, activities, or undertakings across the province.

(i) Section 38 Standing Rules

Section 38 of the *EBR* establishes two conditions precedent for seeking leave to appeal a prescribed instrument: (a) the leave applicant must have an "interest" in the impugned decision; and (b) the proponent must have a right under other legislation (e.g., *Environmental Protection Act*, *Ontario Water Resources Act*, etc.) to appeal from a decision whether or not to issue the instrument. In CELA's view, both provisions are outdated, serve no useful purpose, and should be amended or deleted.

With respect to the "interest" component, CELA notes that this term is undefined in the *EBR*, but evidence of interest can be demonstrated by the filing of written comments on the proposed instrument (see section 38(3)). In many instances, this is not an onerous requirement for persons, residents' groups, or non-governmental organizations to fulfill during the public comment period on the proposed instruments.

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[57] *Attorney General of British Columbia v. Council of Canadians with Disabilities*, 2022 SCC 27, paras 33-35.

However, the public's ability to submit written comments on Registry-posted proposals is contingent upon several factors (e.g., computer ownership, internet access, etc.) which may preclude persons from knowing about, or submitting comments on, a proposed instrument until after it has been issued. In such cases, persons can still seek leave to appeal (provided that the appeal period has not expired), but they will have to demonstrate that they have a personal, pecuniary or property interest that may be affected by the decision, or, alternatively, that they have public interest standing to seek leave to appeal.

Unfortunately, the *EBR*'s failure to define "interest" makes it unclear whether the appeal right is restricted to private law standing or includes public interest standing. This uncertainty all but guarantees that standing can be frequently contested by the respondents if the leave applicant did not previously submit comments on the proposal.

Moreover, if a group possessing public interest standing can automatically pursue an appeal if it simply filed a written comment on the instrument, then there are no cogent or logical reasons why the same group should not be able to do so without the prerequisite of filing written comments. On this point, CELA notes that for access to justice purposes, the Supreme Court of Canada has recently re-affirmed the importance of allowing non-governmental organizations to challenge administrative actions, even if they are not directly impacted by such decisions.[58]

(ii) The *EBR* Prerequisite of a Proponent's Right of Appeal

With respect to proponents' right of appeal, this precondition in section 38 has the unintended consequence of shielding some prescribed instruments from third-party appeal under the *EBR*. For example, a proposed site-specific air quality standard under O.Reg.419/05 is a prescribed Class II instrument due to the environmental significance of allowing industrial facilities to emit air contaminants at levels in excess of applicable provincial standards (see section 5(2)(13.1) of O.Reg.681/94). This means that such proposals must be posted on the Registry for public comment. However, since the proponent has no statutory right to appeal the granting or refusal of a site-specific standard, concerned residents in the local airshed similarly have no ability under the current *EBR* to seek leave to appeal the instrument if issued.

In CELA's view, this anomaly impairs access to justice and militates against governmental accountability for decisions that approve site-specific standards to allow airborne contaminant concentrations to significantly exceed the limits prescribed by province-wide standards. Accordingly, CELA submits that the *EBR* should be amended to permit residents to appeal decisions on prescribed instruments for which the instrument holder has no statutory right of appeal.

In the alternative, consideration could be given to enacting consequential amendments to other environmental laws to create a new statutory right of appeal for instrument holders who apply for prescribed instruments that currently lack an appeal opportunity. If such appeal rights are available to instrument holders, then the need for the above-noted *EBR* amendment may be obviated. This even-handed approach is especially appropriate for a site-specific air standard if the Environment

[58] *Attorney General of British Columbia v. Council of Canadians with Disabilities*, 2022 SCC 27.

Ministry refuses to approve the requested standard or approves a lower standard than what was requested by the proponent. CELA further notes that if an *EBR* appeal right is not available to residents for such instruments, then the only other way for them to seek legal accountability is through judicial review applications.

(iii) Public Nuisance Standing under Section 103

With respect to public nuisances causing environmental harm, CELA notes that section 103 of the *EBR* partially relaxes the common law standing rule that restricts who can sue in relation to public nuisances. However, section 103 still requires plaintiffs to demonstrate that they suffered direct economic loss or direct personal injury resulting from the public nuisance. CELA recommends that section 103 should be amended to delete this precondition. In our view, it is in the public interest for the *EBR* to empower any Ontario resident to commence a civil action to enjoin a public nuisance causing environmental harm, regardless of whether he/she has personally suffered any loss, injury, or damage.

(iv) Intervenor Funding and Costs

CELA submits that the establishment of a participant or intervenor funding program is long overdue under the *EBR* in order to facilitate meaningful public usage of the review, comment and appeal provisions of the *EBR* in relation to instruments.[59] Over a decade ago, the ECO agreed that "this may be an appropriate moment to consider some form of participant funding under the *EBR*," and suggested that this could initially take the form of a pilot project.[60] However, no such project has been proposed or undertaken under the *EBR* to date.

Nevertheless, CELA notes that Ontario has already gleaned years of valuable experience under the former *Intervenor Funding Project Act* (*IFPA*). Thus, the appropriate question is not whether funding should be available under the *EBR*, but how such funding programs will be designed and implemented under the *EBR* (e.g., which instruments warrant intervenor funding, financial eligibility criteria, timing/quantum of funding awards, etc.). In our view, participant funding programs under the *EBR* should be based on the "proponent pays" model used under the *IFPA*.

At the same time, CELA further notes that recent amendments to the *Ontario Land Tribunal Act* now empower the OLT to order costs against an "unsuccessful" party. This broad power appears to apply to all matters heard and decided by the OLT, including leave-to-appeal applications under the current *EBR*. Prior to these amendments, parties at hearings held by the OLT (and its predecessors such as the ERT, OMB, etc.) generally bore their own costs, although the Tribunal had residual discretion to make adverse cost awards to sanction parties who acted unreasonably and irresponsibly in the hearing process (e.g., causing avoidable delays, failing to comply with procedural orders, etc.). CELA submits that this conduct-based approach to cost awards is fair and reasonable, and it should continue to be used at the OLT regarding *EBR* matters (and other environmental or land use planning matters).

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[59] CELA, *EBR Registry #XQ04E0002: Looking Forward: The EBR Discussion Paper* (January 24, 2005), page 9.
[60] ECO Special Report, page 9.

CELA further submits that basing cost awards on the concept of "success" (or lack of success) will likely inhibit individuals and non-governmental organizations from duly exercising their appeal rights under the *EBR*. This is particularly true since approximately 80% of *EBR* leave applications are unsuccessful, as discussed below. Accordingly, CELA recommends that at the very least, an *EBR* reform package should include a consequential amendment to the OLT legislation to exclude application of the new cost power to matters arising under the *EBR* and other environmental and land use planning statutes.

(v) Leave to Appeal under the *EBR*

The third-party appeal against the issuance of a prescribed instrument is arguably one of the most important *EBR* mechanisms for protecting the environment and ensuring governmental accountability. Over the years, however, there has been considerable concern expressed about the relatively short timeframe (15 days) in which *EBR* leave-to-appeal applications must be served and filed (see section 40 of the *EBR*).

As noted above in relation to Consultation Question 4, supporting documentation (and even the full text of the instrument itself) is not always posted with the proposal notice or the decision notice on the Registry, which makes it exceedingly difficult for citizens to obtain and review such documentation within 15 days. For example, the ECO commented that since the 15 day appeal period under the *EBR* serves as a "significant deterrent" to Ontarians hoping to exercise their third-party appeal rights, the appeal period should be extended to 20 days (which aligns with public appeal rights under the *Planning Act*).[61] Similarly, the ECO expressed concern over the 15 day timeframe for filing a third-party appeal in respect of renewable energy approvals issued under the *Environmental Protection Act*.[62]

However, the Environment Ministry has refused to consider or respond to the possibility of extending the timeframe to 20 (or 30) days under the *EBR*, and the ECO has been properly critical of this unpersuasive refusal.[63] Since the OLT has no statutory jurisdiction to extend the deadline (even in hardship cases), some leave applications have been dismissed due to filing delays rather than on the merits,[64] which, in CELA's view, tends to bring the *EBR* appeal process into public disrepute.

It is also clear that in many leave cases, the Tribunal has struggled to meet the 30-day deadline for its decision (see section 17 of O.Reg.74/94), and the Tribunal has often been forced to extend the decision deadline upon notice to the parties. CELA concludes that this practice reflects the legal, technical, and scientific complexity of the issues typically raised in *EBR* leave applications (and governmental and proponent responses thereto), and calls into question the appropriateness of the arbitrary 30-day decision deadline.

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[61] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, pages 2 to 3.
[62] ECO, 2009-10 Annual Report, page 18.
[63] *Ibid.*, pages 157 to 159. For more information about this matter, see also section 5.2.1.15 of the ECO's Supplement to the 2009-2010 Annual Report.
[64] See, for example, *Miller v. Ontario* (2008), 36 CELR (3d) 305, where the ERT declined to hear a leave application that was not filed on time due to a courier delivery error. A motion for reconsideration was dismissed: (2008), 37 CELR (3d) 214 (ERT).

More fundamentally, CELA submits that the current section 41 leave test should not remain intact within the *EBR*. The two-branch leave test (e.g., unreasonableness and significant environmental harm) has been characterized by Ontario courts as "stringent."[65] Although cases such as the above-noted *Lafarge* litigation demonstrate that it is possible for prospective appellants to satisfy the leave test, the fact remains that numerous *EBR* leave applications have been dismissed over the years.

For example, a statistical review of all *EBR* leave applications brought during the first ten years of the *EBR* revealed that out of an estimated 14,000 instrument decisions issued by the Environment Ministry, only 54 were subject to leave-to-appeal applications, and only 13 of these leave applications were granted (in whole or in part) over the decade.[66] While some leave applications are withdrawn prior to adjudication, the ECO has reported that leave to appeal was granted in only 21% of the applications decided between 1995 and 2003.[67]

Even if a longer timeframe is used for statistical analysis purposes, it appears that there has been no material change in the success rate of *EBR* leave applications. For example, between 1995 and 2014, approximately 285 leave applications were brought under the *EBR*, but only 20% of the applications were successful.[68] The traditional low success rate has been confirmed in the most recent *EBR* report by the Auditor General, who found that only six leave applications were filed in 2021-22 and none were granted by the Tribunal.[69]

Given these results, it remains exceptionally difficult for Ontarians to obtain leave to appeal under the *EBR*. The bottom line is that most leave applications are dismissed under the *EBR*. Accordingly, CELA concludes that the section 41 leave test is still inappropriately preventing concerned citizens from accessing justice at the Tribunal, even though, by definition, their leave applications pertain to environmentally significant activities which require the issuance (or amendment) of prescribed instruments.

In addition, even for those individuals and groups which have been fortunate enough to obtain leave to appeal, there is no participant or intervenor funding available to help defray the cost of public interest participation under the *EBR*, as discussed above. In such cases, the costs of participating in Tribunal proceedings have often been extensive if not unduly prohibitive. In the *Lafarge* litigation, for example, the successful leave-to-appeal applicants were forced to bear legal and expert costs in excess of $200,000, which were incurred before the main hearing was terminated by the Environment Ministry's revocation of the impugned instruments at the request of the proponent.[70]

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[65] *Smith v. Ontario* (2003), 1 CELR (3d) 245 (Div. Ct.) at para.8; *Dawber v. Ontario* (2008), 36 CELR (3d) 191 (Div. Ct.) at para.41.

[66] Birchall Northey, *Legal Review of the EBR Leave to Appeal Process* (September 2004), page (i). This paper was prepared as part of the ECO's 10th anniversary review of the *EBR*.

[67] ECO, *Celebrating the 10th Anniversary of the EBR and the ECO* (2004), page 11.

[68] Paul Muldoon et al., *An Introduction to Environmental Law and Policy in Canada (3rd ed.)* (Toronto: Emond, 2020), page 282.

[69] Auditor General of Ontario, *Operation of the EBR* (December 2022), pages 10-11 and Appendix 9.

[70] *Baker v. Ontario* (2009), 43 CELR (3d) 285 (ERT). A motion for reconsideration of this cost ruling was dismissed: (2009), 47 CELR (3d) 118 (ERT).

