Environmental Legal Action:

A Guidebook to Protecting Environmental Rights in Ontario

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August 2025

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Introduction: A Guide to Environmental Rights

This guidebook provides an accessible resource for lay people and grassroots organizers to understand how the legal system can be used to further environmental action. We discuss the current state of environmental law in Ontario and suggest avenues for improvement, looking to existing law and jurisprudence, Indigenous governance, and environmental law developments in other jurisdictions.

There is significant information available to the public on environmental rights and environmental justice. However, the available information is dense, overwhelming, and often difficult to find or understand due to the information being scattered across numerous sites. The information presented in this guidebook seeks to remove these barriers by consolidating legal and policy research into one place, providing those interested in environmental action with the necessary starting points for understanding how Ontario's legal system shapes the barriers and opportunities for environmental advocacy.

Our underlying premise is that the legal system is an important tool to use in the pursuit of environmental action and change. For starters, the law underlies almost everything we can and cannot do. By establishing firm laws and regulations for the environment, people—the government included—must abide by them. Harms to the environment can therefore be more easily caught and prosecuted if there are laws in place. The pros and cons of the current state of environmental laws and rights are examined, highlighting areas for improvement.

Overall, this guidebook is intended to provide a deeper understanding of how the law can further environmental action. Our main goal is to educate readers on how the legal system both inhibits and furthers such action.

This guidebook is organized into five chapters that shed light on how the Canadian legal system plays a role in environmental action.

1. The *Environmental Bill of Rights*

The first chapter discusses the seven mechanisms outlined in Ontario's *Environmental Bill of Rights* (*EBR*). Any Ontario resident can use these mechanisms to protect the environment. This chapter suggests that the government can also be held accountable to its *EBR* obligations through judicial review, annual reports, and, most notably, the Ontario Ombudsman. Finally, this chapter highlights what happens when the Ontario government does not comply with its obligations under the *EBR*.

What is the *Environmental Bill of Rights*?

The *EBR* is a provincial law that came into effect in 1994. It affords all Ontarians certain legal rights including the right to participate in government decisions about the environment and the right to hold the government accountable for those decisions.

2. Nuisance Law

This chapter explores how people can be held accountable for environmental damage through claims brought in the area of law known as nuisance. The law of nuisance generally protects individuals and the public against others unreasonably interfering with the use or enjoyment of private lands or certain public goods. Two types of nuisances are discussed and compared: private and public.

3. Environmental Rights Under the *Charter*

This chapter provides an overview of a constitutional rights-based approach to environmental justice. The chapter reviews recent and ongoing court cases that show how activists can challenge government failures to respond to climate change under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), with a focus on identifying strategies and arguments that might be effective in future cases.

4. Indigenous Rights and Governance

This chapter highlights the interconnection between the rights of Indigenous peoples in Canada and environmental protection, and centers Indigenous leadership in conservation. It discusses the government's legal duty to consult with Indigenous peoples on projects that may impact the environment. The duties of government and the role of Indigenous peoples, their values, and knowledge in such environmental assessments can protect targeted sites from negative impacts. This chapter further explores Indigenous-led conservation efforts in

Canada, focusing on Indigenous Protected and Conserved Areas (IPCAs) as a more equitable form of collaboration between Indigenous peoples and the government.

What are IPCAs?

According to the 2018 Indigenous Circle of Experts report, IPCAs are "lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous law, governance and knowledge systems."

5. Law Reforms

This final chapter explores different legal systems and principles from countries around the world. Examples from international jurisdictions reveal how Canada can more strongly recognize climate rights and advance climate action. Possible reforms include encouraging precautionary action, recognizing nature as holding rights, better protecting the human right to a healthy environment, expanding the authority of courts and tribunals to deal with climate issues, and requiring the government to take positive action to address environmental concerns. CELA has several toolkits on their website for grassroots organizers to use in their law reform efforts.

Chapter 1: The *Environmental Bill of Rights*

This chapter covers the *Environmental Bill of Rights* (*EBR*), a law that gives Ontarians the right to participate in certain decisions around environmental protection in Ontario and the ability to hold the government accountable to the decisions made. The *EBR* is a universally accessible statute that every interested Ontarian has the right to use to further environmental protection. Exercising your rights under the *EBR* can be an empowering experience that can lead to small but sometimes significant change to environmental protection.

This chapter will proceed by describing the seven mechanisms available to Ontarians under the *EBR* and discuss practical tips for exercising these rights.

Mechanisms Available Under the *EBR*

1. Comment on Environmental Registry Proposals

a. Process

Certain Ontario ministries post proposals on the Environmental Registry of Ontario about significant policies, acts, regulations, or instruments pertaining to the environment. Ontarians have at minimum 30 days to submit comments on the proposals to be reviewed by the ministry.[1] Ontarians can make comments online through the Environmental Registry or send in comments using a different method specified in the proposal, such as via email.[2] A decision notice about the proposal will be posted on the Environmental Registry, along with all the comments submitted online, and an explanation of the effect of public participation on the ministry's decision.[3]

b. Uses and Limitations

Commenting on Environmental Registry proposals can prompt ministries to modify their proposals. Such changes can make legislation clearer, strengthen environmental protections, and make the government more open and accountable.[4] All Ontarians are able to do this without the assistance of a lawyer.

c. Cases and Examples

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[1] *Environmental Bill of Rights, 1993*, SO 1993, c 28, s 8(4) [*EBR*].
[2] *EBR, supra* note 1 at s 9(2).
[3] Environmental Commissioner of Ontario, "Ontario's Environmental Bill of Rights and You" (10 May 2013) at 13-14, online (pdf): < https://www.energy.gov/sites/prod/files/2015/06/f22/OEBRG.pdf> [*Ont EBR and You*].
[4] *Ont EBR and You, supra* note 3 at 15.

In 2021, the Court in *Greenpeace Canada v Ontario (Minister of the Environment, Conservation and Parks)* noted that the government was required to consider Environmental Registry comments, before enacting Bill 4: the *Cap and Trade Cancellation Act*, 2018.[5]

In 2009, the Ministry of the Environment posted a decision notice on the Environmental Registry explaining that it had made changes to the *Toxics Reduction Act, 2009* because of 113 comments submitted by the public. The changes included requiring that the summary of the toxic substance reduction plan and certain information in the report be made available to the public on the internet and requiring the Ministry to make a report online every year to the public on its progress in implementing the *Act*.[6]

In 2010, 86 members of the public submitted comments on the *Clean Water Act, 2006*. As a result, the Ministry of the Environment clarified the text of certain provisions by expanding what they cover and enhancing provisions for consultation with First Nations communities.[7]

2. Appeal a Ministry Decision on an Instrument

a. Process

When ministries post decisions about instruments such as permits, licenses, approvals, authorizations, or orders on the Environmental Registry anyone in Ontario can seek leave (ask for permission) to appeal (challenge) a ministry decision on a Class I or II facility within 15 days of the decision being posted.[8] Class I facilities are smaller in scale and self-contained, with low probability of emissions and infrequent outputs. Examples of Class I facilities include electronics manufacturing and repair facilities, beverage bottling facilities, and dairy product distribution facilities. Class II facilities, on the other hand, are medium-scale operations with outdoor storage, occasional outputs of annoyance, and more frequent movements of products and heavy trucks.[9] Examples of Class II facilities include dry cleaning services, magazine printing, and dairy product manufacturing facilities.

To initiate an appeal, an interested individual must show:

1. An interest in the decision, like living in the area that will be affected, and

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[5] *Greenpeace Canada (2471256 Canada Inc.) v Ontario (Minister of the Environment, Conservation and Parks)*, 2021 ONSC 4521.
[6] *Ont EBR and You*, *supra* note 3 at 15.
[7] *Ibid*.
[8] *EBR*, *supra* note 1 at s 38(1) and s 40.
[9] Government of Ontario, "D-6 Compatibility between Industrial Facilities" (last updated 13 July 2021), online: <https://www.ontario.ca/page/d-6-compatibility-between-industrial-facilities>.

2. That the other party affected by the instrument (i.e., the company receiving a permit) has the right to challenge the decision in a different way, such as under different legislation.[10]

An appeal will be successful if the tribunal finds that no reasonable person could have made the decision and that the decision could have resulted in significant harm to the environment.[11] A decision on an application will usually come within 45-60 days.[12] If leave is obtained, the original decision is stayed, which means it cannot be put into effect until a new decision is made. The new decision will then determine whether to keep the original ministry's decision, change it, or add new rules to it. The new decision cannot be appealed.[13]

b. Uses and Limitations

This process can be used for any decision made regarding a Class I or II instrument that is posted on the Environmental Registry and so could be used for a variety of decisions with the potential to threaten Ontario's air, water, land, or wildlife. Instruments are any document of legal effect issued under an Act and include permits, licences, approvals, authorizations, directions, or orders. The process is designed to help people who will be directly impacted by a project and it usually happens relatively quickly because there are time limits. However, using this process can be complicated without the help of a lawyer because you have to persuade the tribunal that no reasonable person could have made the decision, and that the decision could have resulted in significant harm to the environment.

Before you can appeal the decision, you need to show pre-existing interest in the decision, which could limit this mechanism's use. In practice, this requirement is easy to meet. For example, merely having commented on the original proposal to issue the instrument would enable one to clear this barrier.[14]

c. Cases

Many recent appeals, including *Hong v. Ontario* (*Director, Ministry of the Environment and Climate Change*), have failed because they did not show that no reasonable person could have made the decision being appealed.[15] However, *Concerned Citizens Committee of Tyendinaga and Environs v. Ontario (Director, Ministry of the Environment)* is a recent example of the effective use of this mechanism. The plaintiffs, a citizens group, filed this appeal in

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[10] *Ont EBR and You*, *supra* note 3 at 16-17.
[11] *EBR*, *supra* note 1 at s 41.
[12] *Ont EBR and You*, *supra* note 3 at 18.
[13] *EBR*, *supra* note 1 at s 43.
[14] *Ont EBR and You*, *supra* note 3 at 15.
[15] *Hong v Ontario (Environment and Climate Change)*, 2017 CanLII 11497 (ON ERT) at para 102.

response to the issuance of an environmental approval to a landfill in their community. The appeal resulted in the landfill operator being required to re-evaluate and publicize parts of its environmental and contingency plans.[16]

3. Application for Review

a. Process

Any two Ontario residents may apply to ask a relevant minister to review a policy, act, regulation, or instrument, if they believe that it is not good for the environment. They can request that it be amended (changed to make it better), appealed (have a higher authority, like a court, review the decision), or revoked (taken back or cancelled) to protect the environment. They can also request a review if they want a new rule to be made where one does not exist already.[17]

An application must include:

1. The applicants' names and addresses.
2. The measure which they want reviewed.
3. Why the applicants want a review.
4. Evidence outlining the need for a review.[18]

The relevant minister will review the application and decide if a review is in the public interest. They will let those who asked for a review, the Auditor General, and any other relevant parties know their decision on whether the review will proceed within 30 days.[19] There is no set time limit for a review to be completed, though the originally notified parties must be informed within 30 days of it being completed.[20]

b. Uses and Limitations

This application can be used by anyone and applies to a wide range of ministry practices and decisions. It does not need to be made in response to previous decisions; it can also be used to request an evaluation of possible new measures. However, it can only be used for 12 ministries, namely the Ministry of Agriculture, Food and Rural Affairs; Ministry of Education; Ministry of Energy; Ministry of Environment, Conservation, and Parks; Ministry of Health; Ministry of Long-Term Care; Ministry of Mines; Ministry of Municipal Affairs and Housing;

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[16] *Concerned Citizens Committee of Tyendinaga and Environs v Director, Ministry of the Environment*, 2014 CarswellOnt 14090 at para 16.
[17] *EBR*, *supra* note 1 at s 61(1) and s 61(2).
[18] *Ibid* at s 61(3) and s 61(4).
[19] *Ibid* at s 67(1) and s 70.
[20] *Ibid* at s 71(1).

Ministry of Natural Resources and Forestry; Ministry of Northern Development; Ministry of Public and Business Service Delivery; and Ministry of Transportation.[21]

It is also still up to a ministry to accept or reject an application, so it does not provide for an independent review of the ministry's practices. The Environmental Commissioner also reviews these decisions in their annual reports. There is no strict time limit for a review, which could lead to a longer review process. However, in theory, if an application is believed to be improperly handled or rejected, applicants have the opportunity to file complaints with the provincial Ombudsman.[22] As this mechanism only requires a written application to initiate it does not require a lawyer's involvement.

c. Cases

In 2001, three environmental organizations (Environmental Defence Canada, the Algonquin Wildlands League, and the Federation of Ontario Naturalists) submitted applications for a review of the *Provincial Parks Act*, arguing it was outdated.[23] The Ministry of Natural Resources declined the applications, but acknowledged that this review was necessary. By 2006 the *Provincial Parks and Conservation Reserves Act* was signed, addressing many of the applicants' critiques of the old legislation.[24]

More recently, in April 2022, the Canadian Environmental Law Association applied for a review of *Ontario's Clean Water Act* (*CWA*) because the legislation did not have source water protection coverage for non-municipal water sources. In response, the Ministry of the Environment, Conservation, and Parks released updated guidance to landowners who are not covered by the *CWA*, but it is unclear whether this review will also lead to changes to the *CWA* itself.[25]

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[21] O Reg 73/94, s 5.
[22] Richard D. Lindgren, "Why the Environmental Commissioner of Ontario Matters: Legal Analysis of Schedule 15 of Bill 57" (23 November 2018), online (pdf): <https://cela.ca/wp-content/uploads/2019/07/CELA-Legal-Analysis-Bill-57.pdf>.
[23] *Developing Sustainability 2001-2002 Annual Report*, (Toronto: Environmental Commissioner of Ontario, 2002) at 113-114, online (pdf): <https://www.auditor.on.ca/en/content/reporttopics/envreports/env02/2001-02-AR.pdf>.
[24] *Reconciling Our Priorities Annual Report 2006-2007*, (Toronto: Environmental Commissioner of Ontario, 2007) at 100 and 105, online (pdf): <https://www.auditor.on.ca/en/content/reporttopics/envreports/env07/2006-07-AR.pdf>.
[25] Katrina Eñano, "Extend source water protection coverage to non-municipal drinking water systems: environmental group", *Law Times* (2 May 2022), online: <https://www.lawtimesnews.com/practice-areas/environmental/extend-source-water-protection-coverage-to-non-municipal-drinking-water-systems-environmental-group/366276>.

4. Application for Investigation

a. Process

Any two Ontario residents who believe that someone has contravened a prescribed environmental act, regulation, or instrument, can request an investigation of the contravention under the *EBR*.[26]

An application must include:

1. The applicants' names and addresses.
2. A statement about the nature of the alleged contravention and a summary of the evidence supporting any allegations.
3. The names and addresses of those alleged to be involved in the contravention (when available) and those who might be able to give evidence about the contravention.
4. A description of any material which the applicants believe should be considered in the investigation.
5. Details of any previous contacts the applicants had with the provincial government about the allegations.
6. A sworn statement of belief in the contents of the application.[27]

The relevant minister will evaluate this application, and if they decline it, must give notice within 60 days.[28] A decision to pursue an investigation does not require immediate notice. However, if the investigation is not completed within 120 days, then the minister must give the parties a revised time estimate of its completion.[29] Within 30 days of completion, the minister must notify the parties of their decision.[30]

b. Uses and Limitations

Theoretically, this mechanism has a very broad scope, by providing oversight not just of government actions but those of private entities as well. However, in practice this mechanism is far more limited. A 2004 Canadian Environmental Law Association report found that, between 1995 and 2003, approximately two-thirds of applications for investigation were refused, and even in cases where the Ministry of the Environment found offences, it often declined to take

[26] *EBR*, *supra* note 1 at s 74(1).
[27] *Ibid* at s 74(2).
[28] *Ibid* at s 78(1) and s 78(3).
[29] *Ibid* at 79(1).
[30] *Ibid* at 80(1).

action.[31] Additionally, as with an application for review, this mechanism is limited by its dependence on a ministry and the Environmental Commissioner to perform an investigation. However, like the applications for review, if an applicant feels as though their application has been improperly handled, they can file a complaint with the provincial Ombudsman.[32]

While this mechanism could be advanced without the support of a lawyer, a lawyer will be required to commission the statements of events.

c. Cases

In 2013, Ecojustice, a major environmental law organization, helped the Aamjiwnaang First Nation apply for investigation, in response to a release of toxic exhaust from a Shell Canada refinery in Sarnia. This prompted a prosecution, resulting in Shell being forced to pay fines, including a direct payment to the First Nation.[33] Other environmental groups have also used this mechanism, such as the Coalition for the West Credit River, which in 2021 applied for an investigation relating to a planned wastewater treatment plant.[34]

5. Sue to Protect a Public Resource

a. Process

Ontarians can sue private actors (such as individuals or corporations) for violating a prescribed environmental act, regulation, or instrument, if their action is harming, or about to harm, a public resource located in Ontario. Before suing, individuals must apply for investigation under the *EBR*, unless delaying the lawsuit would impose significant risk to the environment. However, if the ministry does not respond to the application for investigation reasonably, or within a reasonable time, individuals can proceed to sue to protect the public resource.[35]

Following an investigation, individuals who wish to proceed must undertake an ordinary civil lawsuit:

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[31] Richard D. Lindgren, *The Environmental Bill of Rights Turns 10 Years-old: Congratulations or Condolences?* (Toronto: Canadian Environmental Law Association, 2004) at 16-17, online (pdf): <https://cela.ca/wp-content/uploads/2019/06/474EBR_turns_10.pdf>.
[32] *Ibid*.
[33] Elaine MacDonald and Ian Miron, "Charges laid against Shell Canada for refinery spill in 'Chemical Valley'", *Ecojustice* (24 November 2015), online: <https://ecojustice.ca/news/charge-laid-against-shell-canada-for-refinery-spill-in-chemical-valley/>.
[34] Joanne Shuttleworth, "Coalition files application for MOE to investigate wastewater treatment plant", *The Wellington Advertiser* (12 August 2021), online: <https://www.wellingtonadvertiser.com/coalition-files-application-for-moe-to-investigate-erin-wastewater-treatment-plant-project/>.
[35] *EBR*, *supra* note 1 at s 84(2).

