



Application for Review

**Ontario Regulation 115/20, entitled the
“Temporary Exemptions Relating to Declared Emergency”,
made under the *Environmental Bill of Rights, 1993***

Date:

May 14, 2020

Submitted by:

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Form: Application for Review
Part IV, *Environmental Bill of Rights, 1993*

Disclaimer: This form is not, and should not be construed as, legal advice. Please refer to the applicable statutes and regulations for the exact legal requirements.

General information about Applications for Review

Under section 67 of the *Environmental Bill of Rights* (EBR), the minister must consider each application for review in a preliminary way to determine whether the public interest warrants a review of the issues raised in your application. To make a determination about whether to conduct a review, the minister may consider several factors, including:

1. The ministry's Statement of Environmental Values
2. The potential for harm to the environment if the review applied for is not undertaken
3. The fact that matters sought to be reviewed are otherwise subject to periodic review
4. Any social, scientific or other evidence that the minister considers relevant
5. Any submission from a person who may be directly interested in the review and who received a notice about the review
6. The resources required to conduct the review
7. Any other matter the minister considers relevant

A minister will not determine that the public interest warrants a review of a decision which was made in the **last five years**, where that decision was made in a manner the minister considers consistent with the public participation provisions under the EBR. However, where appears to the minister that there is other evidence that failure to review the decision could result in significant harm to the environment and that this evidence was not considered when the decision sought to be reviewed was made, the minister may decide that the public interest warrants a review.

The personal information requested in this Application is gathered under the authority of section 61 of the EBR. The collection, use and disclosure of this information is governed by the *Freedom of Information and Protection of Privacy Act*. In addition, pursuant to section 72 of the EBR, notices to persons with direct interest in matters raised in this application and notices of the minister's decision(s) will not disclose your personal information.

The information collected by this form is required by the EBR and will be used to assist the minister to determine whether an existing policy, act, regulation or instrument of Ontario should be reviewed, or to decide whether there is a need for a new policy, act or regulation. The personal information collected will be used to notify you of the minister's decision whether to conduct a review and, if so, to notify you of the outcome of the review.

For more information on the requirements of this Application and how to use the EBR, or any questions about the collection of personal information, please contact the EBR lead for the specific ministry you

wish to submit your application to. For a list of ministries prescribed for Part IV of the EBR, please refer to [Ontario Regulation 73/94](#).

1. Applicants

1(a) Applicant Number One

Gordon Miller

[Redacted contact information]

Declaration of Ontario Residency:

I Gordon Miller am an Ontario resident and have been since birth, [Redacted]

Date: May 13, 2020

(Signature)

1(c) Corporate Applicant

Canadian Association of Physicians for the Environment (“CAPE”)

[Redacted contact information]

Declaration of Incorporation in Ontario:

The Canadian Association of Physicians for the Environment is a Canadian Federal Corporation, carrying on business with its head office in Ontario established by articles of incorporation dated December 23, 1994.

Date: May 13, 2020

Robin Edger, Executive Director & CEO
(Name of Officer and Position)

304824-1-M (Fed.)
1623846 (Ont.)
(Corporate Numbers)

(Signature)

The Applicants

Gordon Miller is an ecologist and environmental policy analyst with many years of experience. He received his undergraduate and graduate degrees from the University of Guelph and has worked in the manufacturing industry and consulting business as well as in academia as a professor. However, most of his career has been spent in the public sector starting as a scientist with the Ministry of the Environment and concluding his career by serving fifteen years as the Environmental Commissioner of Ontario, pursuant to Part III of the *Environmental Bill of Rights, 1993*. In that role, he was an independent Officer of the Legislative Assembly overseeing and critically evaluating government decision-making on the environment, climate change and energy conservation. Mr. Miller retired from that role in May of 2015. He now does public speaking on environment and energy topics, occasional consulting projects, and chairs the Board of Directors for Earthroots.

The Canadian Association of Physicians for the Environment (CAPE) is a physician-directed non-profit organization that seeks to improve human health by protecting the planet. The organization seeks to understand how the environment affects human health in order to be a resource to others. CAPE educates its members, other physicians and health professionals, the public, and policy-makers about environmental health issues, and takes action to contribute to the protection and promotion of human health by addressing issues of environmental degradation. CAPE also collaborates with other organizations, nationally and internationally, and supports and guides physicians to advocate for healthier environments and ecosystems.

2. Request for Application for Review

2(a) We request a review of an existing regulation.

What is the regulation that the Applicants' request be reviewed?

This is an application to the Minister of the Environment, Conservation and Parks (the "MECP") for review of Ontario Regulation 115/20, entitled the "Temporary Exemptions Relating to Declared Emergency" [9], made under the *Environmental Bill of Rights, 1993* (the "Act") [6] on April 1, 2020, and filed on April 1, 2020 (the "Exemption Regulation"). The Exemption Regulation was subsequently published on e-Laws on April 2, 2020; and printed in The Ontario Gazette on April 18, 2020.