To address the foregoing concerns, CELA recommends that the timeframe for filing an *EBR* appeal should be extended from 15 days to at least 20 days (see sections 17(24) and 34(19) of the *Planning Act*) or, preferably, 30 days (see Rule 61.04 of the *Rules of Civil Procedure*). At the same time, subsections 17(4) to (6) of O.Reg.76/94 should be deleted in order to remove the 30-day deadline for the OLT to render leave decisions.

While extending timeframes is important, CELA submits that it is also necessary to enact statutory reforms to ensure that Ontarians have access to relevant government records pertaining to instruments:

> Effective, affordable and timely access to information is an essential prerequisite to effective environmental governance. These rights are central to more representative, equitable and effective decision-making. Access to information empowers and motivates people to participate in a meaningful and informed manner.[71]

Therefore, CELA recommends that the *EBR* reform package should include a consequential amendment to the *Freedom of Information and Protection of Privacy Act* to clarify that all documentation submitted by proponents in relation to proposed instruments shall be immediately disclosed upon request by any person (without filing an FOI request), and that disclosure of such documentation cannot be refused by prescribed Ministries on the grounds that the records were submitted in confidence or contain proprietary information. Where residents have requested such documentation, the running of the leave-to-appeal period should be stopped until the documentation is disclosed in full by governmental officials.

In addition, CELA strongly maintains that the leave test in section 41 should be deleted so that it no longer serves as an unreasonable barrier to citizen access to the Tribunal. In our view, if instrument-holders continue to generally enjoy an unfettered ability to file an instrument appeal as of right, then so should neighbours or other persons who are interested in, or potentially affected by, the impugned instrument. In the unlikely event that a frivolous, vexatious, or *ultra vires* third-party appeal is filed under the *EBR*, then the Tribunal already has ample authority to control its process and to summarily dispose of such appeals without a hearing.[72]

In making these submissions, CELA is fully aware that the *EBR* Task Force had suggested that there should be a "preliminary merits" screen for third-party appeals.[73] However, there was no consensus among *EBR* Task Force members on the actual wording of the leave test, and, in fact, the draft bill within the Task Force Report contained no leave test at all. Thus, it cannot be seriously

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[71] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 230.

[72] See section 4.6 of the *Statutory Powers Procedure Act* and the OLT Rules of Practice. See also the changes to section 19 of the *Ontario Land Tribunal Act, 2021* contained in Schedule 7 of the recently enacted Bill 23 (*More Homes Built Faster Act, 2022*).

[73] *EBR* Task Force Report, page 55.

suggested that the *EBR* Task Force recommended or supported the "stringent" wording that was ultimately inserted into Part II of the *EBR* by the Ontario Legislature.[74]

In any event, the dismal track record regarding *EBR* leave applications over the past decades clearly demonstrates that the current leave test is largely unworkable, unduly complicated, and unnecessarily restrictive. It is therefore necessary and desirable to reconsider the public policy rationale for even having a leave test in the *EBR* at all. By way of comparison, CELA notes that there is no leave test under the *Planning Act*. Instead, Ontarians can appeal planning instruments (e.g., Official Plan amendments, rezoning by-laws, etc.) to the Tribunal as of right, without having to first obtain leave from the Tribunal. Under Schedule 9 of Bill 23, the Ontario government recently proposed to abolish third-party appeal rights under the *Planning Act*, but widespread public opposition led to a restoration of these rights by the time that Bill 23 received Third Reading and Royal Assent in November 2022.

Moreover, CELA notes that given the Environment Ministry's ongoing initiative to "modernize" its approvals program, it seems likely that a number of so-called "low-risk" activities will no longer require the issuance of individual site-specific approvals. If approval requirements are increasingly confined to fewer and fewer "high risk" activities, then CELA submits that it becomes even more imperative to ensure that citizens enjoy unconstrained access to the Tribunal in potentially "high risk" situations where the proponent is still required to apply for a prescribed instrument. In such circumstances, third-party appeals should be routinely available, rather than be arbitrarily restricted to exceptional cases that meet the current section 41 leave test.

In the alternative, if a modified or less restrictive leave test is retained in the *EBR* (which CELA strongly opposes), then we would agree with the ECO[75] that the *EBR* (or the regulations) should be amended to impose an automatic stay of the impugned instrument until the leave application has been heard and decided by the Tribunal. This would be subject to the Tribunal's jurisdiction to lift the automatic stay, in whole or in part, in appropriate cases in accordance with its Rules of Practice.

(vi) Other Amendments or Reforms to Promote Access to Justice

**Public Participation**: Access to justice is not limited to creating legal avenues for challenging governmental acts and omissions, but also includes ensuring that persons interested in, or potentially affected by, environmental decision-making have full access to, and meaningful engagement in, the decision-making process. In our experience, establishing an inclusive, fair, and transparent process that solicits and accommodates public input generally improves the quality and credibility of environmental decision-making (e.g., by providing views, evidence, or perspectives that otherwise are unavailable to the decision-maker) and thereby lessens the likelihood of subsequent litigation against the governmental decision.

For public participation purposes, CELA finds that the Environmental Registry has been one of the more positive developments under the *EBR*, particularly as the Registry itself has slowly

[74] In the *Lafarge* litigation, the Divisional Court characterized the wording of section 41 as "unusual": see *Dawber v. Ontario* (2008), 36 CELR (3d) 191 (Div. Ct.) at para.40.
[75] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 4.

evolved into a more user-friendly and interactive database system. However, as noted by the ECO report, there is a need for further updates in the technical design and usability of the Registry.[76] In addition, there is considerable room for improvement in how the Registry is being used by Ministries to notify the public, and to solicit stakeholder input, about environmentally significant proposals.

For example, there is ongoing public and ECO concern that the minimum comment periods are too short[77] (or, in some instances, are wholly absent), especially in relation to complex or controversial proposals such as wholesale changes to environmental laws/regulations, provincial plans or policies, or complicated instruments for large-scale facilities and projects.[78] The ECO has also documented instances where discretionary "information notices" were misused by prescribed Ministries in relation to significant policy proposals.[79] These continuing problems have been highlighted in the ECO reports,[80] and demonstrate the need for clear, concise and enforceable requirements regarding the posting of proposed Acts, regulations, policies and instruments.

The overall result is that despite the mandatory consultation requirements under Part II of the *EBR*, numerous environmentally significant proposals or decisions are still not being posted on the Registry and are therefore being made without the public review and comment opportunities guaranteed by law.[81] For example, the Auditor General's 2022 report on the EBR revealed that the Energy had failed to consult the public on environmental policies pertaining to small modular reactors and the transition to a low-carbon hydrogen economy.[82] Conversely, the *EBR* provisions relating to enhanced notice/comment (i.e., sections 24, 25, 28) appear to be largely unused over the past three decades.

In addition, as discussed above, the supporting documentation (or actual text of the proposed laws, regulations, policies, or instruments) are not always included as links or attachments to Registry notices,[83] thereby making it difficult for the public to access and comment upon the proposals in a timely manner. While the ECO has recommended that it should become "standard practice" for relevant documents to be linked in Registry notices,[84] CELA submits that amendments to the *EBR* should require this practice as a matter of law. In the past, the ECO found that the supporting documents could not even be found by Ministry staff, who, at the time, appeared to lack efficient centralized systems for storing and accessing files.[85]

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[76] ECO, 2015-16 Annual Report, Chapter 1.2.4; ECO, 2014-15 Annual Report, Chapter 1.2.1.
[77] ECO, 2009-2010 Annual Report, pages 182 to 184. See also ECO, 2007-2008 Annual Report, pages 153 to 154.
[78] For example, the controversial 2006 regulation that exempted Ontario's Integrated Power System Plan from the *Environmental Assessment Act* was not posted on the Registry for public review/comment. See ECO, "Media Release: Third Decision on Government's Electricity Plan Evades *Environmental Bill of Rights*, says Environmental Commissioner" (June 19, 2006). See also ECO, 2007-2008 Annual Report, page 154 regarding Ontario's failure to post an *EBR* Notice in relation to its "Go Green" Action Plan on Climate Change.
[79] ECO, 2009-2010 Annual Report, page 190. See also ECO, 2008-2009 Annual Report, page 112; ECO, 2006-2007 Annual Report, page 160; and ECO, 2005-2006 Annual Report, pages 178 to 180.
[80] ECO, 2015-16 Annual Report, pages 29 to 32.
[81] ECO, 2009-2010 Annual Report, pages 186 to 190. See also ECO, 2007-2008 Annual Report, pages 156 to 158.
[82] Auditor General, *Operation of the EBR* (December 2022), pages 5-6.
[83] ECO, 2006-2007 Annual Report, page 157.
[84] ECO, 2015-2016 Annual Report, page 27.
[85] ECO, 2009-2010 Annual Report, pages 177 to 178.

In other cases, significant delays have occurred between the original posting of a proposed instrument and the subsequent posting of the decision notice, which has allowed proponents to carry out the activities in question while simultaneously undermining the public's right to utilize the *EBR* appeal process in a timely manner.[86] On this point, CELA agrees with the ECO's recommendation that instrument decision notices should generally be posted within two weeks after the decision has been made.[87]

CELA further agrees with the ECO's repeated objections to significant delays by the Ontario government in prescribing new instruments under the *EBR*, which again undermines public notice/comment rights, and the public right to apply for reviews, under the *EBR*.[88]

In every case where ministry decision-makers conclude that Registry notice is not required due to statutory exemptions (see sections 29 to 33 of the *EBR*),[89] then it should be obligatory upon the decision-makers to post an "exception notice", with adequate reasons, on the Registry in order to provide clarity, traceability and accountability.[90] CELA's further comments about these exceptions to public participation are described below in relation Consultation Questions 10 and 11. In addition, CELA agrees with the ECO's recommendation that the "budgetary exception" to public participation (section 33 of the *EBR*) should be scoped to ensure that non-fiscal environmental components of budget bills (particularly if set out in omnibus legislation) are still subject to meaningful public review/comment under Part II of the *EBR*.[91]

**Cost Reform in *EBR* Litigation**: CELA submits that enhancing public access to the courts under the *EBR* will be meaningless unless additional steps are taken to prevent or minimize the risk of an adverse cost award against unsuccessful plaintiffs or judicial review applicants. In our experience, the general rule in Ontario that "costs follow the event" will undoubtedly continue to deter or inhibit residents from launching litigation aimed at safeguarding the environment.

Given the public interest nature of such litigation, CELA recommends that the *EBR* should be amended to entrench a "no cost" rule (e.g., each party bears their own legal/expert costs) or a "one-way" cost rule (e.g., successful plaintiffs or applicants may recover legal/expert costs from the opposing party). For the same reasons, where an *EBR* plaintiff or applicant finds it necessary to seek an interlocutory injunction, CELA recommends that the undertaking as to damages (if required) should be capped at $1,000.

**Applications for Review/Investigation:** An essential component of environmental accountability is ensuring that persons, corporations, and governments comply with the applicable provisions of environmental laws, regulations, and instruments that are kept up to date. Accordingly, Part IV of the *EBR* enables citizens to file applications for review of Acts, regulations, policies, and

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[86] *Ibid.*, page 195. See also ECO, Annual Report, 2015-16, page 27 and Chapter 1.2.3.
[87] ECO, Annual Report 2015-16, page 27.
[88] ECO, 2008-2009 Annual Report, page 122.
[89] CELA questions whether any of these exceptions should remain within the *EBR*, particularly since only a relatively small handful of exception notices have been annually posted on the Registry: see ECO, 2014-15 Annual Report, page 15; ECO, 2015-16 Annual Report, page 29.
[90] ECO, 2009-10 Annual Report, page 5.
[91] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, page 2.

instruments, while Part V of the *EBR* allows citizens to file applications for investigation of suspected environmental offences. From 1994 to 2016, over 600 applications for review and over 230 applications for investigation were filed by Ontarians under the *EBR*.[92] However, the Auditor General recently reported that in 2021-22, only two applications for review and only eight applications for investigation were filed by Ontarians.[93] CELA suspects that the significant decline in the public use of these application is attributable, at least in part, to the Environment Minister's failure to conduct public education and outreach about *EBR* rights, as discussed above in relation to Consultation Question 6.

In addition, the decision whether to carry out the requested review or investigation rests within the discretion of the relevant Ministry, and over the years there have been many instances where such applications are improperly refused by Ministries on unconvincing or irrelevant grounds. In fact, it appears that most applications for review or investigation have been refused by Ontario ministries over the past two decades.[94] Thus, CELA submits that the purpose, value and utility of Parts IV and V are being undermined, and that the public is growing increasingly frustrated, where meritorious applications are being rejected (or delayed) for specious reasons. This may provide another reason that explains the recent declining use of applications for review and investigation.