1. Lawyers must serve a statement of claim on the defendant (the person/corporation being sued), and within 10 days, it must also be served on the Attorney General of Ontario. This is a legal document that outlines the facts and legal arguments supporting the claim. It explains what the claim is for, what the claimant (suing party) wants, and what legal reasoning supports the claim.[36]
2. They will then receive a statement of defence from the defendant. This is a legal document that responds to the claims made by the original statement of claim. Within 30 days of receiving the statement of defence and providing all legal documents related to the case to a court, a notice (including a statement of facts and claims on which the case is based) for the Environmental Registry must be created for approval by the court.[37]
3. If the court approves, the notice will be placed on the Environmental Registry.
4. At this point both parties may agree to resolve the case by entering into a settlement agreement (an agreement between both parties which resolve the dispute and outlines any conditions) before the case goes to trial. If the case goes to trial, the court may grant an injunction (a ruling stopping the behaviour of the defendant), restoration plan, damages (an award of money as compensation), or dismiss the case altogether.
    a. If the claim is not proven in court, the claimant may be required to pay legal costs of both parties.

Please note that **the text above is not legal advice**. If you are trying to pursue a legal case against a party for environmental violations, **please consult a lawyer**.

b. Uses and Limitations

Suing to protect a public resource can require significant time and expenses, including legal costs. It can also involve significant procedural hurdles. A notable limitation is exemplified in the case of the Corporation of the Municipality of Powassan, where the applicants' failure to apply for an investigation under the *EBR* before seeking an injunction led to the dismissal of their case. This underscores the importance of adhering to the prescribed procedures under the *EBR* to avoid dismissal on procedural grounds.

Although this mechanism can be used without assistance from a lawyer, a civil lawsuit is a complicated procedure and as such it is advisable to seek legal advice before proceeding.

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[36] *EBR*, *supra* note 1 at s 86(1).
[37] *EBR*, *supra* note 1 at s 80.

c. *Cases*

In 2002, individuals filed an injunction asking the Court to stop the Corporation of the Municipality of Powassan from proceeding with the development of a snowmobile trail without prior environmental assessment. The Court noted that the applicant could not sue, since they did not apply for an investigation under the *EBR* beforehand.[38]

6. Sue Over a Public Nuisance or Over a Spill

a. Process

In Ontario, if something harmful to the environment also affects the health and safety of an individual directly, they can sue for personal or financial losses on the grounds of public nuisance.[39] As further explained in Chapter 2, a public nuisance is an activity which interferes with the rights of the general public.

Public nuisance suits dealing with environmental harm can typically rely upon the *EBR*. However, because the *EBR* defines the environment and environmental harm in a specific and limited way, the *EBR* does not extend to all public nuisance suits.

For instance, the *EBR* specifically states that when the EBR refers to water and its protection, "'water' means surface and ground water." While this language means that the *EBR* covers public nuisance suits alleging harm to surface and ground water, it also limits the scope of the *EBR*'s protections to these specific kinds of water, while excluding others (e.g., water running through pipes).

The process for suing over a public nuisance is identical to that of suing to protect a public resource and requires an individual to first apply for an investigation. However, unlike suing over a public nuisance outside of the *EBR*, an individual who sues in public nuisance under the *EBR* does not need the Attorney General's approval prior to bringing the case.

The EBR also contains a statutory right to sue with respect to loss or damage arising from "spills" of pollutants, when the polluter did not take reasonable steps to prevent the spill. Compensation may be owed by a polluter even if the spill does not create a private or public nuisance.[40] More generally, the provision has been interpreted to be consistent with the "polluter pays" principle, which provides that whenever possible, the party causing the

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[38] *Campbell v Powassan (Municipality)*, 2002 CarswellOnt 3194, [2002] O.J. No. 3693 (OSCJ).
[39] *Ont EBR and You, supra* note 3 at 27.
[40] *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819 [*Midwest Properties*].

pollution should pay for remediation, compensation and prevention in the event of a spill that that is contrary to the *EBR's* protections.[41]

b. Uses and Limitations

Suing over a public nuisance, a spill, or to protect a public resource can hold members of society accountable, deter them, or prompt a higher degree of care for the environment. However, there is a lot of time, energy, and financial burden associated with going to court, making this route generally inaccessible to people without a lawyer and significant financial resources.

c. Cases

In *Wallington Grace v Fort Erie (City of)*[42], the town brought a lawsuit due to discolored water, medical complaints, and property damage. The Court noted that suing over a public nuisance, under *EBR* standards, requires proof of both a public nuisance and environmental harm. Here, the Court found that for environmental harm to water to count as "harm" under the *EBR*, the type of water must relate to the definition as set out in the *EBR*. Specifically, "water", as defined in the *EBR*, relates to surface or groundwater, but not water running through the pipes. The pipe water thus was excluded from the *EBR*'s protection.

In *Hollick v Toronto (City)*[43], the appellants sued in nuisance and asked for damages from harms suffered because of pollution from a landfill. Although this specific case was unsuccessful for procedural reasons, it reaffirmed that Ontarians can apply for review of existing provisions or apply for investigation of contraventions to those provisions through the *EBR*.

In *Midwest Properties Ltd. v. Thordarson*[44], the individual defendant and the defendant company was, among other things, found to be personally liable for soil and groundwater contamination arising from unsafe storage practices. Under the *EBR*, this required the defendant to compensate the applicant for the cost of restoring the property to its pre-spill state, as opposed to simply the loss of property value, on the grounds that the purpose of the *EBR's* statutory right for compensation is to enforce the "polluter pays" principle.

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[41] *Ibid* at paras 67 – 68.
[42] *Wallington Grace v Fort Erie (City Of)*, 2003 CanLII 48456 (ONSC) [*Wallington Grace*].
[43] *Hollick v Toronto (City)*, 2001 SCC 68.
[44] *Midwest Properties*, *supra* note 40.

7. Protection from Reprisals by an Employer for Exercising Environmental Rights

a. Process

Ontarians may file a written complaint with the Ontario Labour Relations Board ("the Board") arguing that an employer has taken reprisals against them on a prohibited ground (has punished them for reasons that are not allowed by law).[45] An example of this is if the employer penalizes the employee for taking steps to comply with environmental law. Either a Board-authorized labour relations officer or the Board itself will investigate the complaint.[46]

The employer must prove to the investigator that they did not take reprisals on a prohibited ground. If the employer is unable to prove this, the Board will determine how the situation should be fixed. If no conclusion is reached by the investigator, the matter will proceed to a hearing before a Vice-Chair or panel of the Board to make a determination.

Determinations may include an order directing the employer to:

1. Stop doing the act or acts complained of;
2. Fix the act or acts complained of; or
3. Reinstate or hire the employee, with or without compensation, or to compensate for loss of earnings or other employment benefits in an amount assessed by the Board against the employer.[47]

The employer must comply with any determination of the Board within 14 days of its release, or from the date provided in the determination of compliance.[48] If the employer fails to do so, the determination may be enforced by the Superior Court of Justice.[49]

b. Uses and Limitations

This mechanism provides protection for workers who have been punished or mistreated by their employer for reporting violations of environmental laws. Also, it helps workers who refuse to do something for their employer if it goes against the *EBR*. This mechanism can be utilized without hiring legal counsel, although obtaining legal advice is always recommended.

c. Cases

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[45] *EBR*, *supra* note 1 at s 105(1).
[46] *Ibid* at s 108.
[47] *Ibid* at s 110(2).
[48] *Ibid* at s 112.
[49] *Ibid* at s 113.

In *Tirone v Environment (Ministry)*[50], an employee faced a one-day suspension as punishment for his attempt to comply with and seek enforcement of the Ministry of Environment's mandate under various Acts. The Board held that the applicant did plead sufficient facts to suggest that the *EBR* may have been violated and ordered a hearing before the Board to look further into the matter.

What Happens if the Government Doesn't Comply with its Obligations Under the *EBR*?

This section discusses some of the mechanisms available for holding the government accountable to its obligations under the *EBR*. The section first discusses judicial review (a court's review of a government's actions or inaction), followed by the role of the Auditor General and the Ombudsperson.

1. Judicial Review

The power of judicial review allows courts to review government decision making in certain circumstances. Under the *EBR* this power is restricted. A court may not review any minister's action, decision, or failure to take action or make a decision under the *EBR* (or that of someone working on behalf of the minister).[51] The only time a court can review a minister's actions or decisions under the *EBR* is if someone alleges that the minister or their representative did not follow the rules outlined in Part II of the *EBR*, which explains how the ministries must create and inform people about an instrument.[52] If a court finds that the minister did not follow the rules in Part II of the *EBR*, the minister's decision may be considered invalid. Generally speaking, this exception does not allow for reviews of regulations, and the instrument may only be challenged for a fundamental failure to comply.[53]

What are *Regulations*?

Regulations are a set of rules that have the force of law. They ultimately derive their authority from an enabling act. For this reason, regulations are sometimes called "subordinate legislation," because their authority is always grounded in, and subordinate to, the legislation

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[50] *Tirone v Environment (Ministry)*, 2014 CanLII 80534 (ON LRB).
[51] *EBR, supra* note 1 at s 118(1).
[52] *Ibid* at s 118(2).
[53] *Animal Alliance of Canada v Ontario (Minister of Natural Resources)*, 2014 ONSC 2826 at para 25. Because the Supreme Court of Canada has changed to the test used to ask whether regulations are legally valid (as compared to the test used in *Animal Alliance*), see *Auer v Auer*, 2024 SCC 36, there is some uncertainty as to whether a modern ruling on these issues would arrive at the same conclusion.

that enables them.[54] Regulations dictate how legislation is to be applied and enforced. They usually contain more specific guidelines than an act would, including restrictions and authorizations for certain activities as well as requiring reporting, research, and monitoring.

This is not to say that the government cannot be held responsible for any illegal acts committed by any minister, deputy minister or ministry employee.[55] Aside from the mentioned judicial review process, however, those officials or employees cannot be sued if they were acting in good faith while carrying out their duties under the *EBR*.[56]

a. Cases

In *Greenpeace Canada (2471256 Canada Inc.) v Ontario (Minister of the Environment, Conservation and Parks)*[57], the Court granted "declaratory relief", which means they made a formal declaration that the government did not comply with the *EBR* without ordering the government to complete any specific actions or awarding monetary damages. The case involved an application for judicial review where the plaintiffs argued that the Minister of Municipal Affairs did not follow the rules by not sharing proposed changes to the *Planning Act* on the Environmental Registry before implementing them.[58]

In another case, environmental groups alleged that the government failed to meet the *EBR*'s legal requirements for public consultation on a regulation ending Ontario's cap-and-trade program (Ontario Regulation 386/18).[59] Before the case was heard in Ontario Divisional Court, the government passed the *Cap and Trade Cancellation Act*. This had the effect of repealing the regulation. The Divisional Court stated that declaratory relief was not available given that the regulation had been repealed. However, the Court noted that judicial review is an appropriate method to establish the unlawful practice of government, despite not granting declaratory relief in this case.[60]

2. Auditor General

The Auditor General also plays a part in holding the government accountable to its obligations under the *EBR*. The Auditor General creates a report every year that is available to

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[54] *Ibid*.
[55] *EBR, supra* note 1 at s 119(2); *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, s 8(3).
[56] *Ibid* at s 119(1).
[57] *Greenpeace Canada (2471256 Canada Inc.) v Ontario (Minister of the Environment, Conservation and Parks)*, 2021 ONSC 4521.
[58] *Ibid* at paras 83-84.
[59] *Greenpeace Canada v Minister of the Environment (Ontario)*, 2019 ONSC 5629.
[60] *Ibid* at para 40.

the public. This report discusses whether the government is meeting its obligations under the *EBR*.[61] Furthermore, the annual report contains follow-ups on past *EBR*-compliance issues, urges ministries to improve poor *EBR*-related practices, and includes recommendations about how to improve. One example of such a recommendation, from the 2022 report, urged the Ministry of the Environment, Conservation and Parks to repost a notice on the Environmental Registry for public comment with complete and correct information.[62]

Ontarians could use the Auditor General's annual reports to gain insight into the government's *EBR* compliance and use that knowledge to appeal ministry decisions on instruments or request a review of a policy, act, regulation, or instrument (discussed above).

However, the annual reports are limited. It is not mandatory for the Auditor General to include information about Ontario's progress on energy conservation or reducing greenhouse gas emissions, nor provide suggestions on gaps in legislation. So, it is up to the Auditor General's discretion whether this information is included.[63]

3. Ombudsperson

If the government is not complying with its obligations under the *EBR*, Ontarians can bring their concerns to the Ombudsperson, who reviews complaints about provincial ministries and programs. *The Ombudsman Act* gives the Ombudsperson the power to investigate complaints about administrative issues.[64] In 2021-2022, the Ombudsman of Ontario reported that they investigated and resolved complaints related to communication gaps and delays relating to the Ministry of Energy; the Ministry of the Environment, Conservation, and Parks; and the Ministry of Northern Development, Mines, Natural Resources and Forestry. Their staff has helped put people in contact with relevant ministry officials, followed up to make sure they heard back, and encouraged the ministries to improve communication.

For some of these complaints, the Ombudsman has been able to get written acknowledgement of the lack of communication or delay and a detailed explanation of the relevant ministry's decision. This has allowed for more transparency with regards to government processes—which is important for citizens hoping to file comments on environmental registry proposals—and has ensured that applications for review are taken more

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[61] *Operation of the Environmental Bill of Rights, 1993,* (Toronto: Office of the Auditor General of Ontario, 2022), online (pdf): <www.auditor.on.ca/en/content/annualreports/arreports/en22/ENV_EBR_en22.pdf>.
[62] *Ibid* at 19.
[63] Kelsey Scarfone, "Silencing a critic: Ontario Government makes cuts to environmental watchdog in the wake of a damning new report", *Environmental Defence* (23 November 2018), online: <https://environmentaldefence.ca/2018/11/23/environment-commissioner/>.
[64] *Ombudsman Act*, RSO 1990, c O.6.

seriously.[65] As a result, the Ombudsman could be a key resource for responding to potential practical issues with the use of the *EBR*.

[65] *2021-2022 Annual Report*, (Toronto: Office of the Ombudsman Ontario, 2022) at 67-69, online (pdf): <https://www.ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Annual%20Reports/Ombudsman_AR_2022-Web-EN_FINAL-s.pdf>.

Chapter 2: Nuisance Law

This chapter addresses how nuisance lawsuits can be used to hold people legally responsible for causing environmental damage. There are two types of nuisance lawsuits: private nuisance and public nuisance.

In private nuisance lawsuits, a person is sued for unreasonably interfering with another person's use and enjoyment of their property (i.e., for causing a "private nuisance"). For instance, an individual who unreasonably interferes with their neighbour's enjoyment of their backyard may be committing a "private nuisance". The nuisance is "private" because it does not affect the public at large, only the neighbour.

In public nuisance lawsuits, a person is sued for unreasonably interfering with one of the public's rights. For instance, an individual who dumps waste into a local river may be committing a "public nuisance". The nuisance is public because it unreasonably deprives a substantial number of people of the stream. At the same time, the nuisance may also be private, such as if it affects the property rights of a landowner with riverfront property. As noted in Chapter 1, public nuisance suits causing environmental harm may be pursued under the *Environmental Bill of Rights* (section 103), but only if the environmental harm falls under the scope of the *EBR*. The concepts of private and public nuisance are each discussed in greater detail below.

Finally, a nuisance may rise to the level of a criminal offence in certain contexts. Under section 180 of the *Criminal Code*, the criminal offence of nuisance requires, among other things, the commission of an unlawful act (or a failure to perform a legal duty) that endangers the lives, safety, or health of the public or causes injury to an individual.

Unlike the private and public nuisance lawsuits canvassed above, which are litigated as a matter of civil law (allowing private parties to bring suits), the crime of nuisance is prosecuted as a criminal law matter. Prosecutions are the responsibility of government institutions. For this reason, the crime of nuisance is not further addressed in this chapter. That said, individuals and organizations may facilitate criminal prosecutions by reporting suspicious activity to local authorities. If you suspect the crime of nuisance is being committed, you may consider contacting your local police services.

Private Nuisance

A private nuisance is an activity that unreasonably interferes with a person's use and enjoyment of their property. Many types of activities can be considered private nuisances. Causing loud noises or strong smells are two common examples. In certain circumstances, littering could also be considered a private nuisance, such as when litter from a landfill

routinely spills over to a neighboring property.[66] So too could causing soil or groundwater contamination.[67]

There are three general requirements that must be met for something to count as a private nuisance:

1. *There must be a substantial interference with a person's use and enjoyment of their property*. This interference must be more than a minor inconvenience or a slight annoyance.[68] The negative impact of the interference needs to be noticeable. In other words, the interference cannot be so minor that its negative impact is essentially invisible.[69]

2. *The interference must be objectively unreasonable*. An interference with a person's use and enjoyment of their property will be unreasonable if the harms caused by this interference outweigh any benefits the interference provides.[70] Some of the factors that courts will consider in determining whether an interference is objectively unreasonable include:

    - *The type of the area or neighbourhood where the interference is taking place.*[71] What is reasonable in an industrial area might not be reasonable in a residential neighbourhood. For example, dump trucks loudly driving through a residential neighbourhood are more likely to amount to an interference than they would if they were driving through an industrial area where the noise is commonplace.
    - *How sensitive the average person would be to the interference.*[72] The reasonableness of an interference with a person's use and enjoyment of their property is measured against the sensitivities of the average person.[73] It is not measured against the unique sensitivities of the person who owns the affected property. For example, the sensitivities of an average person to dust will be considered rather than the sensitivities of a specific person with asthma.

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[66] *Nippa v C.H. Lewis (Lucan) Ltd, 1991 CanLII 8344 (ONSC).*
[67] *Huang v Fraser Hillary's Limited*, 2018 ONCA 527; *Sorbam Investments Ltd. v Litwack*, 2021 ONSC 5226, affirmed in *Sorbam Investments Ltd. v Litwack,* 2022 ONCA 551.
[68] *Antrim Truck Centre Ltd. v Ontario (Ministry of Transportation)*, 2013 SCC 13 at para 22 [*Antrim Truck*].
[69] *Smith v Inco Ltd.*, 2011 ONCA 628 at paras 49-50 [*Smith v Inco*].
[70] *Antrim Truck, supra* note 69 at para 26.
[71] *Tock v St. John's Metropolitan Area Board*, 1989 CanLII 15 (SCC) [*Tock*], cited in *Antrim Truck, supra* note 71 at para 26.
[72] *Ibid*.
[73] *Walker v Pioneer Construction Co.,* 1975 CarswellOnt 336, 56 D.L.R. (3d) 677 at para 41 (HCJ); *Devon Lumbern Co. v MacNeill*, 1987 CanLII 5330 (NBCA).

- *The frequency and duration of the interference*.[74] The more often an interference occurs, the more likely it is to be unreasonable. Similarly, the longer an interference lasts, the more likely it is to be unreasonable.

3. *The interference with a person's use and enjoyment of their property must originate from outside of that person's property.* Interference that arises from a person's own property is not a private nuisance, even if the property owner is not the cause of the interference. Among other things, this means that a person cannot successfully sue a former owner of their property for having caused a private nuisance.[75]

In Ontario, where a private nuisance lawsuit is based on environmental damage to residential property, there are two other requirements that must be met: (1) *the environmental damage must be severe enough to pose a hazard to human health* and (2) *the consequences of this damage must have been reasonably foreseeable to the person who caused it*.[76] In other words, it must have been possible for a reasonable person in the person who caused the environmental damage's position to have predicted the impact of this damage.

What can I do if I or my organization is a victim of a private nuisance?

Nuisance lawsuits are typically brought before courts of provincial jurisdiction. In Ontario, for instance, nuisance lawsuits would usually be brought before the Superior Court of Justice.

Typically, when a court determines that someone has caused a nuisance, it will order them to stop doing whatever activity has caused the nuisance.[77] But in some cases, a court may order a person who has caused a nuisance to pay damages (i.e., financial compensation) instead.[78] A court may order a person to pay damages if it concludes that ordering this person to stop doing whatever activity has caused the nuisance would place too much of a burden on them. A court may also order a person to pay damages if it concludes that financial compensation would be enough to address the harms caused by the nuisance.

Nuisance lawsuits can be complex. They can also be expensive, particularly if one finds oneself on the losing side. Accordingly, individuals looking to initiate a nuisance lawsuit are strongly advised to consult with a lawyer. The Law Society of Ontario offers a referral service

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[74] *Royal Anne Hotel Co. v Village of Ashcroft*, 1979 CanLII 2776 (BCCA) at 760-761, cited in *Antrim Truck, supra* note 69 at para 26.
[75] *1317424 Ontario Inc. v Chrysler Canada Inc.*, 2015 ONCA 104.
[76] *Smith v Inco, supra* note 70 at para 110. See also Greg Bowley, "Diminishing Strictness: The Growing Gap in Ontario's Private Law Environmental Liability Regime" (2019) 3:1 Lakehead LJ 22.
[77] Bruce Feldthusen et al, *Canadian Tort Law*, 12th ed (Toronto: LexisNexis Canada, 2022) at §11.02(4)(a) [*Canadian Tort Law*].
[78] *Ibid* at §11.02(4)(b).

for residents of Ontario. The service matches Ontario residents with a lawyer or paralegal for a free consultation, for up to thirty minutes. The consultation is done by phone or in person. The referral service is available here:

https://lsrs.lso.ca/lsrs/welcome

Public Nuisance

A public nuisance is an activity or failure to act that unreasonably interferes with one of the public's rights. This could include the public's right to health, safety, comfort, or convenience;[79] the public rights in Crown lands,[80] or more generally, public rights in the air, running waters, and oceans;[81] or pollution of the air, soil, or water.[82] A public nuisance in the environmental context can range from discharging poisonous waste that destroys fish life to discharging ground wood and water into a river.[83] To give a concrete example, an oil spill in and around the Port of Vancouver was found to be clear example of a public nuisance (even if certain property owners may have also been entitled to relief as a matter of private nuisance).[84]

What counts as a public nuisance differs somewhat from what counts as a private nuisance. There are two general requirements that need to be met for something to count as a public nuisance:

1. *There must be a substantial interference with a public right. To count as a public right, a substantial number of persons must be affected*. While a public nuisance must be distinctly public in nature, a public nuisance does not need to affect all people – a substantial number will suffice.[85] There is no set number as to how many people must be affected to count as a substantial amount. The issue is contextual and addressed on a case-to-case basis. However, a guiding principle is that the number of people affected must be large enough that it would be unreasonable to expect a single person to address the interference on their own.[86]

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[79] *Ryan v Victoria (City)*, 1999 CanLII 706 (SCC) at para 52, citing Lewis N Klar, *Tort Law*, 2nd ed (Scarborough: Carswell, 1996) at 525.
[80] *British Columbia v Canadian Forest Products Ltd.*, 2004 SCC 38 at para 81 [*Canadian Forest Products*].
[81] *Ibid* at para 74.
[82] *The Queen v The "Sun Diamond"*, 1983 CanLII 5035 (FC), [1984] 1 FC 3; *Pearson v Inco Ltd.*, 2005 CanLII 42474 (ONCA); *Hickey et al. v Electric Reduction Co. of Canada, Ltd.*, 1970 CanLII 907 (NL SC).
[83] Richard D Lindgren, "The "New" Toxic Torts: An Environmental Perspective", *CELA* (November 2000) at 7, online (pdf): <https://cela.ca/wp-content/uploads/2019/03/toxic_torts.pdf>, citing Faieta et al., *Environmental Harm: Civil Actions and Compensation* (1996) at 46-47.
[84] *The Queen v The "Sun Diamond"*, 1983 CanLII 5035 (FC), [1984] 1 FC 3.
[85] *Canadian Tort Law*, *supra* note 78 at §11.02(1)(a).
[86] *Attorney General v PYA Quarries Ltd*, [1957] 1 All ER (CA) at 908, cited in *Canadian Tort Law*, *supra* note 78 at §11.02(1)(a).

2. *The interference must be unreasonable*. The factors that courts consider in determining whether an interference with a public right is unreasonable are essentially the same as those considered in private nuisance lawsuits (see above).[87]

What can I do if I or my organization is the victim of a public nuisance in Ontario?

As in the case of a private nuisance, individuals or organizations attempting to remedy a public nuisance are strongly advised to consult with a lawyer before proceeding, such as through the Law Society of Ontario's referral service provided above.

Public nuisance lawsuits are like private nuisance lawsuits in that they are typically a matter of provincial jurisdiction, and a court may both (1) stop the offending activity and (2) require any responsible parties to pay damages to those specially affected by the nuisance.

However, public nuisance can also raise additional complications as compared to private nuisance lawsuits.

For instance, traditionally, only the Attorney General could initiate public nuisance lawsuits.[88] Individuals or private groups could only initiate a public nuisance lawsuit if they either received special permission from the Attorney General[89] or if they had suffered special damages as a result of the public nuisance.[90] The purpose of this rule was to avoid the multiplicity of lawsuits that could result if all members of the affected public could sue.

In Ontario, this is no longer the case for public nuisance cases that cause environmental harm (as that term is defined by the *EBR)*. As discussed above, Ontario's *EBR* allows people to initiate a public nuisance lawsuit for environmental damage without having to obtain the consent of the Attorney General beforehand and without having to suffer any special damages provided they have previously applied for an investigation of the matter through the *EBR* process.[91]

An additional complication that may arise in public nuisance suits is determining which members of the public are entitled to damages. Under the common law, which can be superseded by legislation, the general rule is that only members of the public suffering "special damages" can recover damages in a public nuisance lawsuit. What counts as "special damage" continues to be a matter of legal dispute.[92] In some cases, courts will require a plaintiff to show

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[87] *Ryan v Victoria (City)*, 1999 CanLII 706 (SCC) at para 53.
[88] *Canadian Tort Law, supra* note 78 at §11.02(1)(e) and §11.02(1)(f).
[89] *Ibid* at §11.02(1)(e).
[90] *Ibid* at §11.02(1)(f).
[91] *EBR, supra* note 1 at s 103(1). See also *Hollick v Toronto (City)*, 1999 CanLII 2894 (ONCA) at para 30; *Wallington Grace, supra* note 42 at paras 84-85.
[92] *O'Connor v Canadian Pacific Railway Limited,* 2023 BCSC 1371 at paras 162 – 170.

damage that is of a different **kind** than the public at large before they are entitled to compensation. In other cases, courts will only require plaintiffs to show that the **degree** of harm is different from that of the public. As noted, these obstacles to individual recovery often will not apply in Ontario, because the EBR is a statute that has modified the common law rule in certain circumstances. Specifically, a public nuisance claim that falls under the EBR does **not** need to meet the requirement for special damages.

Chapter 3: Environmental Rights Under the *Charter*

This chapter addresses how activists can challenge government failures to respond to environmental justice issues through rights-based constitutional litigation. Constitutional rights, such as the right to life or the right to equality, can and have been used to argue that Canadian governments have failed to adequately combat climate change or protect the environment more generally.

Accordingly, this chapter describes the basic principles underlying constitutional rights-based litigation and its place in advocating on environmental justice matters. The chapter then details how recent and ongoing court cases illustrate both the barriers and potential for rights-based environmental justice activism through the courts.

Overview of the *Charter*

The *Canadian Charter of Rights and Freedoms*[93] ("the *Charter*") guarantees the protection of certain rights and freedoms. It specifically protects these rights against the government, as opposed to private actors (such as private individuals or corporations). Well-known *Charter* rights and freedoms include the right to be secure against unreasonable search and seizure, freedom of expression, and freedom of religion.

The rights and freedoms protected under the *Charter* are not absolute. Rights and freedoms may be subject to limits if the government can demonstrate that they are "reasonable limits" that are "demonstrably justified in a free and democratic society". Practically speaking, this means that although *Charter* rights are guaranteed, they may be reasonably limited in the appropriate circumstance.

Separately, the government can also override certain rights and freedoms via s. 33 of the *Charter,* also known as the "notwithstanding clause". This clause enables the government to pass legislation that would otherwise be invalid for violating certain *Charter* rights. An invocation of the notwithstanding clause expires after 5 years, but can be renewed via new legislation. The use of the notwithstanding clause is often controversial and unpopular, as it was designed to be used in extraordinarily rare and serious circumstances.[94]

The rights and freedoms enumerated in the *Charter* are primarily understood to be protections that guard against unlawful government actions. That is, while the matter is of

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[93] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[94] Canadian Civil Liberties Association, *Save Our Charter Campaign – Why the Notwithstanding Clause Is Dangerous to Us All* (last visited 11 July 2025), online: < https://ccla.org/major-cases-and-reports/notwithstanding-clause/>

some debate, the *Charter* is typically interpreted as a document that does not impose positive obligations on the government, outside of a handful of exceptions. These exceptions are illustrative of what is meant by "positive obligations". They include the requirement that certain federal offices and institutions provide services, and communicate with the public, in both French and English, and the requirement that provinces provide minority language education in French or English in certain circumstances. A burgeoning legal issue that has now been raised by environmental advocates is whether, when, or how the *Charter* may impose positive obligations on governments to protect against climate change.

Environmental *Charter* litigation almost exclusively focuses on two rights: sections 7 and 15. These sections are reproduced below:

> *Section 7 – Life, Liberty and Security of the Person*
>
> 7 – "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
>
> *Section 15 – Equality Rights*
>
> 15(1) – "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The *Charter*'s section 7 guarantee of the "right to life, liberty and security of the person" is often raised in rights-based environmental justice claims because these rights include protection against certain state action that directly or indirectly increases the risk of death, or that seriously impairs our health (mental or physical).

The *Charter'*s section 15 guarantee of "equal protection and equal benefit of the law without discrimination" is a protection against discriminatory state action. Section 15 protects against discrimination based on the characteristics specifically listed in the *Charter* (e.g., race, age, and sex), i.e., on "enumerated grounds". Section 15 also protects against discrimination on what are called "analogous grounds" (e.g., marital status, sexual orientation, and aboriginality-residence for members of an Indian band living off a reserve), i.e., characteristics that are not listed but that are analogous to those that are. Analogous grounds must be recognized by the courts. Because climate change disproportionately affects youth and future generations, litigants have argued that state action or inaction violates the section 15 protection against age discrimination.

The *Charter*'s provisions can be found here.

What can I do if the *Charter* is being violated?

If environmental harms appear to include Charter violations, one approach to remedying the problem is to launch a lawsuit against the provincial or federal government, alleging that legislation, government action, or government inaction has violated your *Charter* rights and freedoms. This type of claim is referred to as a *Charter* challenge. As indicated, *Charter* challenges on the issue of environmental justice most frequently rely upon section 7 and section 15 of the *Charter*.

Charter challenges can be an effective way to affirm environmental protections and strike down harmful laws and regulations. However, litigating *Charter* rights can be a lengthy, complex, and expensive process. There are special rules as to when individuals or organizations may bring a *Charter* challenge if they are not personally harmed by the law, policy, or action being challenged. A typical *Charter* challenge will span years. *Charter* challenges on environmental justice issues often involve additional complications such as the need for expert evidence. An unsuccessful *Charter* challenge also risks creating a bad legal precedent for future court challenges. For these reasons, *Charter* challenges on environmental justice issues typically have the support of an environmental organization, such as Ecojustice (Canada's largest environmental law charity and a prolific litigator of environmental rights cases).

If you or your organization are considering *Charter* litigation, you are strongly advised to seek legal advice and representation before proceeding. You might also consider an important alternative: reaching out to large environmental justice organizations who have a successful history of litigating environmental issues.

Charter Challenges – Recent Cases

Charter challenges related to environmental rights have been exercised recently throughout Canada, with limited success. Four of the leading *Charter* challenges related to the impact of climate change are: *Mathur v Ontario*[95] ("*Mathur*"), *La Rose v Canada*[96] *("La Rose*"), *ENvironnement JEUnesse c Procureur général du Canada*[97] ("*ENvironnement JEUnesse*"), and *Misdzi Yikh v Canada*[98] ("*Lho'imggin*").

Below are brief summaries of each of these cases. They are provided, in part, to illustrate the legal issues that often arise in *Charter* challenges for environmental justice. In the next section, these specific and often reoccurring legal issues are then discussed in more depth.

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[95] *Mathur v Ontario*, 2024 ONCA 762, leave to appeal refused 2025 CanLII 38373 [*Mathur COA*].
[96] *La Rose v Canada*, 2023 FCA 241 [*La Rose FCA*].
[97] *ENvironnement JEUnesse c Procureur general du Canada*, 2021 QCCA 1871 [*ENvironnement JEUnesse*].
[98] *La Rose FCA, supra* note 96 (the Federal Court of Appeal addressed both the *La Rose* and *Misdzi Yikh v Canada*, 2020 FC 1059 appeals in one judgment).

These case studies are also provided to highlight the significant efforts being undertaken by environmental justice advocates to have the courts take on a greater role in matters of environmental protection.

1. *Mathur*

In *Mathur v Ontario,* several applicants are challenging the constitutionality of Ontario's greenhouse gas (GHG) emission target and plan. Seven young Ontarians between 15 to 27 years old are specifically seeking a declaration that Ontario's target and plan are unconstitutional and violate sections 7 and 15 of the *Charter*.[99] They are also seeking an order directing Ontario to set a science-based target and an order directing Ontario to revise its climate change plan in accordance with international standards.[100] To sustain these arguments, the applicants successfully submitted expert evidence to the trial court showing that Ontario's emission target is set lower than the one required by scientific consensus to mitigate climate change.[101]

The case is ongoing, but the applicants have achieved some success to date. First, and in the first instance, the applicants were able to proceed to a hearing, wherein they were also entitled to submit evidence, on both their *Charter* claims. The applicants' expert evidence was unchallenged and, as noted, resulted in favourable and significant trial court findings. These developments were non-trivial hurdles to clear in a case involving relatively novel *Charter* claims and set useful precedents for future efforts.

Second, while the original trial judge ultimately dismissed the case on the grounds that the applicants were allegedly attempting to impose a positive, freestanding *Charter* obligation on the Ontario government, the Ontario Court of Appeal, in 2024, has since allowed the applicants' appeal from this decision on the grounds that the application judge's framing of this case as a positive rights claim tainted the analysis.[102] The Ontario Court of Appeal specifically reasoned that because Ontario had passed legislation intended to combat climate change, Ontario had assumed the burden of creating a climate plan and emissions target that were *Charter* compliant. After the Supreme Court of Canada refused leave to appeal the Court of Appeal decision, with leave to appeal having been sought by both parties, the case has now been returned to the lower courts for a new hearing.[103]

As set out further below, the Ontario Court of Appeal's decision is an important landmark in climate litigation because it stands for the principle that the judiciary has an

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[99] *Mathur COA, supra* note 95 at para 2.
[100] *Ibid*.
[101] *Ibid* at paras 2 and 21-23.
[102] *Ibid* at paras 4 and 26.
[103] *Ibid* at paras 7-8.

important role to play in reviewing environmental legislation and government decision-making for *Charter*-compliance.