For example, the former ECO criticized the tendency among prescribed Ministries to refuse applications for investigation on the grounds that the Ministries have already internally commenced an "investigation" of the matter.[95] As pointed out by the ECO, even where such claims are true, there are public interest benefits in having *EBR* safeguards apply to such applications in order to ensure timeliness, adequacy, and accountability.[96]

The ECO has also criticized the Ministry of Municipal Affairs and Housing for rejecting every application for review that it has received under the *EBR*. As noted by the ECO, summary dismissal of duly filed applications for review (and the serious issues raised therein) does not constitute good public policy.[97] The ECO has also expressed concern about unwarranted delays by prescribed Ministries in their preliminary responses to applications for review.[98]

Given these problems, CELA recommends that Parts IV and V of the *EBR* should be amended to clarify that nothing prevents prescribed Ministries from granting applications for review or investigation, even if the subject-matter of the application is already known to, or under review or consideration by, the Ministries. It would also be helpful to restrict (or even eliminate) the grounds upon which Ministries' preliminary responses to applications for review or investigation may be delayed beyond the prescribed timeframes under the *EBR*. It has been further suggested that questionable ministry refusals of applications for review or investigation could be appealed to an

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[92] ECO, 2015-16 Annual Report, page 47.
[93] Auditor General, *Operation of the EBR* (December 2022), pages 36 and 38.
[94] Paul Muldoon et al., *An Introduction to Environmental Law and Policy in Canada (3rd ed.)* (Toronto: Emond, 2020), pages 283-284.
[95] ECO, 2009-2010 Annual Report, page 162.
[96] *Ibid.*
[97] ECO, 2008-2009 Annual Report, page 18.
[98] ECO, 2006-2007 Annual Report, pages 135, 143 to 144. See also ECO, 2005-2006 Annual Report, pages 138, 157.

independent entity (e.g., the OLT) to ensure that the refusal decision complied with *EBR* purposes and SEV principles.[99]

For both types of applications, the *EBR* should continue to prescribe 60 days as the deadline for the Ministry's preliminary response and should further specify that it is a contravention of the *EBR* for Ministries to provide their preliminary responses after the prescribed deadline (or, alternatively, more than 30 days after the deadline if an extension was invoked by the Ministry).

In relation to applications for review, CELA notes that while this tool may be used to request a review of an *existing* instrument, the current wording of subsection 61(2) appears to prohibit applying for a review of the need for a *new* instrument (e.g., Director's order under section 17 or 18 of the *Environmental Protection Act*, which are Class II instruments under the *EBR*). In retrospect, this appears to be an unfortunate oversight within the *EBR*, and CELA recommends that this subsection should be amended to enable Ontarians to apply for review of the need for a new instrument.

In addition, CELA submits that ministries should be required to post an information notice on the Registry to publicly announce the receipt of an application for review on a particular matter, and to solicit public input from interested persons. The resulting public feedback would undoubtedly assist ministries in reaching an informed decision on whether or not the requested review should be granted. It goes without saying that this information notice cannot disclose any personal information identifying the applicants (see section 72 of the *EBR*). Decisions to grant or refuse requested reviews should also be posted, with reasons, in information notices on the Registry.

Where an application for review has been granted, CELA further submits that the updated information notice announcing this fact should also solicit input from interested persons (including the successful applicants). In our view, this feedback will assist Ministries in determining whether a new or amended Act, regulation, policy, or instrument may be appropriate in the circumstances. In accordance with the public participation purpose of the *EBR*, meaningful public comment opportunities should be provided where an application has been granted in order to improve the soundness, credibility and transparency of the review process. Among other things, persons participating in the review exercise should be entitled to access all documents received or generated by ministry staff during the review process.

In cases where applications for review have been granted, the ECO has raised concerns about the slow pace of the ministries' resulting review activities.[100] In some cases, some applications (such as CELA's application for review of the *EBR*) have languished for years without any tangible progress and without adequate notice to the successful applicants.

If the review outcome results in a specific proposal for a new or amended Act, regulation, policy or instrument, that then proposal should be duly processed in accordance with the notice/comment provisions under Part II of the *EBR*.[101]

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[99] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at pages 234 to 235.
[100] ECO, 2015-16 Annual Report, pages 51, 60-61; ECO, 2014-15 Annual Report, page 23.
[101] *EBR*, section 73.

**CELA Recommendation 7:** The *EBR* should be amended to:

- amend or delete current standing requirements in section 38;
- remove the requirement in section 103 that the plaintiff in a public nuisance action must demonstrate direct economic loss or direct personal injury;
- extend the timeframe for filing a leave-to-appeal application from 15 days to at least 20 days (or preferably 30 days);
- provide the Tribunal with statutory discretion to extend this timeframe upon request by the leave applicant in appropriate circumstances;
- clarify that:

  (i) all applications and supporting documentation submitted by proponents in relation to proposed instruments shall be immediately disclosed for free upon request by any resident of Ontario (without filing an FOI request);

  (ii) despite the *Freedom of Information and Protection of Privacy Act*, disclosure of such materials cannot be refused by prescribed Ministries on the grounds that the records were submitted in confidence or contain proprietary information; and

  (iii) where residents have requested such documentation, the running of the leave-to-appeal period should be stopped until the documentation is disclosed in full by governmental officials.
- delete the section 41 leave test in its entirety;
- establish an intervenor funding program in relation to instrument proposals and third-party appeals;
- strengthen the public participation requirements under Part II to better ensure transparency, timeliness, and accountability in governmental decision-making;
- exclude the OLT's new power to award costs against unsuccessful parties from applying to *EBR* appeals as well as appeals brought under other environmental and land use planning statutes;
- establish a "one way" cost rule (or a "no cost" rule) in litigation (e.g., civil actions or judicial review applications) under the *EBR*;
- impose a limited cap on undertakings to pay damages if interlocutory injunctive relief is being sought in *EBR* litigation;

- improve the timeliness and credibility of prescribed ministries' handling of, and response to, applications for review and investigation; and

- enable residents to file applications for review of the need for the issuance of a new prescribed instrument.

***(h) Consultation Question 8: Should the right to sue for harm to a public resource be modified? If so, how?***

**CELA Response:** It is abundantly clear that the current *EBR* right to commence an action to protect public resources is fundamentally flawed and virtually unworkable in its present form. Accordingly, the current provisions in the *EBR* that confer (and constrain) this right must be replaced by a new streamlined cause of action that will actually be used by Ontarians to safeguard the environment.

**CELA Analysis:** In general, the current *EBR* mechanisms for judicial accountability (e.g., the section 84 cause of action, etc.) have been ineffective or underutilized over the past three decades. Moreover, CELA concludes that there is a clear imbalance between political and judicial accountability within the *EBR*, as described above. Therefore, CELA recommends that is now necessary to undertake appropriate statutory reforms to enhance public access to the courts under the *EBR*.

One legal commentator has identified seven distinct problems with the section 84 cause of action, which goes a long way in explaining why the provision has gone virtually unused since 1994:

> These various limitations constitute a formidable set of impediments to its public use, and do not provide comfort to plaintiffs contemplating bringing an OEBR action. Although the task force intended that the provision be used only as a last resort, these obstacles suggest little deterrent effect on the regulated community.[102]

Similar views have been expressed by the former ECO, who found that the current *EBR* cause of action (section 84) was "essentially useless" because it was burdened with too many conditions precedent and other restrictive provisions.[103] In CELA's opinion, these statutory limitations undermine the availability and efficacy of the cause of action, and they undoubtedly explain why there has been little or no litigation activity under section 84 over the past three decades. On this point, the ECO has agreed that "the test for bringing an action in harm to a public resource is too strict."[104]

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[102] Joseph Castrilli, "Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences" (1998), 9 Vill. Env. LJ 349, at pages 430-32.
[103] ECO Special Report, page 7.
[104] *Ibid.*, page 8.

With respect to the current cause of action, the ECO has identified potential reforms which could be considered by the Ontario Legislature (i.e., deleting the need for plaintiffs to demonstrate statutory contraventions or "significant" harm).[105] CELA agrees with these suggested deletions.

CELA further recommends that the filing of an application for investigation (and waiting for an answer from government) should no longer serve as the precondition to commencing the section 84 action.[106] Similarly, plaintiffs should not be required to go before the Farm Practices Protection Board before commencing an action in relation to environmental arm arising from agricultural operations (see section 84(4)). In addition, the specific defences outlined in section 85 (e.g., due diligence, statutory authority, and mistake of law) should be deleted since they are unnecessary and inappropriate.

In short, the right of action in section 84 needs to be transformed into a streamlined and meaningful "citizens' suit" provision which enables Ontarians to commence a civil action in respect of breaches of environmental laws and regulations. As a potential model for this approach, CELA would point to the new civil action contained within the proposed federal *EBR* that has been introduced as a private member's bill in Parliament.[107]

Another potential model for the revamped *EBR* right of action is the *Michigan Environmental Protection Act* (*MEPA*).[108] This legislation has been in existence since 1970, and currently enables private citizens to commence legal proceedings and obtain declaratory and equitable relief against any person to protect the "air, water, or other natural resources or the public trust in these resources." This substantive right to sue under the *MEPA* entitles the plaintiff to succeed in an action upon demonstrating a *prima facie* case that the defendant has caused, or is likely to cause, pollution, impairment, or destruction to the environment.[109] Unlike section 84 of the *EBR*, the *MEPA* right to sue has been used by individuals and groups over the decades, and it has resulted in trial and appellate jurisprudence that has interpreted and clarified many of the key definitions and provisions of the legislation.

Our overall conclusion is that if the *EBR* is amended to fully entrench the public trust doctrine and an enforceable RTHE as recommended by CELA, then these legal tools can serve as a more comprehensive and effective accountability mechanism than the convoluted section 84 cause of action that currently exists in the *EBR*. However, if these two tools are not embedded in the *EBR*, then it will be necessary to fundamentally reform Part VI of the *EBR* so that it more closely resembles the statutory cause of action found in Bill C-219 or *MEPA*.

**CELA Recommendation 8:** The *EBR* should be amended to create a new statutory cause of action that:

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[105] *Ibid.*, pages 8 to 9.
[106] CELA, *EBR Registry #XQ04E0002: Looking Forward: The EBR Discussion Paper* (January 24, 2005), page 6.
[107] Bill C-219, section 9. See also Bill C-202, section 18.
[108] See Joseph Castrilli, "Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences" (1998), 9 Vill. Env. LJ 349.
[109] *Ibid*., page 373. The defendant in such cases may avoid liability by calling evidence that it did not cause, or is unlikely to cause, environmental harm, or that there was no "feasible and prudent alternative" available to the defendant.

- confers standing on any resident of Ontario to commence and maintain the action against any person, corporation, or government to protect the natural and the public trust therein;

- does not contain the prerequisite of filing an application for investigation or applying to the Farm Practices Protection Board;

- empowers the court to grant a wide range of remedies if the action is successful; and

- eliminates the defences set out in subsection 84(4).

***(i) Consultation Question 9: Should additional ministries, including the Ministry of Finance, be subject to the EBR?***

**CELA Response:** The current suite of prescribed ministries under the *EBR* should be expanded to include the Ministry of Finance and other ministries, and the list of prescribed statutes and instruments under the *EBR* should also be expanded.

**CELA Analysis:** The overall objective in prescribing ministries under the *EBR* is to ensure that all ministries making environmentally significant decisions are caught by, and subject to, the *EBR* (including public participation requirements and SEV conformity).

Since 1993, however, some originally prescribed Ministries are no longer subject to the *EBR*, and the Ontario government has failed or refused to prescribe other key, newer or re-named Ministries whose decisions may affect the environment and public resources. In turn, these omissions have prompted many citizens to file applications for review to request prescribing Ministries which were outside the scope of the *EBR* coverage.

The ECO has described this problem as "keeping the *EBR* in sync" with newly created or differently named Ministries.[110] In CELA's view, O.Reg.73/94 should be regularly reviewed and revised to ensure that all relevant Ministries and Crown agencies are prescribed by regulation as being subject to all appropriate sections of the *EBR*.