2. *La Rose*

La Rose v Canada is a federal case brought against Canada for its failure to address climate change.[104] Fifteen children and youth between ten and nineteen years old originally raised several claims, including under section 7 and 15 of the *Charter.* Among other things, the children and youth have argued that "climate change has negatively impacted their physical, mental and social health and well-being" and that they are particularly vulnerable to climate change.[105] The applicants have also argued that Canada causes, contributes to and allows GHG emissions that are incompatible with a "stable climate capable of sustaining human life and liberties".[106]

The lower court originally dismissed the applicant's entire claim for not challenging specific state action. Had this decision stood, the result would have been that the case would not go forward to a hearing, where the applicants would be entitled to bring forward evidence to substantiate their claims (i.e., as the applicants were entitled to do in *Mathur*). However, in 2023, the Federal Court of Appeal allowed an appeal on the decision to strike the claimants' section 7 claims, finding that the applicants were entitled to a judicial hearing on issues raised regardless of the apparently "political", "controversial", or "complex" nature of the claim.[107] The claimants were, however, required to amend their pleadings for the matter to go forward.

The Federal Court of Appeal did not allow the appeal on the remaining claims, including by finding that section 15's protections did not -- at least as the law presently stands -- extend to the kind of "intergenerational equity" that was central to the claimants' argument.[108] The Court of Appeal reasoned, in part, that Parliament has significant discretion in creating legislative schemes that affect different agent groups differently, and thus more was needed to make out a claim of age-based discrimination.

Although it is important to recognize the Federal Court of Appeal's substantial narrowing of the challenge brought by the claimants in *La Rose*, the decision is a further indication that courts will, going forward, have a meaningful role to play in deciding whether climate action schemes are *Charter* compliant.

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[104] *La Rose FCA, supra* note 96 at para 2.
[105] *La Rose v. Canada*, 2020 FC 1008 at para 2 [*La Rose FC*].
[106] *Ibid* at para 6.
[107] *La Rose FCA, supra* note 96 at para 8.
[108] *Ibid* at paras 21-22.

3. *Lho'imggin*

In *Lho'imggin*, Indigenous claimants argued that Canada breached its international obligations under the *Paris Agreement* by "authorizing the current levels of greenhouse gas (GHG) emissions, along with the continued and past approvals of GHG-emitting projects".[109] The claimants alleged that Canada's legislative response and actions violate the claimants' section 7 and 15 *Charter* rights, among other things.[110] The claimants have argued that "Canada has contributed to climate change in a way that poses a "threat to their identity, to their culture, to their relationship with the land and the life on it, and to their food security".[111]

Like *La Rose*, the lower court would have dismissed the entire appeal, without a hearing. On an appeal heard together with *La Rose*, the Federal Court of Appeal noted that the lower court in *Lho'imggin* had erred by focusing on the political nature of the issue before it (an error akin to that of the lower court in *La Rose*). The Federal Court of Appeal specifically reasoned that "the law is not immunized from Charter scrutiny" when the issues are complex or involve policy-laden choices.[112]

In the result, the Federal Court of Appeal upheld the dismissal of the section 15 claim but permitted leave to amend the section 7 claim.

4. *ENvironnement JEUnesse*

In *ENvironnement JEUnesse c Procureur général du Canada*, an environmental, youth-focused non-profit had applied to certify a class action against the Canadian government for, among other things, setting inadequate greenhouse gas emission targets, failing to meet its international obligations with respect to such targets, and failing to put in the place the necessary measures to meet targets it had otherwise recognized as necessary to combat global warming. The applicant sought, in part, a declaration that Canada had violated the proposed class's right to life and age-based equality under the Canadian *Charter*, as well as their right to a healthy environment that respects biodiversity, as guaranteed by the Quebec *Charter.*

Ultimately, in 2021, the Quebec Court of Appeal (i.e., prior to the Courts of Appeal in *Mathur* and *La Rose*), upheld a lower court's dismissal of the non-profit's application. The Court primarily found that the application was, in effect, not a matter for the courts (i.e., not "justiciable") because the applicant was asking the court to set climate change policy. The Court reasoned that because the applicant was not challenging a specific statute, the applicant was

[109] *Ibid* at para 4.
[110] *Ibid*.
[111] *Ibid*.
[112] *Ibid* at paras 32-33.

asking the court to order the legislature to legislate, and to otherwise assume a complex policy-making role for which the court was ill-suited.

The Court also observed that the composition of the proposed class – Quebec residents aged 35 and under – provided additional grounds to dismiss the application. The Court reasoned that because global warming impacts the Canadian population as a whole, accepting the applicant's proposed class would arbitrarily exclude victims of global warming. This would defeat a chief purpose of class action proceedings: to promote the accessibility of justice for individuals suffering a common harm.[113]

ENvironnement JEUnesse serves an important illustration of the reluctance of courts to intervene on climate action issues when a specific statutory scheme is not being challenged.

Common Obstacles for *Charter* Challenges

As illustrated by the above case law, the success of *Charter* challenges in environmental litigation depends on overcoming several obstacles. Early in the process of litigation, courts may prevent environmental *Charter* challenges from advancing by reasoning that the issues are not appropriate for courts to decide and that the applicants did not point to a specific statute or state action that resulted in the *Charter* deprivations. Further issues may occur when applicants fail to meet the specific, technical requirements for a *Charter* claim, such as those required by section 7 or section 15.

These frequent hurdles to *Charter* claims are explained in more depth below.

1. Justiciability

Justiciability refers to whether a matter is suitable for court resolution (is it "justiciable"?). In deciding whether a matter is justiciable, courts will typically ask whether the issue is an appropriate one for courts to decide or whether courts have the capacity to decide the issue at all.

Claims related to environmental action are sometimes found to be non-justiciable. As we have seen, a finding of non-justiciability is often grounded upon the principle that courts should give legislatures significant deference on "policy" decisions and, conversely, that courts are not an appropriate body for making policy-laden decisions.

That said, there appears to be an encouraging trend in the case law suggesting that environmental litigation will be considered justiciable if it has a sufficient hook in the form of a statute or state action. In *Mathur*, for instance, the Ontario Court of Appeal held that the issue

[113] *ENvironnement JEUnesse*, *supra* note 97.

of whether the Ontario government's GHG emission target was appropriate was justiciable.[114] The Court did caution that challenges to government policy responses, on their own, are not justiciable; instead, government policy responses must be translated into law or state action.[115] However, that threshold was met in *Mathur* because, the Court reasoned, the applicants had challenged specific state action and legislation, namely Ontario's emissions target and sections 3(1) and 16 of the *Cap and Trade Cancellation Act*.[116]

As noted, the lower court decisions of *La Rose* and *Lho'imggin* raised similar issues and were decided together on appeal. Like in *Mathur*, the Federal Court of Appeal held that the section 7 claims before it were justiciable, reasoning that claims are not inherently non-justiciable because they raise complex or controversial issues.[117] This notably reversed the decisions of the lower courts, which had wrongly found the claims to be non-justiciable.[118] The Federal Court of Appeal instead found that what matters in an assessment of justiciability is "the presence of a sufficient legal component or legal anchor to the claim".[119] Here, the plaintiffs properly grounded the violation of their section 7 rights on the failure of the Canadian government to meet its commitments in the *Paris Agreement,* commitments which were ratified and thus legally defined. The Court held that the commitments are objective standards that the plaintiffs' *Charter* claims could be assessed against.[120]

In *ENvironnement JEUnesse*, by contrast, the Quebec Court of Appeal found that the plaintiffs did not challenge specific legislation or state action, and were instead accusing the government of a "fault of omission" [121]. For this reason, the Court found the claim to be non-justiciable. In arriving at this conclusion, the Court stressed that deference is to be given to the legislature on policy-making as it is in the better position to weigh policy concerns, and that the court now had power to obligate the government to legislate.[122]

In sum, the case law to date suggests that climate-related legal actions are more likely to be viable if they are anchored on specific legislation or specific state action, such as the GHG emissions target set by Ontario via its regulatory scheme.

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[114] *Mathur v His Majesty the King in Right of Ontario*, 2023 ONSC 2316, at para 97 [*Mathur*].
[115] *Ibid* at para 103.
[116] *Ibid* at para 106.
[117] *La Rose FCA, supra* note 96 at paras 29 and 44.
[118] *Ibid* at para 31.
[119] *Ibid* at para 36.
[120] *Ibid* at para 38.
[121] *ENvironnement JEUnesse, supra* note 97 at para 32.
[122] *Ibid* at paras 31-33.

2. Section 7 Claims

A section 7 claim generally requires an applicant to satisfy a two-part test: (1) to show there has been a deprivation of one of the three stated interests, namely life, liberty, or security of the person; and (2) to show that the deprivation was not in accordance with the principles of fundamental justice. Three concepts are often at issue in environmental Charter claims relying on section 7: causation; the principles of fundamental justice; and the apparent distinction between positive and negative rights.

a. Causation Threshold

Courts have generally been sympathetic to the claim that climate change may deprive individuals of the interests of life (e.g., average lifespan) and security of the person (e.g., physical and mental health). Instead, the difficult issue at step 1 is whether it is the government who caused, i.e., who was responsible for, the deprivation. Section 7 requires proof that more likely than not, it was **specific government actions** that caused any interference with someone's life, liberty, and/or security of the person.[123] As noted above, this is because the *Charter* is concerned with protecting against government action (or inaction), not the conduct of private actors, such as private corporations.

The above cases illustrate how this causation threshold may be met.

In *Mathur*, the Ontario Court of Appeal took notice of the application judge's finding of causation in the section 7 context, namely that "by failing to produce a Target that would further reduce greenhouse gas emissions, Ontario is contributing to an increase in the risk of death and in the risks disproportionately faced by the appellants and others with respect to the security of the person".[124]

In *La Rose,* the Federal Court of Appeal found that the applicants' theory of causation was at least sufficient to merit a trial. According to the applicants, the deprivation occurred as Canada has missed the emissions targets under the *Paris Agreement* (which is implemented domestically, i.e., via legislation) and is on track to miss future targets, depriving the claimants "of the fruits of Canada's legislated commitments".[125]

Likewise in *Lho'imggin*, the Federal Court of Appeal found that the applicants made out an issue that merits a trial. The applicants alleged that the "deficient legislative standards and permissive licensing of GHG-emitting projects" caused a direct deprivation of the security of the

[123] *Mathur, supra* note 113 at 150; *La Rose FCA, supra* note 96 at para 92.
[124] *Mathur COA, supra* note 95 at para 65.
[125] *La Rose FCA, supra* note 96 at para 106.

person, specifically the effects of climate change on their food security, culture and economies.[126]

b. Principles of Fundamental Justice

Section 7 of the Charter prohibits deprivations of the right to life, liberty, and security of the person only if the deprivations are not "in accordance with the principles of fundamental justice".

The principles of fundamental justice have been defined as widely recognized basic tenets of the Canadian legal system. The principles of fundamental justice include principles against arbitrariness, overbreadth, and gross disproportionality. Arbitrariness refers to a situation where there is no rational connection between the purpose of the law and its infringement on life, liberty, and/or security of the person. Overbreadth refers to laws that are rational in part but that also prohibit conduct that is unrelated to the statutory objective. Gross disproportionality refers to a situation where the degree of infringement is not proportionate to the benefit gained by achieving the object of the law.

The applicants in *Mathur* argued that Ontario's reduction target and section 3(1) and 16 of the *CTCA* were contrary to the principles against arbitrariness and gross disproportionality.[127] The application judge found that Ontario's reduction target and section 3(1) and 16 of the *CTCA* were not arbitrary or grossly disproportionate. The judge had reasoned that while the applicants felt that the target was inadequate, incrementalism and imprecision do not automatically imply that no rational connection exists.[128] Additionally, the judge indicated that gross disproportionality has no application in cases where applicants contend that the government should have done more.[129]

However, the Court of Appeal for Ontario found that the application judge's incorrect framing of the application as a positive rights case biased her section 7 analysis.[130] She failed to consider the correct question, which is: "whether, given Ontario's positive statutory obligation to combat climate change that it had voluntarily assumed, the Target was Charter compliant".[131] As a result, the Court of Appeal ordered a new hearing on the issue.

c. Positive Rights

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[126] *Ibid* at para 105.
[127] *Mathur*, *supra* note 114 at para 152.
[128] *Ibid* at para 160.
[129] *Ibid* at para 162.
[130] *Mathur COA*, *supra* note 95 at paras 49-50.
[131] *Ibid* at para 53.

The prevailing view in the courts is that most rights in the *Charter* are "negative" rights. Some climate change activists argue that the rights protected in section 7 of the *Charter* also require government action. However, the courts have yet to rule that positive rights exist in the climate context.

The issue of positive rights was addressed in *Mathur* and *La Rose*.

In reversing the decision of the application judge, the Court of Appeal in *Mathur* found that the application judge erred in her analysis by framing this case as a positive rights claim.[132] While the Court of Appeal required a rehearing of the matter, it did so via the finding that the application did "not seek to impose on Ontario any new positive obligations to combat climate change".[133] By enacting the *CTCA,* Ontario "voluntarily assumed a positive statutory obligation to combat climate change".[134] The Court of Appeal thereby distinguished between freestanding positive obligations and statutory obligations, with the latter applying where the state chooses to legislate (as it did here).[135]

In *La Rose*, the Federal Court of Appeal expressly acknowledged that the door to positive rights claims under section 7 is not closed, including in the climate litigation context.[136] Indeed, as the Court went on to observe, the distinction between positive and negative claims is also not always a clear one.[137]

In short, while courts have acknowledged the possibility that they may have authority to impose Charter-based environmental obligations on the government, including in the section 7 context, the recognition of positive s. 7 rights, as such, is still only a theoretical possibility. Care and caution is warranted for any litigant raising a positive rights s. 7 claim, especially given the courts' preferences for incremental change in its understanding of *Charter* rights and freedoms.

3. Section 15 Claims

Section 15 claims undergo a 2-part test: (1) whether the law or state action creates a distinction based on an enumerated or analogous ground, and (2) "whether the law or state action imposes burdens or denies a benefit in a manner that perpetuates, reinforces, or exacerbates some disadvantage experienced by the group, either systemically or

[132] *Ibid* at paras 4 and 26.
[133] *Ibid* at para 4.
[134] *Ibid*.
[135] *Ibid* at paras 38-41.
[136] *La Rose FCA, supra* note 96 at paras 96 and 98.
[137] *Ibid* at paras 101-104.

historically".[138] An issue over which there is still legal uncertainty is whether or when youth are protected against the developing effects of climate change.

In *La Rose* and *Lho'imggin,* the Federal Court of Appeal interpreted section 15's protections relatively narrowly. The Court upheld the application judge's decision to strike the applicants' section 15 claims, thereby depriving the applicants of a hearing on the issue.[139] Among other things, the Federal Court of Appeal reasoned that Section 15 does not yet include in its scope intergenerational equity,[140] and the "true nature" of the *La Rose* claim was "how the legislation will affect them when they are older", which is a matter of policy as opposed to a right that is currently protected under section 15.[141]

In *Mathur*, the applicants argued that Ontario's reduction target created a distinction based on the enumerated ground of age since (1) youth are particularly vulnerable to negative physical and mental health impacts of climate change; (2) younger generations bear the brunt of climate change; and (3) young people's liberty is being constrained by decisions made today.[142]

Due to the application judge's error in characterizing the application as a positive rights case,[143] the proper analysis of these section 15 claims has yet to be decided. However, in reversing the application judge, the Ontario Court of Appeal may be viewed as taking a more expansive view of section 15's protections in this context.

Specifically, the Ontario Court of Appeal drew attention to the inconsistency in the application judge's findings. In the section 7 context, the application judge found that "by failing to produce a Target that would further reduce greenhouse gas emissions, Ontario is contributing to an increase in the risk of death and in the risks disproportionately faced by the appellants and others with respect to the security of the person"; in the section 15 context, by contrast, she found that "climate change, and not the Target, the Plan or the CTCA, disproportionately impacts young people".[144] By failing to address this inconsistency, the application judge "failed to address whether there was a link or nexus between the impact of the Target and the disproportionate impact based on a protected ground".[145] The Court then specifically noted that the judge hearing the matter afresh must be alive to the above issue of

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[138] *Ibid* at para 79.
[139] *Ibid* at para 81.
[140] *Ibid* at para 82.
[141] *Ibid* at para 86.
[142] *Mathur*, *supra* note 114 at para 177.
[143] *Mathur COA*, *supra* note 95 at para 56.
[144] *Ibid* at para 65.
[145] *Ibid* at para 57.

the need for consistency in findings as to the impact of climate change and Ontario's contribution to this impact.

Additional Arguments

Litigants raising C*harter* arguments will often also rely on complementary theories as to why government action or inaction is unlawful. One frequent argument is worth attention here, namely the argument that the "public trust doctrine" should be incorporated into Canadian case law.

If accepted, the public trust doctrine would impose a duty on governments to hold and manage public resources **in trust** for the benefit of current and future generations. This doctrine is to be contrasted to the position that the environment is a collection of resources that the state owns. To date, efforts to have the doctrine recognized in Canada as a matter of common law (as it has been recognized in other jurisdictions), have been unsuccessful.