CELA is particularly concerned about the ongoing exclusion of the Ministry of Finance as a prescribed ministry under the *EBR*, and similar concerns have been raised by the ECO about this unjustifiable exclusion.[111] Indeed, the very first Special Report filed by the ECO addressed the Ontario government's ill-advised decision in 1996 to suddenly remove the Ministry of Finance as a prescribed Ministry under the *EBR*.[112] In our view, the Ministry of Finance should again be made fully subject to the *EBR*.

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[110] ECO, 2015-16 Annual Report, Chapter 1.4.
[111] ECO, 2015-16 Annual Report, page 41. See also ECO, 2009-10 Annual Report, page 29. On the general topic of prescribing Ministries and statutes in a timely manner under the EBR, see also ECO, *Supplement to the 2009-2010 Annual Report*, pages 357-72.
[112] ECO, *Ontario Regulation 482/95 and the EBR* (January 17, 1996), pages 4 to 7.

Similarly, CELA, the ECO, and various stakeholders have expressed concern about environmentally significant statutes which have not yet been prescribed under the *EBR*. As noted by the ECO, these omitted statutes include the *Building Code Act, 1992, Drainage Act, Electricity Act, 1998, Forest Fires Prevention Act,* and *Weed Control Act.* In CELA's view, O.Reg.73/94 should be revised to prescribe these statutes.

With respect to non-prescribed instruments, the ECO has identified several environmentally significant permits, approvals and licences which are not prescribed under the *EBR*, such as:[113]

- instruments under the *Food Safety and Quality Act, 2001*;
- nutrient management instruments under the *Nutrient Management Act, 2002*;
- instruments under the *Provincial Parks and Conservation Reserves Act, 2006*.

CELA recommends that O.Reg.681/94 should be amended to include these and any other environmentally significant instruments that have not yet been prescribed under the *EBR*. CELA further recommends that the following instruments should also be prescribed under this regulation:

- provincial officers' orders under section 157 and 157.1 of the *Environmental Protection Act*;
- registrations in the Environmental Activity and Sector Registry under Part II.2 of the *Environmental Protection Act*; and
- orders that permit activities or development in the absence of a land use plan under the *Far North Act, 2010*.[114]

**CELA Recommendation 9:** The regulations under the *EBR* should be reviewed and revised to ensure that:

- the Ministry of Finance and all other Ministries making environmentally significant decisions are prescribed; and
- all environmentally significant Acts, regulations, and instruments are prescribed.

***(j) Consultation Question 10: Are specific criteria required for section 30 of the EBR? If so, how should they be defined?***

**CELA Response:** Section 30 should be deleted from the *EBR*. In the alternative, **s**tatutory criteria should be added to section 30 to help clarify when a non-*EBR* public participation process is "substantially equivalent" to Part II of the *EBR*.

[113] ECO, 2015-16 Annual Report, page 42.
[114] ECO, 2014-15 Annual Report, pages 24-25.

**CELA Analysis:** Section 30 of the *EBR* provides that the Part II requirements to post Registry notices for proposed Acts, regulations, policies, and instruments for public review/comment do not apply if the environmentally significant aspects of the proposal have already been considered (or will be considered) in a public participation process that is "subsequently equivalent" to the *EBR* process.

In our experience, this ambiguous exception was not often invoked in the first two decades after the *EBR* was proclaimed into force. However, it appears that there has been an increased governmental willingness to invoke or rely upon this exception in recent years. For example, CELA's recent Registry search (using the term "substantially equivalent") revealed a small number of exception notices involving Acts, policies, regulations, and instruments. In some instances, the exception was posted because of a previous Registry posting pertaining to the same proposal (or matters arguably related to it), while in other instances the exception was premised on the existence of a prior environmental assessment process at the provincial or federal level.[115]

To date, the most notable and controversial attempt to invoke the section 30 exception occurred when the Ontario government purported to repeal the province's cap-and-trade program regarding greenhouse gases without undertaking any public consultation under Part II of the *EBR*. The government argued that the 2018 provincial election served as a "substantially equivalent" public participation process that justified bypassing the public's participatory rights under Part II of the *EBR*, but this proposition was firmly rejected by the Divisional Court in *Greenpeace #1*.[116]

In CELA's view, situations like the *Greenpeace #1* scenario readily demonstrate why section 30 is too vague in its current form, which leaves the door open to future attempts by the Ontario government to evade its public consultation duties under Part II of the *EBR*.

More fundamentally, CELA questions whether there is any public interest need for the continued existence of section 30 at all. First, it should be noted that the *EBR* Task Force qualified its support for this exception by indicating that it should only be invoked if the Minister responsible for the other statutory participation process "determines" that the process is in substantial "compliance" with the *EBR* process.[117] To CELA's knowledge, such formal Ministerial determinations have not been publicly proposed, released, or consulted upon pursuant to Part II of the *EBR* to date.

Second, it appears to CELA that this exception has been infrequently (and sometimes improperly) used by the Ontario government over the past three decades. In these circumstances, CELA is unaware of any compelling evidence-based reasons why this exception can still be justified in 2023 when its only real purpose and legal effect is to disenfranchise Ontarians of their important participatory rights under Part II of the *EBR*. In our view, the rationale for section 30 does not outweigh or supersede the rights-based provisions of Part II of the *EBR*.

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[115] See, for example, Registry Notice 019-0443 and Registry Notice 019-0680. It is unclear to CELA why the "substantially equivalent" exception in section 30 was invoked in these two cases instead of the "EA exception" in section 32.
[116] *Greenpeace Canada v. Ontario*, 2019 ONSC 5629 (Div. Ct.).
[117] *EBR* Task Force Report, page 32.

In summary, the short-term governmental benefit in occasionally using section 30 does not warrant the larger long-term risk to environmental democratic rights entrenched in the *EBR*. Moreover, posting a proposal for the minimum 30-day public comment period is not time-consuming, costly, or onerous, particularly if the proposal does not address an emergency (in which case section 29 of the *EBR* may be applicable).

Third, it is highly debatable whether there are, in fact, other statutory participation regimes in Ontario that can truly be characterized as "substantially equivalent" to the Part II process under the *EBR*. In our view, the Part II regime features not only Registry (and enhanced) notice requirements and minimum comment periods (which may or may not exist in other processes), but also includes additional accountability mechanisms such as: (a) the obligation on the governmental decision-maker to explain in writing how public input influenced the decision; (b) the third-party appeal right regarding instruments; and (c) the requirement of governmental decision-makers to consider the applicable SEV before proposals are implemented.

In our view, while there may be other statutory processes in Ontario that may, at least in in part, address certain environmental aspects of a proposal, they do not fully replicate all mandatory components of Part II of the *EBR*. This is particularly true if CELA's suggested improvements to public participation rights under the *EBR* (e.g., intervenor funding) are adopted. In any event, the mere fact that another process may include a public notice/comment opportunity is not dispositive of the overarching legal question of whether the process is "substantially equivalent" to the *EBR* public participation regime.

Accordingly, CELA submits that section 30 should be wholly deleted from the *EBR*. CELA is mindful of the need to prevent or minimize overlap and duplication in public participation processes, but we submit that it is inconsistent with the purposes of the *EBR* to allow the government to sidestep Part II requirements for reasons of administrative expediency.

In the alternative, CELA submits that if section 30 is retained within the *EBR*, then it must be amended to include statutory criteria or indicia that clarify when other statutory processes are – or are not – "substantially equivalent" to the Part II process. This criteria-based approach would not necessarily eliminate Ministerial discretion but would help structure the use of such discretion and presumably prevent a recurrence of the *Greenpeace #1* situation. Moreover, because the Minister is being called upon to make a statutory power of decision in accordance with legal standards, the decision to rely upon the section 30 exception (if unreasonable or unlawful) would be subject to judicial review for accountability purposes.

At a minimum, the section 30 criteria should address the following factors to systematically compare and evaluate the Part II process with another process that the Minister may determine to be "substantially equivalent":

- the nature, type, and timing of public notice requirements;
- the extent, scope and duration of the comment period;

- whether the decision-maker is legally compelled to take into account public comments and to explain, in writing, how the comments were considered during the decision-making process;

- whether there have been prior Registry postings regarding the identical proposal;

- whether – and to what extent – that all environmental aspects of the proposal were considered (or are going to be considered) at sufficient level of detail in the process;

- for proposed instruments, whether the public has an appeal right to independent appellate body; and

- whether the decision-maker is within a prescribed Ministry that has an SEV that must be considered and applied to the proposal.

**CELA Recommendation 10:** The *EBR* should be amended to:

- delete section 30 in its entirety; or

- insert statutory criteria or indicia which provide clear direction on when non-*EBR* public participation processes are "substantially equivalent" to Part II of the *EBR*.

***(k) Consultation Question 11: Should section 32 of the EBR be amended? If so, how?***

**CELA Response:** Section 32 of the *EBR* should be deleted in its entirety since it no longer serves its original intended purpose due to changed circumstances in Ontario's legislative framework.

**CELA Analysis:** Section 32 of the *EBR* creates two controversial exceptions to the public notice, comment, and third-party appeal rights under Part II of the *EBR*. First, section 32(1)(a) provides that the Part II requirements do not apply to instruments which are necessary to implement undertakings or projects approved by a statutory tribunal after "affording an opportunity for public participation." Second, sections 32(1)(b), 32(2) and 32(3) create the same exception for undertakings or projects approved (or exempted) under Ontario's *Environmental Assessment Act* (*EAA*). In CELA's view, these exceptions are no longer justifiable due to material changes in circumstances that have occurred under the *EAA* since the 1993 enactment of the *EBR*.

In relation to the tribunal-related exception in section 32, CELA notes that what constitutes a "affording an opportunity for public participation" is undefined in this provision. Moreover, unlike section 30 of the *EBR*, there is no express requirement in section 32 that this "opportunity" must be "substantially equivalent" to the Part II regime under the *EBR* before this exception becomes applicable. It is also unclear whether the word "tribunal" means an adjudicative body established under provincial or federal law, or whether it includes municipal councils under the *Municipal Act* or all types of agencies, boards, or commissions exercising statutory powers of decision.

More importantly, even if this exception is intended to be triggered by written, virtual, or in-person tribunal hearings on an undertaking or project, there is no guarantee that the environmental impacts will be adequately considered, at a sufficient level of detail, in such hearings.

For example, if a proposed quarry requires an official plan amendment and/or rezoning approval under the *Planning Act* that gets appealed to the OLT, it is open to members of the public to get involved in the hearing as a non-appellant party or participant (which typically requires leave from the Tribunal in its discretion). While the quarry's potential environmental impacts on surface water or groundwater resources may be generally addressed through evidence and argument at the Tribunal hearing, it has been CELA's experience that the critically important implementation details on precisely how – or to what extent – such impacts can be prevented, reduced, measured, or mitigated (e.g., through design, operations, monitoring, contingency plans, etc.) do not become publicly available until after the hearing when the proponent applies for the requisite site-specific instruments (e.g., water-taking permit and/or wastewater discharge approval under the *Ontario Water Resources Act* (*OWRA*)).

In our view, the mere fact that the Tribunal hearing preceded the filing of the *OWRA* application (and the proponent's supporting documentation) should not shield or exclude the proposed instruments from public review/comment, SEV conformity, and third-party appeal under Part II of the *EBR*. In addition, as a matter of law, the Tribunal's jurisdiction under the *Planning Act* is limited to determining whether the necessary land use approvals should be granted or refused, and the Tribunal does not perform the Environment Ministry's authority to decide whether *OWRA* instruments (or other environmental permits, licenses, and approvals) should be refused or issued, with or without conditions.

CELA therefore submits that simply obtaining the Tribunal's approval under the *Planning Act* to proceed with the proposed land use does not mean that the proponent is subsequently entitled as of right to all other environmental instruments that are needed to proceed with the undertaking or project. To the contrary, the Environment Ministry must still carefully review and decide the instrument application on its merits and apply the relevant aspects of the applicable law/policy framework, including the SEV. In accordance with the purposes of Part II of the *EBR*, Ontario residents must be able to provide information, opinions, and perspectives to the Environment Ministry on whether the proponent's application materials are complete, whether the instrument should be issued to the proponent, and what terms/conditions are necessary to protect the environment. For accountability purposes, Ontario residents should also be entitled to appeal the Ministry's instrument decision as of right, as discussed above.