For instance, in *La Rose*, the applicants expressly raised a public trust doctrine claim in their application. The lower court struck the claim, thereby finding that the matter would not go to trial. The Federal Court reasoned that the applicants were not entitled to a hearing on the matter because "the public trust doctrine is a concept that Canadian Courts have consistently failed to recognize".[146]

Be that as it may, it should be noted that while courts have yet to be receptive to public trust claims, Canada's territories (Yukon, Nunavut, and the Northwest Territories) have all codified the public trust doctrine into their territorial environmental legislation. That said, under this legislative framework, the case law to date on the public trust claims is sparse, with no comprehensive or substantial review of public trust claims to date. [147]

[146] *La Rose FC*, *supra* note 96 at para 93.
[147] *A New Environmental Bill of Rights for Ontario Final Paper* (Toronto: Law Commission of Ontario, 2024), online (pdf): <https://www.lco-cdo.org/wp-content/uploads/2024/03/LCO-Environmental-Accountability-Final-Paper-compressed.pdf> at 108.

Chapter 4: Indigenous Rights and Governance

This chapter focuses on the relationship between Indigenous rights and environmental law in Canada. Indigenous environmental rights offer the clearest case of environmental rights that receive constitutional protection in Canada.[148] The chapter aims to highlight how protecting and promoting Indigenous rights, including as those rights are protected in the Canadian Constitution, advances environmental justice in Canada and Ontario. This chapter illustrates some of the ways in which Aboriginal and Indigenous law are, and can be, a site for environmental action at both the provincial and federal levels. We wish to acknowledge that while this guide is focused on Canadian legal instruments and institutions, Indigenous groups across Canada have their own distinctive and sophisticated legal systems that pre-date the arrival of European settlers.

Indigenous peoples' relations to their lands pre-dates the arrival of European settlers. Indigenous knowledge systems, legal traditions, and customary and cultural practices, including the principle of stewardship or guardianship (wherein the natural world "is a place where all living beings and spirits are connected", thereby requiring "us to care for, respect and live within the bounds created by the rest of the natural world"), help provide distinct ethical approaches to land planning and environmental justice.[149] Accordingly, an attentiveness to Indigenous rights, and diverse Indigenous perspectives, can strengthen climate action and environmental protection by offering more enduring, holistic, and suitable responses to environmental justice.

A focus on Indigenous environmental rights is also required because environmental changes frequently disproportionately harm Indigenous peoples, both directly and indirectly.[150] For example, in Ontario, climate change has been found to disproportionately harm Indigenous peoples' health and well-being, impacting food security, cultural practices and livelihoods, and social cohesion.[151] Any real and comprehensive response to issues of environmental justice must address these disproportionate harms.

Section 1 of this chapter discusses the importance of conservation in protecting Indigenous peoples' rights to lands and natural resources, including as a foundational principle

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[148] Lynda M Collins, "Constitutional Eco-Literacy in Canada: Environmental Rights and Obligations in the Canadian Constitution" (2022) 26:2 Rev Const Stud 227 at 230 [*Eco-Literacy*].
[149] Indigenous Circle of Experts, *We rise together: achieving pathway to Canada target 1 through the creation of Indigenous protected and conserved areas in the spirit and practice of reconciliation : the Indigenous Circle of Experts' report and recommendations* (Ottawa: Government of Canada, 2018) at 8 [*ICE Report*].
[150] Climate Risk Institute, *Ontario Provincial Climate Change Impact Assessment Technical Report* (2023) at 316-332, online (pdf): <https://www.ontario.ca/files/2023-11/mecp-ontario-provincial-climate-change-impact-assessment-en-2023-11-21.pdf>.
[151] *Ibid*.

of Canadian constitutional law. Section 2 then discusses an expression of these rights, Indigenous Protected and Conserved Areas (IPCAs). IPCAs cover "lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems."[152] This section begins with a discussion of the potential effectiveness of IPCAs for conservation, government-to-government collaboration, and the affirmation of Indigenous laws, and then outlines the difficulties in implementing IPCAs in Ontario without further law reform.

Section 3 discusses the Crown's related duty to consult and accommodate Indigenous peoples. Section 4 outlines the role of Indigenous peoples, project proponents, and the Crown in fulfilling consultation obligations in environmental and impact assessment processes. Section 5 discusses Indigenous-led impact assessment beyond the traditional Environmental Impact Assessment (EIA) model. Finally, Section 6 of this chapter highlights Indigenous Climate Partnership programs through which the government of Canada has committed to consulting Indigenous peoples on climate policy.

Section 35 Rights and Environmental Protection

In Canada, Indigenous rights in relation to land and natural resources are protected by section 35 of the *Constitution Act, 1982*.[153] The *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of Indigenous peoples, including those that now exist by way of land claims agreements or that may so be acquired.[154] When Aboriginal rights have not yet been established, the courts will consider a claim enforceable if there is appreciable and current potential for harm, along with foreseeability that harm may occur.[155]

While the term "Aboriginal" is often considered outdated in non-legal contexts, it is used in section 35 and is a term of art in law more generally. As it is used at s. 35, the term Aboriginal includes three subgroups of Indigenous peoples: First Nations, Inuit, and Métis. The Aboriginal rights referred to at s. 35 are rooted in the existence of Indigenous societies in Canada prior to the arrival of Europeans, Indigenous' peoples continuing use and occupation of certain lands, and the promises made by the Crown when they have entered into treaty relationships with Indigenous peoples. Aboriginal law therefore governs the relationship between the Aboriginal peoples of Canada and Canada.

The term Indigenous law, by contrast, generally refers to the well-developed laws and legal systems that have governed, and continue to govern, Indigenous peoples in their exercise

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[152] *ICE Report*, *supra* note 149.
[153] *Constitution Act*, 1982, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 35(1).
[154] *Ibid*.
[155] Theresa McClenaghan, "Prematurity, Precaution, and the *Charter*" in The Law Society of Upper Canada, ed, *Special Lectures 2017* (Toronto: The Law Society of Upper Canada, 2017) 174.

of self-government. Indigenous laws and Indigenous rights of self-government have increasingly been enshrined in Canadian law in recent years. Most notably, the Canadian government has committed itself to the position, via legislation, and via its commitment to implement the *UN Declaration on the Rights of Indigenous Peoples*, that s. 35 of the *Constitution Act, 1982* requires Canada to recognize and affirm Indigenous peoples inherent right to self-government, at least in certain contexts.[156]

1. Advancing the Implied Right to Conservation in Aboriginal and Treaty Rights

Environmental protection is a necessary component of adequately recognizing and affirming Aboriginal rights in Canada. To illustrate: the Constitution requires Canada to recognize and affirm Aboriginal title lands and Aboriginal rights, such as the rights to hunt, fish, and gather. While treaties must be interpreted on a case-by-case basis, this obligation logically requires the continued vitality of the natural environment.[157] Accordingly, judges have interpreted treaties to encompass substantive protections of Indigenous group's resource-based economies, which may, and often do, imply a corresponding right to conservation.[158] Such interpretations are a promising avenue for further advocacy on environmental protection.

For instance, in 2015, the Haida Nation was able to temporarily block the re-opening of a commercial fishery in the Haida Gwaii area on various grounds, including on the finding that adequate roe herring was central to the culture, traditions, and way of life of the Haida Nation.[159] In this case, the honour of the Crown, which required dealing appropriately in consultation and accommodation with the Haida Nation, was found to extend to honouring special conservation agreements protecting the Haida Gwaii area.

The above protections owed to the Haida Nation are not unique. Indigenous peoples entered into treaties with the Crown in Canada to maintain their way of life and their existing rights, a way of life which necessarily relies on the land and its resources.[160] The treaties were made with the understanding that Indigenous peoples would keep enough land and resources to maintain the well-being of their nations.[161] Therefore, as some courts have recognized, the promises made by Canada include a promise of environmental preservation and

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[156] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families,* 2024 SCC 5.
[157] Lynda M Collins and Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap" (2010) 47:4 Alta L Rev 959 at 967 [*Right to Conservation*].
[158] *Ibid* at 971-975.
[159] *Haida Nation v Canada (Minister of Fisheries and Oceans)*, [2015] FCJ No 281, 2015 FC 290 (FC).
[160] *Right to Conservation, supra* note 157 at 973.
[161] *Ibid* at 971.

conservation.[162] Indeed, the Crown has a legal obligation to uphold its promises (the legal concept of the "honour of the Crown" generally requires the Crown to act with honour, integrity, good faith, and fairness in its dealings with Indigenous peoples[163]). This duty logically extends to the promise to protect and preserve the environment to the extent it is necessary for the exercise of Aboriginal rights.[164]

The section 35 right to conservation also affects how governments make decisions involving the environment.[165] For instance, in determining the locations of logging, mining, and oil extraction, governments have a constitutional duty to ensure that any applicable Aboriginal rights are not compromised, including by ascertaining the resource needs of Indigenous peoples.[166]

2. Recognizing and Implementing the Right to Self-Determination

In 2007, the United Nations (UN) General Assembly passed an international human rights resolution, the *UN Declaration on the Rights of Indigenous Peoples* ("the UN Declaration" or "UNDRIP"), that sets out "the minimum standards for the survival, dignity and well-being of Indigenous peoples throughout the world".[167] While Canada originally opposed the resolution, it has since reversed its position, including by passing the *United Nations Declaration on the Rights of Indigenous Peoples Act*. The Act creates a federal framework to advance and achieve the objectives of the UN Declaration.[168] The federal framework includes consultation and cooperation processes with Indigenous peoples to identify legislative and policy changes needed for alignment with the UN Declaration.[169] One of the chief goals of the federal framework is to support Indigenous peoples' right to self-determination, including their rights to land, territories and resources.

Specifically, Article 29(1) of the UN Declaration recognizes and affirms Indigenous peoples' right to conservation. It states:

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[162] *Ibid* at 974.
[163] Government of Canada, "Principles respecting the Government of Canada's relationship with Indigenous peoples" (last modified 1 September 2021), online: <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.
[164] *Right to Conservation, supra* note 157 at 976.
[165] *Ibid* at 986.
[166] See *Ibid*.
[167] *The United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan*, (Ottawa: Department of Justice Canada, 2023) at 9, online (pdf): <https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf> [*UNDRIP Action Plan*].
[168] *Ibid* (provinces and territories have developed their own approaches for implementing the UN Declaration).
[169] *Ibid*.

> Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.[170]

Unfortunately, the Canadian promise of recognizing and implementing Indigenous rights of self-determination, including by implementing the UN Declaration, is still a work in progress. The Canadian government, for instance, is tracking and reporting out on its initial efforts at implementation.[171] As addressed further below, facilitating this work of recognizing and implementing rights of self-determination is a meaningful area in which the cause of environmental justice must still be advanced.

Case law is beginning to interpret and enforce Canada's commitments under UNDRIP. In January 2024, the Canadian Nuclear Safety Commission ("CNSC") approved an application authorizing Canadian Nuclear Laboratories ("CNL") to construct a nuclear waste disposal facility near the Ottawa River.[172] Kebaowek First Nation ("Kebaowek") challenged the decision, seeking judicial review in the Federal Court because the Commission failed to apply UNDRIP as part of its consideration of the application.[173] The Kebaowek First Nation has traditional territories that extend to Ontario and Quebec which borders the region around the facility on the Ottawa River. Kebaowek maintained that they had been insufficiently consulted on the project.[174]

The respondent, CNSC, had maintained that the consultation spanning 2016-2023 was adequate but had found that their jurisdiction did not give them the power to implement UNDRIP into Canadian law.[175] Additionally, CNSC provided scientific information indicating that the facility was safe and unlikely to cause significant adverse environmental effects for the disposal of low-level nuclear waste, adding that The Near Surface Disposal Facility ("NSDF") designated would protect the environment and the Ottawa River.[176] In the Federal Court review proceeding, the court found that CNSC had erred in finding it had no jurisdiction if UNDRIP applied, and in failing to consider UNDRIP more generally. The CNSC was ordered to resume

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[170] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 2007, UN Doc 61/295 at 21, online (pdf): <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> [*UNDRIP*].
[171] Government of Canada, "Annual progress reports on implementing the United Nations Declaration on the Rights of Indigenous Peoples Act" (last modified 26 June 2024), online: <https://www.justice.gc.ca/eng/declaration/report-rapport/index.html>.
[172] *Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319 at para 1 [*Kebaowek*].
[173] *Ibid*.
[174] *Ibid* at para 15.
[175] *Ibid* at para 8.
[176] *Ibid* at para 27.

consultation with Kebaowek, and the court emphasized the importance of robust consultation aligned with the principles of Free Prior and Informed Consent related to *UNDRIP*.[177] As of June 2025, this decision is under appeal.

Indigenous Protected and Conserved Areas

An expression of the constitutional right to conservation, as a matter of Aboriginal law, is found in Indigenous Protected and Conserved Areas (IPCAs). IPCAs are "lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems."[178] This definition was created by the Indigenous Circle of Experts (ICE) in their 2018 report, *We Rise Together*.[179] IPCAs offer a chance for Crown governments to acknowledge and support Indigenous laws and jurisdiction, contributing to the goals of reconciliation.[180] As such, IPCAs are a successful model of environmental protection, and ideally should be expanded.

Indigenous nations decide the lands and waters they want to include in IPCAs, and IPCA conservation standards are set by Indigenous governments with or without co-management by Canadian, provincial, or territorial governments. Being Indigenous-led, IPCAs are likely to be set up in ecosystems that support the traditional ways of life, values, and laws of Indigenous peoples, helping preserve their cultures.[181] IPCAs can be established anywhere within the territory of an Indigenous nation, government, or community. Generally, the process of creating an IPCA should be flexible, considering the diverse needs, governance systems and aspirations, varying levels of protection, and the different capacities and priorities of Indigenous governments and communities.[182]

Although IPCAs take on many forms aimed at conserving ecological and cultural values important to Indigenous peoples, IPCAs have three common elements:

1. They are Indigenous-led;
2. They represent a long-term commitment to conservation; and
3. They elevate Indigenous rights and responsibilities.[183]

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[177] *Ibid* at para 177.
[178] *ICE Report, supra* note 149.
[179] *Ibid* at 5.
[180] Larry Innes et al, *Indigenous Laws in the Context of Conservation* (2021) at 1, online (pdf): <https://www.wcel.org/sites/default/files/publications/indigenouslawsinthecontextofconservation_mar2021_final_web.pdf> [*Indigenous Laws in Context*].
[181] Indigenous Leadership Initiative, "Indigenous Protected and Conserved Areas" (last visited 20 October 2023), online: <https://www.ilinationhood.ca/indigenous-protected-and-conserved-areas> [*ILI IPCA*]; *ICE Report, supra* note 149 at 40.
[182] *ICE Report, supra* note 149 at 38.
[183] *Ibid* at 5.

Moreover, Indigenous governments do not have to give up their land or cede their territories to Crown governments to create an IPCA.[184] For example, the Dasiqox Tribal Park is not recognized by any Crown government but was established as an IPCA entirely by the Tsilhqot'in National Government.[185]

IPCA's are an effective form of conservation as they provide an opportunity for collaboration between Indigenous peoples and government, while providing a way to affirm Indigenous laws.[186] IPCAs are a way to acknowledge and support Indigenous laws and governance.[187] The relationship between Indigenous and Crown governments is one of mutual respect and recognition for governance instead of "consultation" or "participation."[188] A relationship of mutual recognition is better at avoiding conflict and making decisions effectively.[189]

What sets IPCAs apart from other protected areas is how their management and operations are visible. To be considered an IPCA, the operation of the protected area must be shaped by Indigenous knowledge and values.[190] IPCAs provide the Canadian government with opportunities to learn from Indigenous peoples about improving conservation efforts. They also give Indigenous nations a space to practice and pass on their laws to future generations.[191] IPCAs represent a shift in the Euro-Canadian conceptions of parks and protected areas. Instead of seeing these places as being "protected from people" they are now seen as being "protected for people".[192]

Governing Indigenous territories based on the experiences of Indigenous peoples is more effective than conservation-based practices of Canadian government bodies.[193] For example, IPCAs improve species populations and habitat protection.[194] This can be done by applying Indigenous legal concepts to IPCAs, like:

- the understanding that everything is connected,
- that humans must care for the territories, and

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[184] IPCA Knowledge Basket, "Frequently asked questions about IPCAs" (last visited 8 April 2025), online: <https://ipcaknowledgebasket.ca/ipca-faq/>.
[185] *Indigenous Laws in Context, supra* note 180 at 8-9.
[186] *Ibid* at 1.
[187] *Ibid*.
[188] *Ibid* at 1-2.
[189] *Ibid* at 2.
[190] *Ibid* at 15.
[191] *Ibid* at 1.
[192] *Ibid* at 6.
[193] *Ibid* at 1.
[194] *Ibid* at 6.

- other beings that sustain them; and that non-human beings also have rights and agency.[195]

1. Implementing IPCAs in Ontario

The Ontario government should follow the federal government's initiative. The current lack of recognition from the provincial government limits federal efforts in Ontario as provinces have the authority over land matters.[196] For instance, the Grassy Narrows First Nation has received support and commitment from the federal government to establish their entire territory as an IPCA. However, the Ontario government continues to propose industrial logging and mining projects in the area.[197] Therefore, to implement IPCAs in Ontario, a crucial step would be for the province to support the federal government and acknowledge Indigenous legal systems and governing authorities.[198]

Another way in which Ontario could implement IPCAs is to amend their existing legislation. To date, Ontario has two relevant statutes: the *Provincial Parks and Conservation Reserves Act*[199] and the *Public Lands Act*[200].