CELA's concerns about relying upon public hearings as the basis for the section 32(1)(a) exception are exacerbated by Ontario's recent changes to the provincial land use planning regime and the Tribunal itself. For example, Schedule Bill 23 (*More Homes Built Faster Act, 2022*) originally proposed to terminate third-party appeals under the *Planning Act*, which would have greatly diminished public participation in Tribunal proceedings. Fortunately, these appeal rights were restored (without restrictive leave requirements) before Bill 23 received Third Reading and Royal Assent in late November 2022.

However, there are other remaining components of Bill 23 that may still inhibit public participation in appeals that are heard and decided by the Tribunal. For example, as discussed above, Schedule 7 of Bill 23 now empowers the Tribunal to award costs against "unsuccessful" hearing parties. Given that environmental disputes often result in multi-party hearings that are lengthy, complex, and expert-intensive, the quantum of potential adverse cost awards may deter residents or citizens' groups from initiating, or seeking leave to participate in, Tribunal proceedings under various planning or environmental statutes. If this occurs, then Tribunal hearings may be largely confined to proponents, municipalities, or ministries with little or no public participation.

Schedule 7 of Bill 23 also empowers the Tribunal to summarily dismiss proceedings without a full hearing and authorizes the promulgation of regulations that set timelines for Tribunal hearings. In these circumstances, CELA concludes that the mere existence of an administrative hearing – that may or may not feature meaningful public involvement – cannot justify section 32's wholesale exclusion of Part II requirements from prescribed instruments that are necessary step toward implementing an approved undertaking or project.

In relation to the *EAA* exception in section 32, the *EBR* Task Force rationalized this exception in 1992 on the grounds that the opportunities for public participation then in existence under the *EAA* (e.g., notice/comment periods, public hearings by the independent EA Board, availability of intervenor funding, etc.) were "substantially compliant" with *EBR* public participation requirements.[118] The *EBR* Task Force also drew comfort from the pending release of a major report by the Environmental Assessment Advisory Committee (EAAC) on long overdue reforms to Ontario's EA program.[119]

Since the early 1990s, however, most of the EAAC's suggested EA reforms have not been implemented by the Ontario government, and the EAAC itself was abolished in 1995. In addition, the *EAA* was substantially overhauled in 1996 and again in 2020 in a manner that weakens the credibility, fairness and effectiveness of Ontario's EA program (e.g., no public hearing referrals since 1995; proliferation of "scoped" EAs; inadequate consideration of need/alternatives; questionable public consultation; growing number of regulatory exemptions; loss of intervenor funding legislation in 1996; elimination of bump up requests on environmental grounds, etc.).[120] Thus, the underlying assumptions made by the *EBR* Task Force about public participation in the *EAA* program are no longer valid, and it is now time to revisit and revoke the *EAA* exception in section 32.

In addition, CELA submits that the overbroad *EAA* exception in section 32 has been improperly used by ministries to deprive members of the public of their right to notice and comment "on many instruments that affect Ontario's environment."[121] In particular, the former ECO scrutinized public participation rights in a number of EA processes (e.g., individual and Class EAs), and concluded that "they are deficient in many respects compared to the *EBR* process for instrument

[118] *EBR* Task Force Report, page 33.
[119] *Ibid.*
[120] The many problems which continue to plague Ontario's EA program have been succinctly described by the ECO in the 2007-08 Annual Report, pages 28-48. See also ECO, 2013-14 Annual Report, pages 132-39; Richard Lindgren and Burgandy Dunn, "Environmental Assessment in Ontario: Rhetoric vs. Reality" (2010), 21 JELP 279.
[121] ECO Special Report, page 5.

approvals."[122] In 2005, the Environment Minister's EA Advisory Panel (Executive Group) agreed with the ECO that section 32 of the *EBR* was "being used to 'shield' important EA-related approvals from adequate public scrutiny, and that public participation rights are being frustrated as a result."[123]

Given the unfortunate devolution and current state of Ontario's *EAA* program, CELA submits that the *EAA* exception is no longer appropriate and should be deleted from the *EBR* in its entirety. In the alternative, if section 32 is retained within the *EBR*, then the provision should be substantially narrowed to provide that the *EAA* exception only applies where the undertaking or project has been approved by the OLT after holding a public hearing under the *EAA*. Such a recommendation was made by the EA Advisory Panel in 2005,[124] but it has not been acted upon to date by the Ontario government. Similar recommendations to amend section 32 have been made in various reports released by the ECO over the years.[125] Significantly, in the ECO's 2016 list of "key areas in need of reform" under the *EBR*, the first item mentioned is eliminating or scoping the section 32 EA exception.[126] CELA fully concurs with the ECO on the public interest justification for this long overdue change.

**CELA Recommendation 11:** The *EBR* should be amended by wholly deleting section 32.

***(l) 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?***

**CELA Response:** The current *EBR* purposes and principles are ambiguous and incomplete, and they should be defined, amended and/or expanded to include key environmental concepts, policies, and commitments that have emerged since the *EBR* was enacted in 1993.

**CELA Analysis:** Section 2 of the *EBR* provides a workable starting point for reformulating the purposes and principles of the statute but it requires significant modification of the current text as well as the insertion of new text.

For example, the phrase "where reasonable" should be deleted from section 2(1)(a) for two main reasons. First, this vague qualifier does not appear in the third recital of the *EBR* preamble,[127] which correctly refers to environmental restoration (without any exceptions) for the benefit of current and future generations. Second, it is internally inconsistent for the *EBR* to expressly recognize the right to a healthful environment (RTHE) while concurrently creating open-ended

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[122] ECO 2003-2004 Annual Report, page 53.
[123] EA Advisory Panel (Executive Group), *Improving Environmental Assessment in Ontario: A Framework for Reform* (March 2005), Volume I, page 90 [EA Advisory Panel Report].
[124] EA Advisory Panel Report, page 85, Recommendation 17.
[125] ECO Special Report, pages 5 to 6. See also ECO, 2007-2008 Annual Report, page 44.
[126] Letter from ECO to the Hon. Glen Murray dated June 9, 2016, pages 1 to 2.
[127] CELA further submits that as an important aid to statutory interpretation, the four sentences in the current *EBR* preamble should be re-written in a more expansive manner to accurately reflect the public policy considerations and objectives that underpin the *EBR*. As an illustrative example of a broader rights-based preamble, see the recitals contained in Bill C-219 (*Canadian Environmental Bill of Rights*) that was introduced for First Reading in Parliament in December 2021.

and subjective discretion that potentially allows the Ontario government to delay, defer, or forgo restoration or rehabilitation merely because it is subjectively perceived to be "unreasonable." In our view, as a matter of principle, cost considerations should not override or trump the societal need for timely and effective restoration of damaged or degraded environmental features and functions.

At the same time, the phrase "by the means provided in this Act" should be deleted from sections 2(1)(a), (b) and (c). As a matter of legislative drafting, this language is redundant since the various *EBR* tools are self-evidently the key statutory mechanisms that are available under the Act to help achieve the purposes and principles of the legislation. Moreover, this phrase has traditionally limited the broad scope of the preamble's statement that "the people of Ontario have a right to a healthful environment," particularly since this substantive right has not been included in the "means" provided in the *EBR* to date.

Moreover, section 2(1)(b) should be amended to provide more specificity about the intended meaning of "sustainability" of the environment. At present, there is no definition of "sustainability" in the *EBR*, which creates considerable uncertainty about what this term means in the context of environmental decision-making by prescribed ministries. At a minimum, "sustainability" should be clearly defined in the *EBR* (either in section 1 or section 2), and duly reflected and operationalized in SEVs (see above), to provide meaningful direction to ministry decision-makers and to clarify the overall objective of the *EBR*. The definition could resemble the definition of "sustainability" in the federal *Impact Assessment Act* (*IAA*)[128] or could utilize the phrase "healthy and ecologically balanced environment."[129] In addition, section 2(1) should be expanded to include recognition of the Ontario government's public trust duty, as discussed above.

In relation to section 2(2), CELA is reasonably content with the current wording of these environmental goals and objectives. However, we would not object to the inclusion of new paragraphs that further particularize the key elements of the overarching purposes set out in section 2(1), or that entrench Ontario's environmental policies or commitments that have been adopted after passage of the *EBR* (e.g., climate change mitigation and adaptation, circular economy, extended producer responsibility for products/packaging, etc.). For the purposes of greater certainty, we would also suggest that consideration should be given to defining some of the key words and phrases contained in section 2(2) (e.g., pollutants, biodiversity, ecologically sensitive areas, etc.).

Similarly, although CELA has no objection to the current wording of section 2(3) of the *EBR*, we submit that paragraph (a) should be expanded to address the public right to adequate information and supporting documentation regarding proposals for Acts, policies, regulations, and instruments, as described above.

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[128] Section 2 of the *IAA* states that "**sustainability** means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations."

[129] See, for example, section 2 of Bill C-219: "**healthy and ecologically balanced environment** means an environment of a quality that protects human and cultural dignity and human health and well-being and in which essential ecological processes are preserved for their own sake, as well as for the benefit of present and future generations."

CELA further submits that the *EBR* should expressly impose a duty on the Ontario government to ensure that its environmental decision-making is consistent with, or does not conflict, well-established principles that are currently absent from the *EBR* (e.g., precautionary principle, polluter pays principle, ecosystem approach, intergenerational equity, environmental justice, non-regression, UNDRIP, etc.). This duty could be entrenched by adding new clauses after section 2(3), or by enacting a new stand-alone section 2.1. If such amendments are made to the *EBR*, it goes without saying that all current SEVs will have to be reviewed and updated, with public input, to ensure conformity with the new principles.

In summary, CELA concludes that if combined with other recommended *EBR* reforms, an updated set of "green" purposes and principles within the *EBR* will help inform the content and implementation of SEVs, and it will provide an important benchmark that can be relied upon when the public utilizes other *EBR* tools (e.g., third-party appeals, applications for review or investigation, court proceedings, etc.). In addition, expanding the list of *EBR* purposes and principles will serve as an important interpretive aid and solid policy foundation for responding to the serious environmental challenges facing Ontario in the 21st century (e.g., climate change, biodiversity conservation, toxics reduction, waste management, energy conservation, etc.).

**CELA Recommendation 12:** Section 2 of the *EBR* should be amended to read as follows:

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

(a) to protect, conserve and restore the quality and integrity of the environment;

(b) to provide sustainability of the environment;

(c) to protect Ontarians' individual and collective right to a healthy and ecologically balanced environment; and

(d) to recognize and affirm the Ontario government's public trust duty to protect the environment.

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

1. The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.
2. The protection and conservation of biological, ecological, and genetic diversity.
3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.
4. The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.
5. The identification, protection and conservation of ecologically sensitive areas or processes.

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

(a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario, including public access to adequate information and supporting documentation about such decisions before they are made;

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

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

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

(4) When making decisions about environmentally significant proposals for Acts, policies, regulations, and instruments, the Government of Ontario shall protect the environment and human health and shall ensure that the decisions are consistent with the following principles:[130]

(a) the precautionary principle according to which where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty must not be used as a reason for postponing measures to prevent environmental degradation;

(b) the polluter-pays principle according to which polluters must bear the cost of measures to prevent, reduce, or mitigate environmental harm that they have contributed to or caused or contributed to through their facilities, operations, or activities;

(c) the principle of ecosystem approach according to which ecosystems consist of air, land, water and living organisms, including humans, and the interactions among them, and environmental decision-making must consider direct, indirect and cumulative effects upon these interdependent ecosystem components;

(d) the principle of sustainable development according to which development must meet the needs of the present without compromising the ability of future generations to meet their own needs;

(e) the principle of intergenerational equity according to which the Government of Ontario holds the environment in trust for future generations and has an obligation to use, manage and conserve its renewable and non-renewable resources in a way that leaves that environment in the same, or better, condition for future generations;

(f) the principle of free, prior and informed consent in the *United Nations Declaration on the Rights of Indigenous Peoples* according to which Indigenous peoples shall be consulted by government before adopting legislative measures, taking administrative action, or approving projects, that may affect Indigenous peoples or their lands, territories and resources;

(g) the principle of environmental justice according to which there should be:

[130] Several of these principles have been adapted from section 5 of Bill C-219.

(i) meaningful and timely participation by low-income, disadvantaged, vulnerable, marginalized, racialized, and Indigenous persons and communities in governmental decision-making about prescribed Acts, policies, regulations, and instruments; and

(ii) a just distribution of environmental benefits and burdens among residents of Ontario, without discrimination on the basis of any ground prohibited by the *Canadian Charter of Rights and Freedoms*.

(h) the principle of non-regression according to which governments shall not repeal or weaken existing environmental legislation or reduce current levels of environmental protection.

***(m) 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?***

**CELA Response:** On these questions, CELA defers to the views, perspectives, and recommendations expressed by Indigenous peoples, communities, and organizations.

**CELA Analysis:** In recent decades, CELA has served as counsel for, or otherwise worked with, Indigenous persons, elected chiefs and band councils, and First Nation communities that have been impacted by activities or facilities that contaminate or degrade the environment in Ontario. For example, in addition to commencing litigation in such cases, CELA has used *EBR* tools, including Part II leave-to-appeal applications, Part IV applications for review, and Part V applications for investigation to help protect Indigenous rights, lands, interests, and health and safety.

Despite this experience, CELA does not purport to speak for Indigenous peoples in relation to the specific questions posed by the LCO. In our view, it is necessary for the LCO to consult directly with Indigenous peoples to obtain evidence, make findings, and provide recommendations about the above-noted *EBR* issues. It goes without saying that this Indigenous consultation should occur before the LCO finalizes and releases its report on *EBR* reform.

**CELA Recommendation 13:** The LCO should undertake meaningful consultation with Indigenous peoples about the need for, and nature of, *EBR* amendments that recognize, integrate, safeguard Indigenous rights when environmentally significant decisions are being made by the Ontario government.

***(n) Consultation Issue 14: Should the EBR be amended to include a substantive RTHE [right to healthy environment]? If so, how should the law address the following issues:***
***• Definition***
***• Adjudication forum***
***• Applicability and Enforceability***

***• Standing***
***• Evidential standard***
***• Defences***
***• Remedies***

**CELA Response:** The continuing lack of a substantive RTHE is the most significant gap in the current *EBR*. Accordingly, appropriate amendments should be made to the *EBR* to provide an effective and enforceable RTHE for all residents of Ontario.

**CELA Analysis:** Since its inception, the *EBR* has referred to the "right to a healthful environment" in the unenforceable preamble. Similarly, subsection 2(1)(c) states that the purpose of the *EBR* is to "protect the right to a healthful environment through the means provided in this Act."

However, there is no stand-alone, substantive public right to a healthful environment entrenched within the *EBR*. This significant omission has prompted many stakeholders and commentators to lament the irony of having an *EBR* that does not actually confer any enforceable environmental rights:

> Apart from the section 84 statutory tort, citizens' recourse to the courts is precluded (apart from ordinary civil proceedings where personal injury or property damage occurs). The only real "rights" of citizens are rights of notice, opportunities to comment, and the right to have their comments taken into account when government makes its decisions; failure to respect such rights will not invalidate those decisions…
>
> To summarize, while the Ontario *EBR* no doubt provides a great deal of public notice and input into government decision-making, it provides very little in the way of a remedy if environmental security is, nevertheless, violated. There is no judicial review of government failings and the statutory tort which permits action directly against rights-violators is, as with the Yukon Act, extremely limited. Indeed, given the absence of any equivalent to the Yukon "public trust" action, the Ontario legislation has virtually no potential to fulfill our "strong" rights model.[131]

At best, the current *EBR* represents a collection of procedural rights, not environmental rights *per se*. As noted by a leading commentator, "the failure to clearly articulate the right to a healthy environment is one of the major shortcomings of existing environmental rights legislation in Canada", including Ontario's *EBR*.[132]

In CELA's view, it is now necessary to amend the *EBR* to include a substantive right to a healthy and ecologically balanced environment. We submit that creating such a statutory right is long overdue and represents a fundamental building block of a revitalized *EBR*. When accompanied by appropriate definitions, the new right can be expressed in the *EBR* in clear and concise terms:

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[131] Elaine Hughes & David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999), 30 Ottawa L.R. 229, paras. 79 and 81.
[132] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 225.

> Every Ontarian has a right to a healthy and ecologically balanced environment.[133]

CELA submits that for the purposes of greater certainty, the *EBR* should include the following additional provision:

> The Government of Ontario has an obligation to protect the right of every Ontario resident to a healthy and ecologically balanced environment.

In making these submissions, CELA is aware that over thirty years ago, the *EBR* Task Force was unable to agree upon the inclusion of a substantive environmental right within the *EBR*. However, it appears to CELA that with a few exceptions, little, if any, progress has been made on the significant environmental problems and challenges facing Ontarians, despite the existence of an *EBR* that focuses on political accountability and procedural rights.[134]

In addition, we note that there is a federal private member's bill currently before Parliament that proposes to create a public right to a "healthy and ecologically balanced environment."[135] At the international level, the United Nation Human Rights Council recently declared access to a "clean, healthy and sustainable environment" as a human right, and the United Nations General Assembly similarly passed a resolution that recognized the human right to a "clean, healthy and sustainable environment."

Given these important developments, CELA submits that it is now timely and appropriate to revisit the need to include an environmental right in Ontario's *EBR*.[136] In our view, creating an enforceable right to a healthy and ecologically balanced environment in the *EBR* falls squarely within the legislative competence of Ontario and does not depend on further legislative developments at the federal level or in other jurisdictions. In short, the time has come for this substantive right to be incorporated into the *EBR* to achieve the purposes of the legislation.

This new right should be enforceable by actions commenced in the Superior Court of Justice by any person resident in Ontario, pursuant to the *Rules of Civil Procedure* and the *Courts of Justice Act*. Like the *MEPA* provisions discussed above, this new *EBR* right should not include any special restrictions on standing, and it should be enforceable against persons, corporations, and governments whose acts[137] or omissions contravene, or are likely to contravene, of this right. No specific or affirmative defences should be created (or excluded) by the *EBR*.

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[133] This is a common form of wording used in constitutions around the world to entrench a fundamental right to environmental quality: see David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 225.

[134] CELA, *The EBR Turns 10 Years-Old: Congratulations or Condolences?* (June 16, 2004), pages 3, 6 to 7.

[135] Bill C-219, section 6. See also Bill C-202, section 9, and CELA, *In Support of a Federal Environmental Bill of Rights: Submissions to the House of Commons Standing Committee on Environment and Sustainable Development on Bill C-469* (November 1, 2010).

[136] ECO and LURA Consulting, *EBR Law Reform Workshop June 16, 2004: Meeting Report* (October 2004), pages 26 to 27.

[137] For governmental defendants, the "act" could include the passage or implementation of a law, regulation, or standard that contravenes, or is likely to contravene, the right to a healthy and ecologically balanced environment.

CELA would not be opposed in principle to importing the *MEPA*'s *prima facie* standard of proof into the *EBR*, but we are content with using the usual civil standard of proof (e.g., balance of probabilities) in RTHE actions. As described above, there should be a special "one way" cost rule (or "no cost" rule) in these *EBR* actions, and the undertaking to pay damages (if an interlocutory injunction is sought by the plaintiff) should be capped at $1,000.

If the *EBR* action is successful, then the usual range of declaratory and equitable remedies should be available to the Superior Court to address or remedy the defendant's contravention of the plaintiff's right to a healthy and ecologically balanced environment. In appropriate cases, the Court should also be empowered to award damages for the breach of the *EBR* right, just as courts have the discretion under section 24 of the *Charter of Rights and Freedoms* to order damages for violation of a *Charter* right.

For example, as recently noted by the Federal Court, "once a breach of a *Charter* right has been established, the second step in the *Ward*[138] framework is to determine whether an award of damages would serve one of the three recognized functions of compensation, vindication, and deterrence."[139] In the *EBR* context, an award of damages under the RTHE provisions could achieve: (a) compensatory objectives where the plaintiff has suffered personal harm, loss, or injury caused by the contravention; (b) vindication objectives by condemning the harm that the contravention causes to society as a whole; and (c) deterrence objectives by reinforcing the *EBR* right and sending a clear signal that such contraventions will not be tolerated by the judiciary.

In the unlikely event that a frivolous or vexatious RTHE action is brought under the *EBR*, the Court has various tools (e.g., motion for summary judgment dismissing the action) that may be used to strike out the action at a very early stage.

**CELA Recommendation 14:** The *EBR* should be amended to provide that:

- every Ontarian has a right to a healthy and ecologically balanced environment;
- the Government of Ontario has an obligation to protect the right of every Ontario resident to a healthy and ecologically balanced environment;
- this right should be enforceable by actions commenced in the Superior Court of Justice by any person resident in Ontario;
- the defendants who may be named in such actions include persons, corporations, and governments whose acts or omissions contravene, or are likely to contravene, of the right to a healthy and ecologically balanced environment
- the plaintiff's case must be proven on the usual civil standard of proof (e.g., balance of probabilities);

[138] *Vancouver (City) v. Ward*, 2010 SCC 27.
[139] *Boily v. Canada*, [2022] FCJ No. 1258 (Fed. Ct.), para 194.

- the *EBR* does not create (or exclude) any defences that may be invoked by the defendant in such actions; and

- the court is empowered to grant declaratory or equitable relief, and to award monetary damages, if the action is successful.

***(o) 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?***

**CELA Response:** The *EBR* should be amended to include the essential elements of environmental justice to ensure that low-income, vulnerable, disadvantaged, marginalized, racialized or Indigenous persons and communities are fully and fairly engaged in environmental decision-making by the Government of Ontario, and that they are not disproportionately affected by environmental harm arising from facilities, activities, or physical works undertaken or authorized by the Ontario government.

**CELA Analysis:** It is well-documented that environmental injustices have occurred – and continue to occur – in Canadian jurisdictions, including Ontario (e.g., waterborne mercury contamination affecting the Grassy Narrows First Nation, cumulative air pollution impacts on the Aamjiwnaang First Nation, etc.). Environmental injustice can arise not only where polluting industries and other environmental hazards are disproportionately located in or near Indigenous, Black, and other racialized communities, but also where such communities have unequal access to nature, green space, and other environmental benefits. As the UN Special Rapporteur on toxics noted in a 2020 report to the Human Rights Council:

> Environmental injustice persists in Canada. A significant proportion of the population in Canada experience racial discrimination, with Indigenous, and racialized people, the most widely considered to experience discriminatory treatment. The Canadian Human Rights Commission recently raised concerns of "environmental racism" to the UN Human Rights Council citing "landfills, waste dumps and other environmentally hazardous activities [that] are disproportionately situated near neighbourhoods of people of African descent, creating serious health risks" …The disproportionate exposure to pollution is worsened by pre-existing and long-standing socio-economic inequalities resulting from Canada's colonial legacy (para 47)
>
> The prevalence of discrimination in Canada's laws and policies regarding hazardous substances and wastes is clear. There exists a pattern in Canada where marginalized groups, and Indigenous peoples in particular, find themselves on the wrong side of a toxic divide, subject to conditions that would not be acceptable elsewhere in Canada. A natural environment conducive to the highest attainable standard of health is not treated as a right, but unfortunately for many in Canada today an elusive privilege (para 105).[140]

[140] Microsoft Word - A_HRC_45_12_Add_1_AUV.docx (srtoxics.org).

At the federal level, a private member's bill to address environmental racism (Bill C-226) is currently awaiting Third Reading by the House of Commons. In essence, this Bill, if enacted, would require the federal Environment Minister to publicly develop and report upon a "national strategy to promote efforts across Canada to advance environmental justice and to assess, prevent, and address environmental racism."[141] This strategy must include a study that examines: (a) the link between race, socio-economic status and environmental risk; (b) information and statistics on the location of environmental hazards; and (c) measures to advance environmental justice and address environmental racism (e.g., changes to federal laws, policies or programs; involvement of community groups in policy-making; compensation to individuals or communities; collection of information about health outcomes in communities located near environmental hazards).[142] CELA supports this modest but important step forward at the national level.

At the Ontario level, the *EBR* and other environmental laws (e.g., *Environmental Protection Act*, *Ontario Water Resources Act*, *Environmental Assessment Act*, etc.) have been silent on environmental justice and environmental racism for decades. In CELA's view, the *EBR*'s ongoing failure to expressly address these issues is puzzling since the legislation provides a ready-made platform to advance environmental justice. For example, many of the environmental laws, regulations, policies, and instruments that are used to authorize the siting, construction, and operation of polluting industries are, in fact, already prescribed under the *EBR*. As discussed below, an amended *EBR* could be readily transformed into an effective mechanism for making progress on the advancement of environmental justice in Ontario.