The *Provincial Parks and Conservation Reserves Act* provides a framework for establishing and managing provincial parks and conservation reserves.[201] Under provincial parks legislation, protected areas are further categorized based on levels of ecological protection and permitted uses or purposes. The Act also gives the Minister of Environment, Conservation and Parks authority to establish new protected areas and change park boundaries.[202] Similarly, the *Public Lands Act* gives the Minister of Natural Resources and Forestry the authority to manage Crown lands.[203]

Unfortunately, these statutes do not currently recognize Indigenous legal orders and governance authorities. They also do not recognize IPCAs as a distinct category of protected area.[204] Therefore, to implement IPCAs in Ontario, the *Protecting Lands and Waters*: *A*

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[195] *Ibid* at 3.
[196] Emma McIntosh, "Ontario is Resisting Canada's Plans for Indigenous-led Conservations", *The Narwhal* (18 August 2022), online: <https://thenarwhal.ca/ontario-resisting-indigenous-conservation-plans/>.
[197] *Ibid*; Kerrie Blaise, "Protecting Lands and Waters: Toolkit" (June 2022), online (pdf): <https://cela.ca/wp-content/uploads/2022/06/Full_Report_and_Toolkit.pdf> [*CELA Toolkit*].
[198] *Ibid* at 12-13.
[199] *Provincial Parks and Conservation Reserves Act, 2006*, SO 2006, c 12.
[200] *Public Lands Act*, RSO 1990, c P.43.
[201] *CELA Toolkit, supra* note 196 at 18.
[202] *Ibid* at 19.
[203] *Ibid*.
[204] *Ibid* at 17.

Toolkit report prepared by the Canadian Environmental Law Association makes several recommendations:

1. IPCAs could be added as a class of recognized provincial parks under the *Provincial Parks and Conservation Reserves Act*.[205]

2. The objectives of the *Provincial Parks and Conservation Reserves Act* could include: (1) to be Indigenous-led and elevate Indigenous rights and responsibilities; (2) to support the practice and revival of the local Indigenous way of life; and (3) to provide opportunities for ecologically sustainable, non-industrial Indigenous-led economic activities.[206]

3. The *Public Lands Act* could set objectives to inform the Minister's decision-making to include Indigenous perspectives.[207]

The Duty to Consult

To protect the rights of Indigenous peoples under section 35, Canadian courts have developed the doctrine of the duty to consult.[208] Because it provides Indigenous peoples with a right to be consulted on matters affecting Aboriginal or treaty rights, the duty to consult is often an additional source of environmental protection in Aboriginal law. This section explains the duty and its applicability to issues of environmental justice.

1. What is the Duty to Consult?

The duty to consult requires the federal and provincial governments to consult with Indigenous groups when their actions may impact Aboriginal and treaty rights.[209] As a matter of law, the duty to consult may also require governments to accommodate the interests of Indigenous groups being consulted. The duty to consult ideally allows affected Indigenous groups to influence resource development and other projects that could impact the environment affecting their Aboriginal title, Aboriginal right, and/or treaty right. However,

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[205] *Ibid* at 12.
[206] *Ibid* at 95-96.
[207] *Ibid* at 19.
[208] Isabella Brideau, *The Duty to Consult Indigenous Peoples* (Ottawa: Library of Parliament, 2019) at 1, online (pdf): <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2019-17-e.pdf>.
[209] Natai Shelsen, "What is the Crown's Duty to Consult and Accommodate Indigenous peoples?", *Goldblatt Partners* (July 2019) at 1, online (pdf): <https://goldblattpartners.com/wp-content/uploads/Shelsen-Crowns-Duty-to-Consult.pdf> [*Shelsen*].

because the duty is merely one of consultation, the duty may be legally satisfied even if affected groups do not ultimately influence the project.

2. Role of the Crown and Third Parties

The duty to consult is a responsibility owed by the Crown (the federal and provincial governments) to Indigenous peoples and cannot be wholly delegated to third parties such as resource development companies.[210] However, the Crown can delegate procedural aspects of consultation to private parties and regulatory agencies to assist in fulfilling its duty to consult.[211]

3. When is the Duty to Consult Triggered?

The duty to consult is triggered when:

1. The Crown knows or ought to know of a potential Aboriginal right or title claim.
2. There is Crown conduct, or a Crown decision made impacting the potential Aboriginal right or claim.
3. There is potential for the Crown's conduct to negatively affect the Aboriginal claim or right.[212]

If the Crown does something that impacts a potential Aboriginal right or claim without adequate consultation with affected Indigenous peoples, the affected group may pursue legal action against the government and require that they be consulted.

4. How is the Duty to Consult Satisfied?

The doctrine of the duty to consult does not create a requirement of consent. Accordingly, courts have found that the duty is legally satisfied when the Crown has made "reasonable efforts" to provide meaningful consultation and accommodation.[213] The Crown must engage in "meaningful two-way dialogue" with Aboriginal groups to understand their concerns and find a way to address them.[214] What is considered meaningful consultation depends on the strength of the rights claim and the severity of the infringement on the potential or proven rights at stake. Cases where there is a strong claim and a severe potential infringement may require deeper consultation and greater accommodation.[215] In practice this has meant that at the lower end of the spectrum, consultation might merely require notice and

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[210] *Ibid* at 2.
[211] Centre for Constitutional Studies, "Duty to Consult" (4 July 2019), online:<https://www.constitutionalstudies.ca/2019/07/duty-to-consult/> [*Centre for Constitutional Studies*].
[212] *Shelsen, supra* note 209 at 2.
[213] *Centre for Constitutional Studies, supra* note 211.
[214] *Shelsen, supra* note 209 at 3.
[215] *Centre for Constitutional Studies, supra* note 211.

discussion of issues brought up by the affected Indigenous community, with no tangible concessions being made to the affected community.

For example, the Supreme Court of Canada found that the province of British Columbia fulfilled its duty to consult with the Taku River Tlingit First Nation ("TRTFN") on a road building project.[216] The proposed road ran across the TRTFN's traditional territory and had potential negative impacts on wildlife and the ability to use the resources.[217] The Supreme Court found that despite being unable to reach an agreement with the TRTFN, the province had fulfilled its duty by engaging in meaningful consultation through the required provincial environmental assessment process. Specifically, the Court found that TRTFN had "a large role in the environmental assessment process, their concerns were presented to the Ministers who approved the project, and the ultimate approval contained measures to address their concerns".[218]

5. Duty to Accommodate

Sometimes, a situation may come up where the duty to accommodate is triggered. This requires good faith efforts by the ministry to address concerns raised by the impacted Indigenous community. The actions taken to avoid irreparable harm, minimize negative impacts, and balance interests are all factors that the ministry should consider when determining whether good faith efforts to address concerns have been made.[219] Therefore, when government action triggers the duty to consult, the Crown has a responsibility to make good faith efforts to accommodate affected Indigenous communities.

6. The Implementation of International Law on the Duty to Consult

The duty to consult is not and should not be a static concept. If fully implemented, Article 32(2) of the UN Declaration would strengthen Indigenous rights to self-determination and Canada's corresponding duties with respect to any projects affecting Indigenous lands. Article 32(2) of the UN Declaration specifically advocates for a standard of free, prior, and informed consent, which effectively means that Indigenous peoples must be consulted early and throughout the process ("prior"), without coercion or manipulation ("free"), while also ensuring that the consulted groups have an adequate and timely understanding of the issues arising and impacts of the projects ("informed"). The Article subsection is reproduced below:

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[216] *Ibid*, citing *Taku River Tlingit First Nation et al v Ringstad et al*, 2000 BCSC 1001.
[217] *Ibid*.
[218] *Ibid*.
[219] Government of Ontario, "Environmental assessments: consulting Indigenous communities: Information on consulting Indigenous communities during the environmental assessment process"(last modified 23 May 2024), online: <https://www.ontario.ca/page/environmental-assessments-consulting-indigenous-communities> [*Ontario Consultation*].

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[220]

In principle, Canada's *United Nations Declaration on the Rights of Indigenous Peoples Act* is to further the principle of free, prior, and informed consent, and thereby build upon and go beyond the traditional duty to consult.[221] However, to adequately implement these concepts, Canada will need to improve and strengthen its models for project consultations. The relevant model most in need of reform to meet this standard – environmental and impact assessments – is the subject of the next section.

Notably, Canada is also required to provide annual reporting on its implementation of the UN Declaration, in consultation with Indigenous rights holders and representative organizations.[222] This duty of annual reporting provides a forum for further advocacy with respect to Indigenous rights issues, including environmental protection. A list of organizations who participated, and who may be a potential contact for advocating for further implementation of UNDRIP, is appended to the report.[223] That said, many current contributors have voiced their frustration with the process, and with government failures to meet its obligations under UN Declaration more generally (including, but not limited to, environmental protection issues).[224]

Environmental and Impact Assessments

As a part of the Crown's duty to consult, the Ontario *Environmental Assessment Act*[225] and the federal *Impact Assessment Act*[226] require proponents to consult with affected Indigenous communities when conducting an Environmental Impact Assessment ("EIA") for a

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[220] *UNDRIP*, *supra* note 170 at 23.
[221] *UNDRIP Action Plan, supra* note 167 at 9.
[222] Department of Justice Canada, "Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act" (last modified 20 June 2024), online: <https://www.justice.gc.ca/eng/declaration/index.html>.
[223] *Third annual progress report on implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act,* (Department of Justice Canada, 2024) at 54-56, online (pdf): <https://www.justice.gc.ca/eng/declaration/report-rapport/2024/pdf/UNDA_Third_annual_report.pdf> [*Third Annual Report*].
[224] *Ibid* at 37-38.
[225] *Environmental Assessment Act*, RSO 1990, c E.18 [*EAA*].
[226] *Impact Assessment Act*, SC 2019, c 28, s 1. See *Re Reference Impact Assessment,* 2023 SCC 23 (while the majority of the *Impact Assessment Act* was found to be invalid legislations, sections 81-91 of the Act pertaining to federal projects was upheld and continues to apply).

potential project.[227] EIAs are used to assess the potential negative impacts of a proposed project on the environment and how they can be managed and reduced.[228] Projects subject to an EIA generally cannot proceed without an Environmental or Impact Assessment certificate.

As indicated above, these current legislative frameworks reflect the traditional obligations placed upon governments by the duty to consult. They do not yet reflect the heightened obligations that flow from Canada's commitment to the UN Declaration.

1. Consultation Obligations

In terms of Aboriginal and treaty rights, project proponents have specific consultation obligations they must fulfill when conducting an EIA. During a consultation, proponents must execute the following:

- Contact and inform First Nation communities of the proposed project.
- Notify the communities of open houses and meetings.
- Provide project documentation and information to the communities.
- Respond to questions or concerns raised by the communities regarding the project's impact.
- Notify the Crown if the duty to consult is triggered or if the communication process is stalled.
- Adhere to other Aboriginal consultation requirements found in regulations, codes of practice, and government guidelines.[229]

Proponents are to document how potentially affected Indigenous groups were identified and consulted, the issues identified, and how those issues were avoided, prevented, mitigated or addressed.[230] Proponents are required to submit EIAs to government agencies who have final say over their approval.

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[227] Government of Canada, "Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011" (last modified 29 January 2024), online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729> [*Canada Consultation Guidelines*]; *Ontario Consultation, supra* note 219.

[228] Jeff Nishima-Miller and Kevin Hanna, *Indigenous-Led Impact Assessment, An Introduction: Case Studies and Experiences in Indigenous-led Impact Assessment* (2022) at 2, online (pdf): <https://ok-cear.sites.olt.ubc.ca/files/2023/01/Indigenous-Led-Impact-Assessment-An-Introduction-CEAR-UBC.pdf> [*ILIA Case Studies*].

[229] *Ontario Consultation, supra* note 219.

[230] *Ibid*.

a. Duty to Consult

If an EIA establishes that the duty to consult may be triggered, the relevant ministry must work with the proponent to ensure that the duty is fulfilled.[231]

Indigenous-led Impact Assessment

Although government-led environment and impact assessments and proponent-led consultations help protect against negative environmental effects, they often fail to consider Indigenous perspectives and priorities. In response, Indigenous groups facing resource and development projects that affect their rights have started doing their own assessments to make sure their views and needs are better considered.[232]

Indigenous-led Impact Assessments involve:

1. Indigenous values and interests.
2. Methods and information provided by Indigenous knowledge and western science.
3. A variety of assessment methods including cumulative effects, regional, strategic, risk, disaster, and health assessments.
4. Value-based assessment considering community values, needs, and cultural use of places and resources.
5. Providing control to affected Indigenous groups on how the assessment is conducted, what information and knowledge is used and who performs the assessment and related activities.
6. Applying Indigenous interpretations for significant impacts as determined by the community.[233]

While Indigenous-led Impact Assessments are powerful tools of self-determination, these assessments are not understood by governments as legally-binding on ministry decision makers in many jurisdictions, including Ontario.[234] In such cases, these assessments are usually considered as one piece of evidence among other issues raised by community and public interest groups during the EIA process. Improvements can be made in this area by finding ways to make Indigenous-led Impact Assessments legally-binding, or by providing them with greater legal force. Such reforms would better recognize the constitutional rights of Indigenous communities as well as the need for free, prior, and informed consent under the UN Declaration.[235]

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[231] *Canada Consultation Guidelines*, *supra* note 227.
[232] *ILIA Case Studies*, *supra* note 228 at 2.
[233] *Ibid* at 5.
[234] *EAA*, *supra* note 225.
[235] *UNDRIP Action Plan*, *supra* note 167.

Indigenous Climate Partnerships

The Government of Canada has partnered with Indigenous communities to address climate change and adapt to its impacts. Numerous Indigenous leaders act as guardians and stewards of ecosystems to improve and respect the natural environment. For example, various Indigenous communities are doing important work to reduce greenhouse gas emissions. The knowledge and leadership of Indigenous people are important to achieve the changes necessary to address climate change and make sure our environment stays healthy and strong.[236] The following partnerships create a space for Indigenous environmental issues, barriers, and concerns to be raised and addressed by their respective members.

1. First-Nations Canada Partnership

The First Nations-Canada Joint Committee on Climate Action ("**JCCA**") is a committee where First Nations representatives and government officials work together on climate policy.[237] First Nations are supported by the JCCA as full partners in carrying out Canada's national climate plan.[238] The JCCA's annual report documents the progress towards reconciliation and climate partnership, highlighting areas like:

- Accelerating First Nations' participation in clean growth and climate change programs
- Advancing First Nations Climate Leadership through dialogue with First Nations
- Developing communication tools to improve the transparency, accountability and engagement of JCCA activities
- Using intergenerational and intersectional dialogue in all JCCA activities.[239]

2. Inuit-Canada Partnership

The Inuit-Canada Table on Clean Growth and Climate Change is an assembly with representatives from Inuit Tapiriit Kanatami, Regional Land Claims Organizations, and federal officials from government departments. The assembly works together to discuss and work on important climate change issues.[240] The focus is on implementing the National Inuit Climate Change Strategy (NICCS).[241] The Canadian government funds the NICCS implementation to advance Inuit-led activities, including:

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[236] Environment and Climate Change Canada, "Canada's Partnership with Indigenous Peoples on Climate" (last modified 9 December 2024), online: <https://www.canada.ca/en/environment-climate-change/services/climate-change/indigenous-partnership.html> [*Climate Partnership*].
[237] *Ibid*.
[238] *Ibid*.
[239] *Ibid*.
[240] *Ibid*.
[241] *Ibid*.

- Advance Inuit capacity in climate decision-making.
- Improve Inuit and environmental health and wellness outcomes through integrated Inuit initiatives.
- Reduce the climate vulnerability of Inuit and market food systems.
- Support Inuit energy independence.[242]

3. Métis-Canada Partnership

The Métis National Council along with its governing members and federal officials collaborate with the Métis Nation to identify Métis-specific considerations for designing and funding federal climate programs. Working with the Métis Nation, the federal government can adjust programs and policies under Canada's climate plan.[243] For instance, Métis climate change leadership is advanced through:

- Collecting Métis traditional knowledge and data to guide Métis policy.
- Training opportunities in climate change.
- Emergency management and disaster-risk mitigation.
- Renewable energy and energy-efficiency retrofits.[244]

[242] *Ibid*.
[243] *Ibid*.
[244] *Ibid*.

Chapter 5: Law Reforms

This chapter explores different opportunities for advocacy and law reform to strengthen environmental protection and climate action in Canada. It begins with emphasizing the importance of incorporating the **precautionary principle** in legislation and in its interpretation and application, which requires that environmental action or accountability should not be barred due to a lack of scientific certainty. Specific examples are taken from other jurisdictions to provide suggestions on how to implement the principle in Canada. The next issue is one that was partially explored in Chapter 3: the furthering of **positive rights**.

The chapter then provides proposals for legislative reform in Ontario and Canada to enhance environmental protection and rights. Specifically, the chapter addresses the possibility of updating Ontario's environment legislation to strengthen the legal accountability of the Ontario government to avoid environmental harm and remedy any harms that have occurred, and recognizing the rights of nature, which confer rights on natural bodies like mountains, rivers, and forests to ensure their protection.

The last section of this chapter looks at two specific acts that have been passed by the Canadian government relating to the environment: the *National Strategy Respecting Environmental Racism and Environmental Justice Act* and the *Strengthening Environmental Protection for a Healthier Canada Act*. The potential positive impacts these acts may have on protecting the environment are discussed along with their shortcomings. The chapter then explores ways the government can improve and strengthen these legislative initiatives.

As a whole, this chapter is intended to provide an overview of ways in which the laws and policies governing environmental justice in Canada may be improved, as well as signposts as to how this reform can be pursued and achieved by environmental advocates.

The Precautionary Principle

The precautionary principle is a central feature of modern environmental law that embodies a "better safe than sorry" approach to environmental risk.[245] In 1990, Canada recognized the formulation of the principle set out in the *Bergen Ministerial Declaration on Sustainable Development* ("*Bergen*"), which stated that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[246] The most widely-cited version

[245] Chris Tollefsen, "A Precautionary Tale: Trials and Tribulations of the Precautionary Principle" (Paper delivered at the Symposium on Environment in the Courtroom at the Faculty of Law, University of Calgary, 23 March 2012), Canadian Institute of Resources Law at 1–2 [*Tollefsen*].
[246] "The Precautionary Principle in Canada" (Paper delivered at the ELC Associates' Program Teleconference, 14 June 2010), Environmental Law Centre, University of Victoria at 1.

of the principle is outlined in the 1992 *Rio Declaration on Environment and Development* ("*Rio Declaration*"), which amended the *Bergen* formulation to specify "cost-effective measures."[247]

These relatively "weak" definitions set out in *Bergen* and *Rio Declaration* are often contrasted with the more stringent version recognized at the 1998 Wingspread Conference on the Precautionary Principle. Here, the principle was formulated to require that "when an activity raises threats to the environment or human health, precautionary measures should be taken, even if some cause-and-effect relationships are not fully established scientifically."[248]

While Canada has historically recognized the precautionary principle, the principle has not been applied consistently and effectively. This can be attributed to a general lack of clarity around the principle's purpose, definition, scope, and legal status.[249] For example, some statutes use the language of a precautionary "approach," "manner," or "basis," creating ambiguity as to what each term entails and whether they carry the same connotations as a legal principle. Other statutes reference the principle but fail to provide any definition, leaving it up to the discretion and interpretation of courts.[250] Where legislation is silent, some courts have used the principle as an interpretive tool whereas others have been unwilling to recognize its legal status absent clear statutory authority.[251]

The Supreme Court of Canada has recognized the precautionary principle. Two leading cases are: *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*[252]; and *Castonguay Blasting Ltd. v. Ontario (Environment)*[253].

In *Spraytech* (2001), a town in Quebec validly enacted a by-law regulating and restricting pesticide use out of public interest and health concerns. The Court interpreted the relevant statute and by-law to confer this power of environmental regulation upon the town, reasoning, in part, that this interpretation was consistent with international law and policy, including especially the precautionary principle as defined in *Bergen*.[254] In its view, the town's health concerns over the use of pesticides fell well within the "rubric of preventative action".[255]

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[247] *Tollefsen, supra* note 245 at 2.
[248] *Ibid*.
[249] Charles Birchal, Julie Abouchar & John Donthee, "Navigating Environmental Risk: When and How to Apply the Precautionary Principle" (2017), *Willms & Shier Environmental Lawyers LLP* at 8, online: <https://www.willmsshier.com/docs/default-source/articles/navigating-environmental-risk-when-and-how-to-apply-the-precautionary-principle---cjb-jd-ja-and-rj---december-22-2017.pdf.> [*Birchal*].
[250] *Ibid* at 6-7.
[251] *Ibid* at 14.
[252] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 40 [*Spraytech*].
[253] C*astonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 [*Castonguay*].
[254] *Spraytech, supra* note 252 at paras 30-31.
[255] *Ibid* at para 32.

Spraytech has both general and particular significance. Generally, *Spraytech* is a reminder that Canadian courts are willing to look to international law when interpreting a domestic statute. More specifically, *Spraytech* is also an important precedent for the principle that Canada's domestic environmental legislation can be shaped by interpretations that place significant weight on the precautionary principle. As reflected by the result in *Spraytech*, such interpretations will often serve to facilitate government action and prevent environmental degradation.

More recently, in *Castonguay* (2013), the Court relied again upon the precautionary principle. The case involved a blasting operation propelling "fly-rock" (a contaminant) into the air and elsewhere. The discharge of a contaminant was not reported to the Ministry as required by section 15(1) of Ontario's *Environmental Protection Act* ("*EPA*").[256]

In its reasons, the Court drew explicitly on the precautionary principle when interpreting the relevant environmental legislation. The Court reasoned: "since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation".[257] The Court also explicitly found that section 15(1) of the *EPA* embodied the precautionary principle by ensuring the Ministry "has the ability to respond once there has been a discharge of a contaminant out of the normal course of events, without waiting for proof that the natural environment has, in fact, been impaired".[258]

Castonguay remains an important precedent in Canadian law. *Castonguay* is a clear and authoritative recognition that the precautionary principle is an enforceable part of Ontario's environmental protection legislation.[259]

Be that as it may, Canada can continue to strengthen its understanding and application of the precautionary principle by adopting the approaches taken in other jurisdictions. For instance, unlike in Canada, Australian courts have developed rigorous legal tests outlining who, when, and how the precautionary principle should be applied. This has included establishing a comprehensive list of elements relevant to assessing environmental threats and scientific uncertainty.[260] In determining the severity or irreversibility of environmental damage, the court must consider factors like the spatial scale of the threat, the magnitude of possible impacts, and the perceived value of the threatened environment. A determination of scientific uncertainty

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[256] *Castonguay*, *supra* note 253.
[257] *Ibid* at para 20.
[258] *Ibid*.
[259] Canadian Environmental Law Association, Media Release, "Broad interpretation of environmental laws upheld by Canada's highest court" (17 October 2013), online: <https://cela.ca/broad-interpretation-of-environmental-laws-upheld-by-canadas-highest-court/>; *Castonguay*, *supra* note 253 at para 20.
[260] *Telstra Corporation Limited v Hornsby Shire Council,* [2006] NSWLEC 133.

must consider the sufficiency of the evidence, the level of uncertainty, and the potential to reduce uncertainty having regard to what is possible.

Another example of the application of the precautionary principle can be found in India, where it is widely accepted as a fundamental feature of sustainable development. In India, the precautionary principle is directly related to the constitutional protection of life and personal liberty.[261] Relatedly, proponents of a project bear the burden of showing that their actions are environmentally benign.[262] India also created a specialized tribunal dedicated to undergoing legal and scientific evaluation to decide when the principle applies.[263]

These more robust and aggressive approaches to the recognition of the precautionary principle can be models for policy and law reform in Canada. For instance, since the Australian framework clarifies when, or if, the precautionary principle applies, the adoption of a similar framework would very likely expand the usefulness and applicability of the environment-enhancing principle in Canada. Similarly, India provides a useful for model for any future institutional reforms in Canada. India's experience suggests that a specialized tribunal, explicitly tasked with enforcing the principle, is generally better equipped at providing systematic reviews of proposed projects, thereby providing clarity and consistency in the principle's application.

More practically, the principle may be extended via activist efforts at legislative reform, but also, potentially, via further litigation. For instance, many of the Charter arguments canvassed in Chapter 3 can be meaningfully coupled with the argument that, in areas of scientific uncertainty, rights-engaging government action must be evaluated within a general context that assumes the environment-degrading theories are correct (i.e., on the principle of precaution).

Positive Rights Advocacy and Legislation

Another important and feasible arena for further law reform would be to increase the adoption of positive rights in Canadian law, and particularly with respect to environmental justice.

As previously discussed in chapter 3, Canadian courts have not yet affirmed that positive rights exist in the environmental law context. Outside of Canada, the recognition of positive rights is varied, as seen through constitutional litigation in countries such as the Netherlands

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[261] Gitanjali Nain Gill, "The Precautionary principle, its interpretation and application by the Indian judiciary: 'When I use a word it means just what I choose it to mean-neither more nor less' Humpty Dumpty" (2019) 21:4 Envt L Rev 292 at 300 [*Gitanjali*]. See *Vellore Citizens Welfare Forum v Union of India*, (1996) 5 SCC 647.
[262] *Ibid* at 295.
[263] *Ibid* at 295-296.

(where the Supreme Court has recognized such rights, via the *European Convention on Human Rights*) and the United States of America (where such litigation has been dismissed).[264]

While litigation continues to be a possible way to have positive environmental rights recognized in Canada, Parliament and legislatures are also well-equipped to deal with this problem via changes to legislation. This may include the passage of statutes that would codify rights and obligations that Parliament or provincial legislatives hold flow from the *Charter* (see Chapter 3). Indeed, any significant implementation of positive climate rights would very likely require comprehensive policies, which are typically the domain of Parliament, the provincial legislatures, and government ministries or other administrative institutions.[265] For this reason, legislative action would be an appropriate way in which to advance the cause of positive environmental rights.

Legislative Reform: Existing Legislative Schemes

Another important and feasible opportunity for legal reform is to improve and build upon Ontario's and Canada's existing legislative frameworks. This section examines three such opportunities.

First, the Ontario *EBR* forms the backbone of environmental protection and accountability in Ontario (see Chapter 1). However, it has many shortcomings that would benefit from reform. Most notably, legislative reform would strengthen the ability of Ontario residents to hold the Government of Ontario legally accountable on matters of environmental protection.

Second, governments throughout the world have adopted legal instruments that confer legal personhood and thus legal rights to environmental features. These "rights of nature," as they are often called, provide legal guardians the power to seek legal accountability and remedial action for environmental harm. Through legislative advocacy and negotiation with governments, rights of nature can be adopted in Ontario.

Third, Canada has recently passed two important but imperfect pieces of environmental legislation. The new legislation provides opportunities for consultation with relevant government actors and a new starting point for future reform.

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[264] Colin Feasby, David deVlieger & Matthew Huys, "Climate Change and the Right to a Healthy Environment in the Canadian Constitution" (2020) 58:2 Alta L Rev 213 at 214 [*Feasby*].
[265] *Ibid* at 220.

1. Proposed Changes to the Ontario EBR

In the 30 years of its operation, several issues have been identified with the *EBR* and its implementation, notably in the Office of the Auditor General of Ontario's annual reports.[266] Reform to the *EBR* has been suggested as a means of addressing its shortcomings. Central to many of the proposed reforms to the *EBR* is the importance of implementing legal accountability where political accountability has failed to ensure compliance with the existing *EBR*.[267]

The Law Commission of Ontario (LCO), a leader in law reform efforts in the province, has done an in-depth and expert-informed study into the issue, advocating for several reforms. If adopted, these reforms would result in significant progress for environmental protection in Ontario.

The LCO's most recent report in 2024 specifically provided 55 recommendations on how to reform the *EBR* to improve its efficacy and protective abilities. The LCO concluded that the *EBR* has not been able to fulfill its stated objectives (a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act, (b) to provide sustainability of the environment by the means provided in this Act, and (c) to protect the right to a healthful environment by the means provided in this Act.[268] The LCO's proposed reforms would:

- Update the *EBR* to reflect contemporary environmental accountability principles and priorities by:
    - Incorporating a right to a healthy environment into the *EBR*.
    - Establishing a right for residents to commence environmental protection actions.
    - Incorporating environmental justice principles and practices into the *EBR*.
    - Updating the purposes of the *EBR*.

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[266] *Operation of the Environmental Bill of Rights, 1993*, (Toronto: Office of the Auditor General of Ontario, 2023) at 4, online (pdf): <https://www.auditor.on.ca/en/content/annualreports/arreports/en23/AR_EBR_en23.pdf> [*EBR Operation*].

[267] Law Commission of Ontario, *Environmental Accountability in Ontario Consultation Paper* (Toronto: 2022) at 20-21, online (pdf): https://www.lco-cdo.org/wp-content/uploads/2022/10/LCO-Environmental-Accountability-Paper-Sep-16-2022-Rev.pdf.

[268] Law Commission of Ontario, *A New Environmental Bill Of Rights For Ontario Final Paper* (Toronto: 2024) at 12, online (pdf): <https://www.lco-cdo.org/wp-content/uploads/2024/03/LCO-Environmental-Accountability-Final-Paper-compressed.pdf> [*LCO Final Paper*]. As of the writing of this report, the LCO is currently working on a follow up Environmental Accountability – Indigenous Engagement project. The project will feature Indigenous representation on issues related to environmental accountability and the *LCO Final Paper*.

- Improve public participation in provincial environmental decision-making by:
    - Improving Statements of Environmental Values.
    - Enhancing the role of the Commissioner of the Environment.
    - Improving Ontarian's access to environmental information.
    - Improving environmental data collection and transparency.

- Update and clarify *EBR* procedures by:
    - Updating rules for standing and judicial review.
    - Clarifying *EBR* exceptions.
    - Deleting the *EBR* statutory cause of action for harm to a public resource.[269]

Additionally, the LCO recommends that provincial environmental policymakers and stakeholders study and monitor strategies to improve environmental accountability like the rights of nature and public trust doctrine.[270]

For a complete list of the recommendations, see pages 111-114 of the report.

The LCO invites contact and comments on the report to ensure successful reform is informed by consultations with individuals and communities across Ontario.[271] As a leader in law reform in Ontario, the LCO is also well-placed to use such consultations to advocate for the implementation of its proposed reforms. If you are interested in contributing to LCO's efforts, further information is available at: https://www.lco-cdo.org/en/.

2. Rights of Nature

The rights of nature movement seeks recognition and protection of non-human entities such as mountains, rivers, marshes, and coastlines as legal subjects/persons with rights in and of themselves.[272] Legal actions against harms to the natural environment have traditionally required the harm to be framed as having human impact in order to be actionable. Thus, a gap in the law arises in terms of environmental protection where there is harm to the environment with no direct impact on humans or communities.[273]

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[269] *Ibid*.
[270] *Ibid*.
[271] *LCO Final Paper, supra* note 268 at 10.
[272] Mallory Jang, "Rights of nature and Indigenous Peoples: Navigating a New Course", *Peter A. Allard School of Law Centre for Law and the Environment* (2 September 2021), online: <https://allard.ubc.ca/about-us/blog/2021/rights-nature-and-indigenous-peoples-navigating-new-course> [*Allard*].
[273] See Ecotrust Canada, "Homelands Toolkit: Rights of Nature" (last visited 14 March 2025), online: <https://ecotrust.ca/toolkit/homelands/rights-of-nature-module/>.

The rights of nature framework provides for direct remedies for and prevention of environmental harm in line with Indigenous views of the land, ecosystems, and other natural entities as relational beings rather than mere property.[274] The following sections address the potential of rights of nature laws in Ontario, including how rights of nature operate, how they might be implemented, and challenges to their implementation.

a. *Rights and Guardianship Under Rights of Nature*

While rights of nature laws have been implemented in New Zealand, India, Ecuador, and Bolivia, among other countries worldwide, the Magpie River in Quebec is the first Canadian example of rights of nature receiving legal recognition. It serves as a primary example for how rights might be granted to nature/natural entities in Ontario.[275]

The rights granted to the Magpie River represent the culmination of a decade-long advocacy effort, particularly by the Innu and allied environmental groups.[276] The Magpie River was granted legal personhood status in February 2021 through joint resolutions adopted by the Municipality of Minganie and the Innu Council of Ekuanitshit in partnership with various environmental groups. These resolutions conferred nine legal rights to the river including: 1) the right to flow; 2) the right to respect for its cycles; 3) the right for its natural evolution to be protected and preserved; 4) the right to maintain its natural biodiversity; 5) the right to fulfill its essential functions within its ecosystem; 6) the right to maintain its integrity; 7) the right to be safe from pollution; 8) the right to regenerate and be restored; and, 9) the right to sue.[277]

This final right, the right to sue, has been noted as particularly important within the rights of nature movement, as it provides natural entities the legal capacity to defend their given rights.[278] Yet, as the entity itself cannot file a lawsuit, it must be represented by guardians or a governing body if it is to have its rights upheld. Additionally, resources must be available in

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[274] See Rachel Garrett and Stepan Wood, "Rights of Nature Legislation for British Columbia: Issues and Options" (2020), Peter A. Allard School of Law, Working Paper NO. 1/2020, online (pdf): <https://allard.ubc.ca/sites/default/files/2020-08/RON%20Legislation%20Working%20Paper%20-%20FINAL%20-%2019%20August%202020.pdf> [*Garrett*].

[275] Amanda McAleer, "Rights of Rivers in Ontario", CELA Memorandum (26 May 2021), online (pdf): <https://cela.ca/wp-content/uploads/2021/07/Rights-of-Rivers-Memo-Amanda-McAleer.pdf> [*Rights of Rivers*]; See also Amanda McAleer, "Quebec's Magpie River is Now a Legal Person: A Monumental Moment in Canadian Environmental Law", *CELA* (15 July 2021), online (blog): <https://cela.ca/blog-quebecs-magpie-river-is-now-a-legal-person/> [*Magpie*].

[276] *Ibid* at 14.

[277] Chloe Rose Stuart-Ulin, "Quebec's Magpie River becomes first in Canada to be granted legal personhood", *Canada's National Observer* (24 February 2021), online: <https://www.nationalobserver.com/2021/02/24/news/quebecs-magpie-river-first-in-canada-granted-legal-personhood> [*Stuart-Ulin*]. See *Magpie, supra* note 275.

[278] *Magpie, supra* note 275.

order for the rights of the entity to be supported through legal action.[279] The creation of a fund for the natural entity that has been granted rights is vital to alleviate financial pressure on individuals and community groups and will enable them to take legal action against environmental harms affecting this natural entity.