More generally, it is widely recognized that environmental rights legislation can play a key role in addressing or preventing environmental injustices:

> Access to environmental justice in the environmental context requires the availability of a number of diverse types of legal proceedings:
>
> - civil actions based on nuisance or harm to public resources;
> - civil actions or prosecutions for violations of any Act, regulation, standard or other statutory instrument where the offence has resulted or is likely to result in damage to the environment;
> - civil actions to prevent/remedy violation of the right to a healthy environment;
> - civil actions against the government for failing to fulfill its fiduciary duties in protecting and preserving the public trust (including air, water, land and biodiversity);
> - judicial review of government decisions; and

[141] Bill C-226, section 3(1).
[142] *Ibid*., section 3(2).

- appeals of government decisions.[143]

At the present time, the *EBR* includes some – but not all – of the above-noted legal mechanisms but also prioritizes political accountability over judicial accountability for environmental decision-making, standard-setting, and permit-issuing in Ontario. For the reasons described above, CELA submits that legal accountability (and public participation requirements) should be enhanced or expanded under the *EBR* so that the legislation more effectively advances environmental justice throughout the province.

For example, the purposes and principles of the *EBR* should expressly refer to environmental justice, as described above in relation to Consultation Question 12. In turn, this environmental justice commitment must be reflected and operationalized in the prescribed ministries' SEVs. It would also be helpful for the *EBR* and SEVs to include an appropriate definition of environmental justice in order to direct the day-to-day decision-making by prescribed ministries.

On this latter point, CELA commends the definition of environmental justice currently used by the U.S. Environmental Protection Agency:

> Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This goal will be achieved when everyone enjoys:
>
> - The same degree of protection from environmental and health hazards, and
> - Equal access to the decision-making process to have a healthy environment in which to live, learn, and work.[144]

The Agency's environmental justice mandate extends to all aspects of its work under federal environmental law, including:

- setting standards;
- permitting facilities;
- awarding grants;
- issuing licenses;
- making regulations; and
- reviewing proposed actions by the federal agencies.[145]

To help advance environmental justice, the Agency has a long-standing Office of Environmental Justice that, among other things, "coordinates Agency efforts to address the needs of vulnerable

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[143] David R. Boyd, "Essential Elements of an Effective Environmental Bill of Rights" (2015), 27 JELP 201, at page 241.
[144] Environmental Justice | US EPA.
[145] Learn About Environmental Justice | US EPA.

populations by decreasing environmental burdens, increasing environmental benefits, and working collaboratively to build healthy, sustainable communities."[146] In addition, the Agency has:

- promulgated policy and technical guidance to ensure that environmental justice considerations are integrated into its environmental rule-making processes;

- developed and publicly released an environmental justice mapping/screening tool (EJSCREEN) based on a national dataset of environmental, demographic, and socio-economic indicators;

- developed and implemented strategic plans for environmental justice; and

- prepared an Environmental Justice Legal Tools document to assist the Agency in using its discretionary legal authority to more fully ensure that its programs, policies, and activities fully protect human health and the environment in minority and low-income communities.[147]

In contrast, Ontario's Environment Ministry and other prescribed ministries appear to have no equivalent to the Agency's Office of Environmental Justice or the above-noted Agency documents, guidance, tools, or strategies. In these circumstances, CELA submits that it is imperative to utilize the *EBR* to ensure a consistent provincial approach to incorporating environmental justice considerations into the governmental decision-making processes that are subject to the *EBR*.

For example, Part II of the *EBR* should be amended to ensure that low-income, vulnerable, disadvantaged, marginalized, racialized or Indigenous persons and communities are fully and fairly engaged as early as possible in environmental decision-making by prescribed ministries. Among other things, this means that prescribed ministries should not just rely upon passive electronic means of providing public notice through Registry postings, but must also proactively utilize the "enhanced" methods of public participation (e.g., public meetings, mediation, etc.) and "additional" notice means (e.g., news release, media ads, mailings, etc.) that are listed in sections 24 and 28 of the *EBR* for proposed Class II instruments but have been rarely used since the *EBR* came into force. In our view, these notice/comment requirements should not be discretionary nor confined to Class II instruments but must be mandatory for proposed decisions about Acts, regulations, policies, and all types of instruments that affect the above-noted communities.

In addition, to help overcome the financial barriers to public participation, the *EBR* should be amended to require prescribed ministries to provide adequate capacity funding to these communities so that they can meaningfully engage in the decision-making process regarding Acts, regulations, policies, and instruments.

At the same time, the *EBR* should require prescribed ministries to collect information and data about such communities, and to prepare environmental and socio-economic mapping to ensure that decision-makers are aware of the location of these communities and any existing

[146] Office of Environmental Justice in Action (epa.gov).
[147] *Ibid.*

environmental burdens arising from current or legacy contaminant sources. As an illustrative example, the U.S. government's Justice40 Initiative has defined various factors that can be used to identify disadvantaged communities for environmental justice purposes:

> Agencies should consider appropriate data, indices, and screening tools to determine whether a specific community is disadvantaged based on a combination of variables that may include, but are not limited to, the following:
>
> o Low income, high and/or persistent poverty
> o High unemployment and underemployment
> o Racial and ethnic residential segregation, particularly where the segregation stems from discrimination by government entities
> o Linguistic isolation
> o High housing cost burden and substandard housing
> o Distressed neighborhoods
> o High transportation cost burden and/or low transportation access
> o Disproportionate environmental stressor burden and high cumulative impacts
> o Limited water and sanitation access and affordability
> o Disproportionate impacts from climate change
> o High energy cost burden and low energy access
> o Jobs lost through the energy transition
> o Access to healthcare[148]

For transparency and accountability purposes, the *EBR* should require prescribed ministries to regularly report upon progress (or lack of progress) in achieving the environmental justice commitments with the *EBR* and SEVs.

If, despite the foregoing *EBR* amendments regarding decision-making, disadvantaged communities are confronted with an environmental injustice, then they could consider utilizing the legal mechanisms (e.g., judicial review/public trust, and RTHE right to sue) recommended above by CELA to address actual or imminent environmental or public health impacts.

**CELA Recommendation 15:** The *EBR* should be amended to:

- define environmental justice in an expansive manner (e.g., full access to, and meaningful participation in, decision-making processes; community right-to-know; avoidance of disproportionate environmental or health impacts; equitable sharing of benefits, etc.);

- embed environmental justice considerations into the purposes and principles of the *EBR* and into the SEVs of all prescribed ministries;

- expand Part II to require prescribed ministries to:

[148] Memorandum dated July 20, 2021 from the Executive Office of the President – Office of Management and Budget.

(i) meaningfully and proactively engage low-income, vulnerable, disadvantaged, marginalized, racialized or Indigenous persons and communities in environmental decision-making about Acts, regulations, policies and instruments ministries;

(ii) provide capacity funding to such communities to facilitate their participation in environmental-decision-making;

(iii) gather adequate information and data, and prepare appropriate mapping, to enable decision-makers to identify when, where, and how environmental justice considerations must be integrated into the decision-making process; and

(iv) regularly report on progress on meeting environmental justice objectives.

***(p) Consultation Question 16: Should the EBR recognize the rights of nature? If so, how?***

**CELA Response:** If the public trust doctrine and the RTHE are not fully incorporated in the *EBR* as legal accountability mechanisms, then the *EBR* should be amended to include effective and enforceable rights of nature for designated areas of Ontario.

**CELA Analysis:** The RTHE provisions recommended above by CELA may be characterized as anthropomorphic in nature since they are predicated upon the human right to a healthy and ecologically balanced environment. Nevertheless, this legal right should be available and effective for use in situations where a defendant has caused, or is likely to cause, environmental contamination or degradation, irrespective of whether the plaintiff has personally suffered any loss, injury, or damage. This is particularly true if the RTHE provisions are modelled on the *MEPA* right to sue.

Similarly, CELA's recommendation to entrench the public trust doctrine in the *EBR* and make it enforceable via judicial review provides an alternative legal avenue for Ontarians to go to court to safeguard the natural environment and public resources in Ontario. Again, this type of legal proceeding may be commenced by concerned residents, even if they have not been personally impacted by the government's breach of its public trust duty.

However, if one or both of these recommended legal accountability tools are not incorporated into the *EBR*, then CELA submits that it is appropriate to consider another alternative, namely creating enforceable rights of nature in the *EBR*. On this point, CELA notes that the *EBR* is already focused on the outdoor (not indoor) environment:

> "environment" means the air, land, water, plant life, animal life and ecological systems of Ontario.[149]

In addition, the current *EBR* purposes espouse: (a) sustainability; (b) the protection and conservation of biological, ecological, and genetic diversity; (c) the protection and conservation of natural resources, including plant life, animal life, and ecological systems; (d) the

[149] *EBR*, section 1(1).

encouragement of the wise management of natural resources including plant life, animal life, and ecological systems; and (e) the identification, protection, conservation of ecologically sensitive areas or processes.[150] Accordingly, given these existing provisions, it is not a far stretch to suggest that the *EBR* should be expanded to create eco-centric rights of nature.

The LCO's discussion paper correctly acknowledges that "over the last decade, the 'rights of nature' has emerged as a new approach to protecting the environment" (page 37). To date, the legal framework for implementing these rights in other jurisdictions has typically featured two main components: (a) conferring "personhood" upon a natural feature; and (b) enabling or appointing a person, guardian, or other entity to safeguard and enforce the natural feature's rights in court.

However, CELA notes that where this approach has been utilized, the natural feature being protected is often a specific river, watershed, forest, mountain range, or other special or sacred spaces, not an area of land the size of Ontario. For example, a private member's bill (C-271) was introduced for First Reading in Parliament in May 2022. If enacted, section 5 of this legislation would confer upon the St. Lawrence River "the capacity and the rights, powers, and privileges of a natural person, including the right to institute legal proceedings."[151]

In addition, the "rights of nature" approach appears to be most workable when it is used in the Indigenous context and involves the active participation of one or more Indigenous communities and other levels of government. For example, the Magpie River precedent in Quebec cited in the LCO discussion paper was cooperatively developed by the regional government and the local Innu community with the support of non-governmental organizations.[152]

Similarly, section 6 of the above-noted Bill C-271 would establish a multi-party St. Lawrence River Protection Committee that includes representatives from the Ontario and Quebec governments, Indigenous governing bodies, and non-governmental organizations, and this Committee would be empowered to serve as the river's agent in court to claim damages for environmental harm (see sections 7, 8 and 11). CELA further notes that the related concept of establishing Indigenous Protected and Conserved Areas (IPCA) has usually involved collaborative agreements and funding arrangements between federal or provincial levels of government and Indigenous governing bodies.[153]

Accordingly, CELA recommends that the rights of nature approach could be entrenched within the *EBR* with permissive provisions that enable the Ontario government, in conjunction with Indigenous partners, to selectively identify and protect designated areas, rather than the entirety of the province. Among other things, the relevant *EBR* sections should deem such areas to be a "person" with fully enforceable legal rights that can be asserted by action commenced by specified

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[150] *EBR*, section 2(1) and 2(2).
[151] C-271 (44-1) - LEGISinfo - Parliament of Canada.
[152] I am Mutehekau Shipu: A river's journey to personhood in eastern Quebec | Canadian Geographic. See also The Rights of Nature: Canadian and International Developments in Granting Legal Rights to Rivers - HillNotes; Legal personality for maunga, awa and other natural features of the land - Community Law; Should rivers have the same rights as people? | Environment | The Guardian; Can Rights of Nature Laws Make a Difference? In Ecuador, They Already Are - Inside Climate News.
[153] See, for example, Kerrie Blaise, *Protecting Lands and Waters: Advancing Indigenous Rights through Indigenous Protected and Conserved Area* (Toronto: CELA, 2022).

guardians in the Superior Court of Justice. If the action is successful, then the Court should be empowered to declaratory relief, equitable remedies, and damage awards.[154]

In our view, this approach can not only safeguard sensitive, vulnerable, or significant areas within Ontario, but it can also help advance reconciliation with Indigenous persons and communities within the province. However, to assist the LCO in its consideration of this concept, CELA reiterates our above-noted recommendation that the LCO should proactively solicit input from Indigenous peoples in Ontario before releasing its final report.