The river's guardians (who have a legal duty to ensure that the rights and interests of the river are upheld) are appointed jointly by the regional municipality and the Innu people.[280] This approach is not always preferable, as having guardians appointed by local government may lead to conflicts of interest when enforcing rights.[281] Still, guardians represent a range of perspectives that help sustain the rights and balance interests over time.[282] The balancing of interests is also why rights afforded to nature must be restricted and tailored to the contextual needs of the entity, rather than be all-encompassing. This ensures continued community support for the rights of the entity and the coexistence of other industries with the rights of the entity.[283]

Special care must also be taken to ensure that any rights and duties are clearly and specifically set forth in any relevant legislation or resolutions. In the context of environmental law, ambiguity often deprives legal instruments of their legal force.[284] For instance, Ontario's *Environmental Bill of Rights* (1993) contains language in its preamble conferring a right to a healthful environment. In 2012, and despite this language, the Ontario Superior Court of Justice found that the preamble's declaration did not actually confer a legal right.[285] With respect to rights of nature, such unfortunate results can be avoided, or at least minimized, by ensuring that the rights and duties are articulated as clearly and precisely as possible.

When advocating for or implementing rights of nature laws, jurisdiction is an additional consideration. Certain entities, such as rivers, cross into different regions and legal jurisdictions. If neighboring jurisdictions affecting the entity do not adopt similar resolutions or legislation, the rights of the entity may be limited or difficult to uphold.[286] To avoid limiting the scope of the right, successful advocacy or implementation with respect to interprovincial natural objects requires coordination between the relevant authorities.

b. *Challenges with Rights of Nature*

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[279] *Ibid*.
[280] *Rights of Rivers*, *supra* note 275 at 17 and 23.
[281] *Ibid* at 18.
[282] *Ibid* at 16.
[283] *Ibid* at 19-20.
[284] *Ibid* at 22.
[285] *Garrett*, *supra* note 274 at 7; *Clean Train Coalition Inc v Metrolinx*, 2012 ONSC 6593 at para 13.
[286] *Ibid* at 18.

Simply adopting a rights of nature doctrine does not necessarily confer effective environmental protection, nor does it necessarily mean Indigenous rights and sovereignty are respected.

New Zealand, Ecuador, and Bolivia are three jurisdictions that have recognized rights of nature to some degree. The recognition of rights of nature in these jurisdictions illustrates some of the best practices, and challenges, that are relevant to the Canadian case.

In certain contexts, such as colonial countries, rights of nature may often be best reserved to Indigenous communities, given the unique and longstanding relationship of Indigenous peoples to lands and other natural entities. New Zealand provides a helpful example. While New Zealand does not recognize rights of nature in its constitution, it has narrowly recognized the rights of the Whanganui River and the Te Urewera Forest.[287] The *Te Urewera Act*, the legislation that confers personhood to the Forest, was developed as an alternative to Māori ownership of the land.[288]

Though the legislation creates opportunities for Māori advisory-based governance and ultimately provides strong mechanisms of conservation for the Forest, the legislation was also used to bypass questions of Māori sovereignty. The example therefore also raises troubling issues at the intersection of Indigenous rights and environmental protection. Caution needs to be taken to ensure that rights of nature are not used as a mechanism to infringe Indigenous rights and sovereignty.

As with all rights, simply establishing rights of nature does not guarantee material benefits. The scope and content of the rights matter. This is illustrated by Ecuador's and Bolivia's decisions to constitutionalize rights of nature.

Ecuador's constitution recognizes the rights of nature, wherein nature is captured in the most expansive, holistic, and broadest terms—everything where life occurs and is reproduced.[289] The rights of nature focus on ecosystem integrity and the ability to regenerate and restore life cycles. However, there is no flourishing right which would ensure some level of well-being, so human impacts are technically only in violation if they cause irreparable damage, not merely temporary damage.[290] This undermines full environmental protection.

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[287] Laura Schimmöller, "Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador" (2020) 9:3 Transnat'l Envtl L 569 [*Schimmöller*].
[288] Brad Coombes, "Nature's rights as Indigenous rights? Mis/recognition through personhood for Te Urewera" (2020) 2020:1-2 Espace populations sociétés at paras 16 and 21, online: <https://journals.openedition.org/eps/9857>.
[289] *Allard*, *supra* note 272. See also Craig M Kauffman & Pamela L Martin, "Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand" (2018) 18:4 GEP 43 [*Kauffman*].
[290] *Kauffman*, *supra* note 289.

Like Ecuador, Bolivia recognizes rights of nature in its constitution. They centre on the right for people and other living things to a healthy environment for future generations.[291] The rights include the diversity of life, water, clean air, restoration, and pollution free living.[292] These rights impose caretaking duties onto humans to safeguard and respect Mother Earth, including policy creation to combat global climate change's causes and effects.[293] A problem with Bolivia's interpretation of rights of nature, however, is that it facilitates the industrialization of nature, wherein laws protect forests that are economically relevant.[294] This can lead to prioritizing resource exploitation and environmental protection that is only piecemeal.

Recognizing and adopting rights of nature in Canada therefore will benefit from indigenous involvement and a clear delineation of the scope and content of any recognized rights.

3. Recent Federal Government Legislation

Canada has recently passed two statutes addressing several environmental justice issues. While the legislation often falls short of the proposals advanced by environmental justice advocates, it provides opportunities for consultation with relevant government actors and a new starting point for future legislative advocacy. The two Acts in question are the *National Strategy Respecting Environmental Racism and Environmental Justice Act*[295] and the *Strengthening Environmental Protection for a Healthier Canada Act*[296].

a. National Strategy Respecting Environmental Racism and Environmental Justice Act

This Act was enacted into law on June 20, 2024 and directs the Minister of Environment & Climate Change to develop a strategy to address environmental racism and advance environmental justice across Canada.[297] The strategy focuses on improving data collection for environmental racism and justice matters, with specific attention given to the location of

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[291] Susana Borras, "New Transitions from Human Rights to the Environment to the rights of nature" (2016) 5:1 TEL 113 [*Borras*]. See also Paola Villavicencio Calzadilla & Louis J Kotzé, "Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia" (2018) 7:3 TEL 397 [*Harmony*].
[292] *Harmony*, *supra* note 291 at 410.
[293] *Ibid* at 402 and 411.
[294] *Borras*, *supra* note 291.
[295] *National Strategy Respecting Environmental Racism and Environmental Justice Act*, SC 2024, c 11 [*National Strategy Act*].
[296] *Strengthening Environmental Protection for a Healthier Canada Act,* SC 2023, c 12 [*Strengthening Act*].
[297] *National Strategy Act, supra* note 295.

environmental hazards and their associated negative health outcomes.[298] Further, a strategy will be created to better involve community groups in the development of environmental policy and compensate individuals and communities negatively affected by environmental hazards. This strategy will set guidelines within which legislation like the *Strengthening Environmental Protection for a Healthier Canada Act* will fit.[299]

The *National Strategy Respecting Environmental Racism and Environmental Justice Act* requires that the Minister of Environment consult with interested persons, bodies, organizations, and communities to develop the strategy.[300] The strategy must be consistent with Canada's framework for the recognition and implementation of the rights of Indigenous peoples. It also includes a provision requiring a report on the strategy's effectiveness every five years. This provision will ensure Canadians are aware of the federal government's progress (or lack thereof) in limiting environmental racism and advancing environmental justice.

The Act was supported by a variety of advocacy groups, including the Canadian Coalition for Environment & Climate Justice, Black Environmental Initiative, and Ecojustice, among many others.[301] Advocates have noted that this Act was long overdue and serves as a starting point to begin collecting data and addressing environmental racism.[302] However, the Act only mandates the development of a strategy document. It provides minimal detail concerning the measures to be included in the strategy and leaves much of the strategy's contents to the discretion of the Minister and current government.

That said, by mandating that the Minister consult with external parties, the Act provides an opportunity for advocacy to provide meaningful input in the development of the government's strategy. For those interested, a dedicated website has been created for the consultations: https://enviroequity.ca/.

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[298] Environmental Defence, Press Release, "MPs pass long-awaited legislation to tackle environmental racism in Canada" (30 March 2023), online: <https://environmentaldefence.ca/2023/03/30/mps-pass-long-awaited-legislation-to-tackle-environmental-racism-in-canada/>.

[299] Jane E McArthur et al., "Bill S-5, Strengthening Environmental Protection for a Healthier Canada Act" *Submission to the Standing Committee on Environment and Sustainable Development* (Ottawa: 2022), online: <https://www.ourcommons.ca/Content/Committee/441/ENVI/Brief/BR12090991/br-external/Jointly1-e.pdf> [*McArthur*].

[300] *National Strategy Act, supra* note 295 at s 3(2).

[301] The Canadian Coalition for Environment & Climate Justice, Press Release, "Groups call for Senate vote on environmental racism bill before summer recess" (19 June 2023), online (pdf): <https://cape.ca/wp-content/uploads/2022/03/Groups-Call-for-Senate-Vote-on-Environmental-Racism-Bill-Before-Summer-Recess.pdf>; Environmental Defence, Press Release, "High time to pass environmental racism bill, advocates say" (14 November 2022), online: <https://cape.ca/press_release/high-time-to-pass-environmental-racism-bill-advocates-say/>.

[302] Natasha Bulowski, "Senate to take the reins on environmental racism bill," *National Observer* (31 March 2023), online: <https://www.nationalobserver.com/2023/03/31/news/senate-take-reins-environmental-racism-bill>.

b. Strengthening Environmental Protection for a Healthier Canada Act

The *Strengthening Environmental Protection for a Healthier Canada Act*, entered into force in June 2023, is the first comprehensive update to the *Canadian Environmental Protection Act, 1999* (*CEPA*)[303] since *CEPA* was first enacted. It strengthens several principles of environmental protection, including creating the right to a healthy environment and guaranteeing protection of vulnerable populations.

Under the revised statute, the Ministers of the Environment and of Health must now consult with "any interested persons" to develop an implementation framework to set out how the right to a healthy environment will be considered in the administration of this Act.[304] This provides an opportunity for environmental advocacy groups to shape how the right to a healthy environment is realized, and how this right is informed by the principles of environmental justice as contained in the Act's text.

i. Government Duties to Uphold a Right to a Healthy Environment

The Act requires that all decisions made under *CEPA* respect the right to a healthy environment. From an environmental rights standpoint, this is the highlight of the revisions to the Act. While the Act also concerns limitations with respect to its scope, the statement of this right to a healthy environment may allow for future rights-based litigation against government action or inaction related to climate change.[305]

The right to a healthy environment must be balanced with relevant social, health, scientific, and economic factors. Under CEPA, powers are provided to the Minister of the Environment and Minister of Health to identify and regulate toxic substances. According to s.90(1.2) of *CEPA*, this balancing process involves the relevant Ministers considering, with respect to an identified substance, "whether the activity or release can be undertaken in a manner that minimizes or eliminates any harmful effect on the environment or human health and whether there are feasible alternatives to the substance." Interest groups have criticized this language, suggesting that its vague nature may allow the government to limit positive action using this clause as justification.[306]

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[303] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [*CEPA*].
[304] *Ibid* at s 5.1.
[305] Rick Williams et al, "Canada enacts into law the right to a healthy environment and more stringent chemical management requirements", *Borden Ladner Gervais LLP* (19 June 2023).
[306] *McArthur, supra* note 299 at 4.

ii. Guaranteed Protection of Vulnerable Populations

Future decisions under *CEPA* will also be required to consider principles of environmental justice. Clause 5.1(2)(a) states that the implementation framework would detail "principles to be considered in the administration of this Act, such as principles of environmental justice–including the avoidance of adverse effects that disproportionately affect vulnerable populations–the principle of non-regression and the principle of intergenerational equity."[307] These principles suggest that the implementation framework would support efforts to reduce environmental racism in Canada.[308]

They also include consideration of the disproportionate environmental effects on vulnerable populations, including the principles of non-regression and the principle of intergenerational equality.[309] In subsection 3(1) of the Act, the amendments define a vulnerable population as "a group of individuals within the Canadian population who, due to greater susceptibility or greater exposure, may be at an increased risk of experiencing adverse health effects from exposure to substances."[310]

iii. Reasonable Limits Caveat

Although the Act recognizes the enforceable right to a healthy environment, this right is "subject to any reasonable limits" under section 2(1)(a.2) of *CEPA*.[311] This is further described in clause 5.1(2)(c), which states that the reasonable limits to which that right is subject results from the consideration of relevant factors, including social, health, scientific and economic factors.[312] These factors will be explained in the implementation framework by the Minister of the Environment and the Minister of Health.[313]

Other environmental legislation in Canada includes a right to a healthy environment without a reasonable limits caveat.[314] By including caveats within the clause, the federal legislation limits the protections that this right would offer. While the possible removal of the clause would need to wait for future amendments, the absence of this limitation in other related statutes suggests that it can, and should, be read narrowly. This need for a narrow reading of reasonable limits also flows from the fact that *CEPA* otherwise requires Canada to

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[307] *Strengthening Act, supra* note 296 at s 5.1(2)(a).
[308] *McArthur, supra* note 299 at 2.
[309] *CEPA, supra* note 303 at s 3(1) (Non-regression means the degree of environmental protection cannot be lessened than its current state: *McArthur, supra* note 298 at 4).
[310] *CEPA, supra* note 303 at s 3(1).
[311] *Ibid* at s 2(1)(a.2).
[312] *Ibid* at s 5.1(2)(c).
[313] *Ibid* at s 5.1.
[314] Yukon's *Environment Act,* RSY 2002, c 76, s 6 (States that "the people of the Yukon have the right to a healthy natural environment").

take the necessity of protecting the environment into account when making social and economic decisions.[315]

iv. Scope of the Right to a Healthy Environment Depends on Government Will

The Act's above commitment to an implementation framework falls short of a codified and rights-based approach to a right to a healthy environment. The Canadian Environmental Law Association (CELA) submitted to the House of Commons Standing Committee on Environment and Sustainable Development that the Act's (formerly Bill S-5) implementation framework suggests that the right to a healthy environment is dependent on the will of the Government of Canada.[316] By so doing, the legislation implies that the right is precarious, subject to changes in political will and the government of the day's policy agenda.

The failure to recognize a freestanding right that is not subject to political discretion is concerning because changes in the federal government, such as a newly elected government, could negatively impact the scope of the right. Accordingly, it is important for activists to advocate for a more permanent right, such as via clear legislative or even constitutional recognition, to prevent the basic right from being subject to the whims of the government of the day.

v. Recommendations

The amendments to *CEPA* have improved the legislation. They were, however, imperfect amendments, and there is further work to be done. The Canadian Environmental Law Association (CELA), for instance, has canvassed important recommendations which would significantly improve *CEPA*:

1. For all chemicals designated as toxic under *CEPA*, pollution prevention should be mandatory. Currently, only a limited number of substances have had pollution prevention plans.

2. *CEPA* should have as a central pillar enshrining safer alternatives to toxic substances. At present, the regulatory scheme is limited to providing alternatives for a small group of chemicals that have the highest risk.

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[315] *CEPA, supra* note 303 at s 2(1)(b).

[316] Joseph F Castrilli and Fe de Leon, "Submissions to the House of Commons Standing Committee on Environment and Sustainable Development on Bill S-5, an Act to Amend the Canadian Environmental Protection Act, 1999, etc.", *Canadian Environmental Law Association* (September 2022) at para 67, online (pdf): <https://cela.ca/wp-content/uploads/2022/10/Bill_S-5-HC_submissions_Sept_2022.pdf>.

3. Where information is not available, such as impacts on vulnerable populations, the government should impose mandatory chemical testing obligations on the private sector to determine whether a substance is toxic or capable of becoming toxic.

4. Some of the measures that were recently removed from *CEPA* should be restored. These include: "geographic authority for toxics regulation-making that provided an explicit basis for addressing such problems as toxic hot spots; authority to virtually eliminate certain toxic substances from commerce; and a single list of toxic substances to which all risk management measures are applicable".

5. *CEPA* should be amended to provide a clear right to, and effective remedy for, a healthy environment.

6. Legally binding and enforceable national ambient air quality standards for selected toxic substances like lead should be developed.[317]

[317] Joseph F Castrilli and Fe de Leon, "Blog: Canadian Environmental Protection Act – Improvements Still Needed" (26 June 2023), online (blog): <https://cela.ca/blog-canadian-environmental-protection-act-improvements-still-needed/>.

Conclusion

This legal guide to environmental action aims to highlight avenues available to those seeking environmental justice. These avenues include Ontario's *Environmental Bill of Rights,* nuisance law, *Charter* rights, and Indigenous rights and governance. They also include proposed reforms to laws and policies in Ontario and federally.

Our aim has been to provide activists the necessary starting points in their efforts to advocate for environmental justice and to ensure the safety of our future. These advocacy efforts are crucial for change and to help hold our governments accountable when they engage in adverse (in)actions.

Acknowledgements

The Asper Centre and CELA would like to thank all the students and staff of the Asper Centre and CELA who have contributed their work and input to this guidebook.

The 2022–2023 Asper Centre Environmental Rights Working Group was led by Elise Burgert and Hannah West, who originated the concept for this guidebook. Its members were Hannah Beltran, Mileva Boghosian, Matthew Chasmar, Carson Cook, Samuel Dreyzin, Noam Epstein Roth, Akash Jain, Muhammad Falah Khokhar, Shaelen MacPherson, Yasmin Rezaaifar, and Christy Zsa.

The 2023–2024 Asper Centre Environmental Rights Working Group was led by Mileva Boghosian, Carson Cook, and Hannah West. Its members were Sangwon Lisa Chung, Lucas Fisher, Maya Hribar, Akash Jain, Andre Lanoue, Roxanne Locke, Jacob Lokash, Amit Nehru, Alessia Ourique, Mariam Patsakos, and Angelina Zhang.

The 2024-2025 Asper Centre drafting team consisted of Rob De Luca, Maya Hribar, and Tal Schreier.

The 2025 CELA Summer Students were Michelle Lin and Olivia Parker. The CELA Lawyers involved were Joseph Castrilli and Theresa McClenaghan.