**CELA Recommendation 16:** The *EBR* should be amended to:

- define and incorporate the rights of nature concept in the purposes and principles of the *EBR* and the relevant SEVs of prescribed ministries; and

- expand Part VI and the regulation-making authority under the *EBR* to allow the provincial government, in cooperation with Indigenous governing bodies, to:

  (i) designate specific geographic areas within Ontario that are deemed to be legal "persons" within the meaning of section 87 of the *Legislation Act*;

  (ii) appoint a person, guardian, committee, Indigenous council, or other entities to commence and maintain an action in the Superior Court of Justice to enforce the rights of the designated area against activities, physical works, or facilities that cause, or may cause, harm to the area or its natural features and functions; and

  (iii) empower the Court to grant declaratory relief, equitable remedies, and damage awards if the action is successful.

## PART III – CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

For the foregoing reasons, CELA concludes that the LCO's review of the *EBR* provides an important opportunity to identify public interest reforms which upgrade the stale-dated legislation and address long-standing gaps in the *EBR* and its implementation. In CELA's view, a comprehensive *EBR* reform package, consisting of statutory, regulatory, policy and administrative changes, should be recommended by the LCO in its final report.

Our specific recommendations for amending the *EBR* are as follows:

**CELA Recommendation 1:** To achieve its purposes more effectively, the *EBR* should be amended to:

- revise and strengthen existing political accountability tools in the *EBR* (e.g., Parts II, III, IV, and V); and

[154] As noted above, this *EBR* litigation should be subject to a "one way" cost rule (or a "no cost" rule) so that guardians would not be inhibited from commencing the action due to adverse cost implications.

- entrench new or amended legal accountability tools in the *EBR* (e.g., Parts I, II, VI, and VIII) to provide greater public access to the courts and tribunals to obtain appropriate relief in relation to substantive and procedural rights in the environmental context.

**CELA Recommendation 2:** The *EBR* should be amended to specify that:

- prescribed ministries shall publicly review and update their respective SEVs every five years;

- SEVs shall be applied whenever ministries are making environmentally significant decisions about proposed Acts, policies, regulations and instruments;

- Ministers shall take every reasonable step to ensure that environmentally significant decisions about proposed Acts, policies, regulations, and instruments conform with (or are consistent with) SEVs;

- documentation that clearly explains how environmentally significant decisions by prescribed ministries conform with (or are consistent with) SEVs shall be posted as part of decision notices placed on the Registry;

- SEVs shall, at a minimum, include provisions that set out clear goals, prescriptive detail, and specific measurable targets and monitoring indicators that are publicly developed and reported upon by prescribed ministries;

- If a governmental decision does not conform (or is inconsistent) with the applicable SEV, then the decision should be judicially reviewable or subject to a statutory appeal to the OLT.

**CELA Recommendation 3:** The *EBR* should be amended to:

- delete sections 37 and 118;

- create a statutory right for persons to seek judicial review of governmental decision-making under the *EBR* in relation to prescribed Acts, regulations, policies, and instruments; and

- specify that all judicial remedies available under the *Judicial Review Procedure Act* may be ordered by the court in applications for judicial review under the *EBR*.

**CELA Recommendation 4:** Part II of the *EBR* should be amended to specify that:

- Registry notices shall include, append, or link to all information and documentation that is relevant to the proposal, including the full draft text of the proposed law, regulation, policy or instrument (e.g., the proponent's application and supporting documentation);

- in the alternative regarding instruments, Registry notices shall inform the members of the public that they can request free and full disclosure of all materials filed by the proponent, and that the public comment period (or leave-to-appeal period, if applicable) will be suspended (or extended) until such time that the requested materials have been provided by the prescribed ministry to the requestor.

**CELA Recommendation 5:** The *EBR* and all SEVs should be amended to fully entrench the necessary elements of the public trust doctrine.

**CELA Recommendation 6:** The *EBR* should be amended to:

- provide the Auditor General with all the duties, powers, and responsibilities (including public education, advice, and assistance) that existed in Part III of the *EBR* prior to the Bill 57 changes;

- enable the Auditor General's annual and special reports to contain general or specific recommendations to prescribed ministries or the Ontario government at large; and

- impose a positive legal duty upon all prescribed Ministries to provide the Ontario Legislature (or a designated standing committee) with a detailed written response, with reasons, to the Auditor General's recommendations within 90 days of their public release.

**CELA Recommendation 7:** The *EBR* should be amended to:

- amend or delete current standing requirements in section 38;

- remove the requirement in section 103 that the plaintiff in a public nuisance action must demonstrate direct economic loss or direct personal injury;

- extend the timeframe for filing a leave-to-appeal application from 15 days to at least 20 days (or preferably 30 days);

- provide the Tribunal with statutory discretion to extend this timeframe upon request by the leave applicant in appropriate circumstances;

- clarify that:

  (i) all applications and supporting documentation submitted by proponents in relation to proposed instruments shall be immediately disclosed for free upon request by any resident of Ontario (without filing an FOI request);

  (ii) despite the *Freedom of Information and Protection of Privacy Act*, disclosure of such materials cannot be refused by prescribed Ministries on the grounds that the records were submitted in confidence or contain proprietary information; and

(iii) where residents have requested such documentation, the running of the leave-to-appeal period should be stopped until the documentation is disclosed in full by governmental officials.

- delete the section 41 leave test in its entirety;
- establish an intervenor funding program in relation to instrument proposals and third-party appeals;
- strengthen the public participation requirements under Part II to better ensure transparency, timeliness, and accountability in governmental decision-making;
- exclude the OLT's new power to award costs against unsuccessful parties from applying to *EBR* appeals as well as appeals brought under other environmental and land use planning statutes;
- establish a "one way" cost rule (or a "no cost" rule) in litigation (e.g., civil actions or judicial review applications) under the *EBR*;
- impose a limited cap on undertakings to pay damages if interlocutory injunctive relief is being sought in *EBR* litigation;
- improve the timeliness and credibility of prescribed ministries' handling of, and response to, applications for review and investigation; and
- enable residents to file applications for review of the need for the issuance of a new prescribed instrument.

**CELA Recommendation 8:** The *EBR* should be amended to create a new statutory cause of action that:

- confers standing on any resident of Ontario to commence and maintain the action against any person, corporation, or government to protect the natural and the public trust therein;
- does not contain the prerequisite of filing an application for investigation or applying to the Farm Practices Protection Board;
- empowers the court to grant a wide range of remedies if the action is successful; and
- eliminates the defences set out in subsection 84(4).

**CELA Recommendation 9:** The regulations under the *EBR* should be reviewed and revised to ensure that:

- the Ministry of Finance and all other Ministries making environmentally significant decisions are prescribed; and

- all environmentally significant Acts, regulations, and instruments are prescribed.

**CELA Recommendation 10:** The *EBR* should be amended to:

- delete section 30 in its entirety; or

- insert statutory criteria or indicia which provide clear direction on when non-*EBR* public participation processes are "substantially equivalent" to Part II of the *EBR*.

**CELA Recommendation 11:** The *EBR* should be amended by wholly deleting section 32.

**CELA Recommendation 12:** Section 2 of the *EBR* should be amended to read as follows:

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

(a) to protect, conserve and restore the quality and integrity of the environment;

(b) to provide sustainability of the environment;

(c) to protect Ontarians' individual and collective right to a healthy and ecologically balanced environment; and

(d) to recognize and affirm the Ontario government's public trust duty to protect the environment.

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

1. The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.
2. The protection and conservation of biological, ecological, and genetic diversity.
3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.
4. The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.
5. The identification, protection and conservation of ecologically sensitive areas or processes.

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

(a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario, including public access to adequate information and supporting documentation about such decisions before they are made;

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

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

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

(4) When making decisions about environmentally significant proposals for Acts, policies, regulations, and instruments, the Government of Ontario shall protect the environment and human health and shall ensure that the decisions are consistent with the following principles:[155]

(a) the precautionary principle according to which where there are threats of serious or irreversible damage to the environment, lack of full scientific certainty must not be used as a reason for postponing measures to prevent environmental degradation;

(b) the polluter-pays principle according to which polluters must bear the cost of measures to prevent, reduce, or mitigate environmental harm that they have contributed to or caused or contributed to through their facilities, operations, or activities;

(c) the principle of ecosystem approach according to which ecosystems consist of air, land, water and living organisms, including humans, and the interactions among them, and environmental decision-making must consider direct, indirect and cumulative effects upon these interdependent ecosystem components;

(d) the principle of sustainable development according to which development must meet the needs of the present without compromising the ability of future generations to meet their own needs;

(e) the principle of intergenerational equity according to which the Government of Ontario holds the environment in trust for future generations and has an obligation to use, manage and conserve its renewable and non-renewable resources in a way that leaves that environment in the same, or better, condition for future generations;

(f) the principle of free, prior and informed consent in the *United Nations Declaration on the Rights of Indigenous Peoples* according to which Indigenous peoples shall be consulted by government before adopting legislative measures, taking administrative action, or approving projects, that may affect Indigenous peoples or their lands, territories and resources;

(g) the principle of environmental justice according to which there should be:

(i) meaningful and timely participation by low-income, disadvantaged, vulnerable, marginalized, racialized, and Indigenous persons and communities in governmental decision-making about prescribed Acts, policies, regulations, and instruments; and

[155] Several of these principles have been adapted from section 5 of Bill C-219.

(ii) a just distribution of environmental benefits and burdens among residents of Ontario, without discrimination on the basis of any ground prohibited by the *Canadian Charter of Rights and Freedoms*.

(h) the principle of non-regression according to which governments shall not repeal or weaken existing environmental legislation or reduce current levels of environmental protection.

**CELA Recommendation 13:** The LCO should undertake meaningful consultation with Indigenous peoples about the need for, and nature of, *EBR* amendments that recognize, integrate, safeguard Indigenous rights when environmentally significant decisions are being made by the Ontario government.

**CELA Recommendation 14:** The *EBR* should be amended to provide that:

- every Ontarian has a right to a healthy and ecologically balanced environment;
- the Government of Ontario has an obligation to protect the right of every Ontario resident to a healthy and ecologically balanced environment;
- this right should be enforceable by actions commenced in the Superior Court of Justice by any person resident in Ontario;
- the defendants who may be named in such actions include persons, corporations, and governments whose acts or omissions contravene, or are likely to contravene, of the right to a healthy and ecologically balanced environment
- the plaintiff's case must be proven on the usual civil standard of proof (e.g., balance of probabilities);
- the *EBR* does not create (or exclude) any defences that may be invoked by the defendant in such actions; and
- the court is empowered to grant declaratory or equitable relief, and to award monetary damages, if the action is successful.

**CELA Recommendation 15:** The *EBR* should be amended to:

- define environmental justice in an expansive manner (e.g., full access to, and meaningful participation in, decision-making processes; community right-to-know; avoidance of disproportionate environmental or health impacts; equitable sharing of benefits, etc.);
- embed environmental justice considerations into the purposes and principles of the *EBR* and into the SEVs of all prescribed ministries;
- expand Part II to require prescribed ministries to:

(i) meaningfully and proactively engage low-income, vulnerable, disadvantaged, marginalized, racialized or Indigenous persons and communities in environmental decision-making about Acts, regulations, policies and instruments ministries;

(ii) provide capacity funding to such communities to facilitate their participation in environmental-decision-making;

(iii) gather adequate information and data, and prepare appropriate mapping, to enable decision-makers to identify when, where, and how environmental justice considerations must be integrated into the decision-making process; and

(iv) regularly report on progress on meeting environmental justice objectives.

**CELA Recommendation 16:** The *EBR* should be amended to:

- define and incorporate the rights of nature concept in the purposes and principles of the *EBR* and the relevant SEVs of prescribed ministries; and

- expand Part VI and the regulation-making authority under the *EBR* to allow the provincial government, in cooperation with Indigenous governing bodies, to:

  (i) designate specific geographic areas within Ontario that are deemed to be legal "persons" within the meaning of section 87 of the *Legislation Act*;

  (ii) appoint a person, guardian, committee, Indigenous council, or other entities to commence and maintain an action in the Superior Court of Justice to enforce the rights of the designated area against activities, physical works, or facilities that cause, or may cause, harm to the area or its natural features and functions; and

  (iii) empower the Court to grant declaratory relief, equitable remedies, and damage awards if the action is successful.

We trust that CELA's recommendations for *EBR* reform will be duly considered by the LCO as it prepares the final report on this matter.

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