Why is the Exemption Regulation a problem?

The Exemption Regulation creates many serious problems that are further discussed below under heading no. 3. These concerns include that the Exemption Regulation:

- is not restricted to anti-COVID-19 measures although it claims to be needed because of the emergency;
- eliminates all public participation in government decision-making regarding the environment while it is in effect;

- allows the government to decide to approve, for example, a landfill, gravel pit, or incinerator, or change an old-growth forestry policy without the public even knowing, as the regulation exempts public notice, comment or right to seek leave to appeal (instruments);
- exempts ministries from honouring their Statements of Environmental Values in their decision-making;
- applies even longer than the COVID-19 emergency order - 30 days longer; and
- is not even necessary because s. 29 of the Act is a better solution that allows the government to act quickly but upholds the Act's goals of transparency and accountability.

The Applicants understand that the COVID-19 pandemic may, in some instances, require emergency measures in relation to certain specific proposals and decisions under the Act. However, the Applicants believe that the Exemption Regulation is overly broad. Section 2 of the Exemption Regulation exempts all government proposals for Acts, policies, regulations and instruments under Part II of the Act. Part II of the Act includes key provisions that require: the posting of proposed Acts, regulations, policies and instruments for public notice and comment; the consideration of various ministry Statements of Environmental Values ("SEVs") [8] before those ministries make decisions; and public appeal rights in relation to instruments.

The exemption of ministry compliance with Part II means that for the duration of the Exemption Regulation, residents of Ontario will not be legally entitled to have notice of, nor means to participate in, provincial decisions that may have a significant effect on the environment. For example, an environmentally significant instrument (licence, permit or approval) regarding a new or expanded landfill, water taking, mine, industrial plant or incinerator, could be proposed, decided, and later implemented without public participation and there would be no public right to seek leave to appeal.

Further, while the Exemption Regulation is in effect, the ministers subject to the Act are not required to take every reasonable step to ensure that the ministry SEV is considered whenever decisions that might significantly affect the environment are made in the ministry.

All of the above can occur without the knowledge of any residents of Ontario, including Indigenous community members, except the relevant ministry and the proponent. This closed-door decision-making is unacceptable to the Applicants, and contrary to the public interest purposes of the Act.

How long will the Exemption Regulation apply?

The Exemption Regulation provides that it will continue to apply for 30 days after the emergency that was declared under the *Emergency Management and Civil Protection Act* [1] on March 17, 2020 (the "Emergency Declaration") [2] is terminated. The Emergency Declaration was extended on April 14 until May 12, 2020[3]. On May 6 the Emergency Order was extended to May 19, 2020[4], and on May 12 it was extended to June 2, 2020. Therefore, subject to further extension of the Emergency Declaration, the Exemption Regulation will apply until July 2, 2020. The period of time from March 17, 2020 until the Exemption Regulation ceases to apply will be referred to as the "Exemption Interval".

There is no explanation or logical reason why it is necessary to prevent public participation in government decision-making in relation to the environment for a longer period of time longer than the Emergency Declaration in respect of the COVID-19 pandemic.

Is the Exemption Regulation even necessary?

The Applicants submit that the Exemption Regulation is not even necessary. It is overly broad and superfluous given the availability of s. 29 of the Act[6], which allows the government to exempt proposals from the public participation obligations in Part II in emergency situations. Section 29 of the Act could be used to exempt proposals and decisions regarding environmental measures directly related to COVID-19. That would more appropriately address the situation without eliminating the ability of Ontarians to have knowledge of, and participate in, provincial decisions that may have a significant effect on the environment, and that have no direct connection to COVID-19 measures.

Section 29 provides:

Exception: emergencies

29 (1) Sections 15, 16 and 22 do not apply where, in the minister's opinion, the delay involved in giving notice to the public, in allowing time for public response to the notice or in considering the response to the notice would result in,

- (a) danger to the health or safety of any person;
- (b) harm or serious risk of harm to the environment; or
- (c) injury or damage or serious risk of injury or damage to any property.

Same

(2) If a minister decides under subsection (1) not to give notice of a proposal under section 15, 16 or 22, the minister shall give notice of the decision to the public and to the Auditor General.

Same

(3) Notice under subsection (2) shall be given as soon as reasonably possible after the decision is made and shall include a brief statement of the minister's reasons for the decision and any other information about the decision that the minister considers appropriate.

The referenced sections 15, 16 and 22 deal with a minister giving public notice of proposals for policies and Acts, regulations, and instruments, respectively. Therefore, s. 29 can be used by the Ontario government to deal with specific situations as needed where time is of the essence, such as where a delay would result in danger to the health of safety of persons, e.g., the immediate need for a new or expanded medical facility to test for COVID-19.

Had the government used the s. 29 emergency provision in regards to COVID-19 then there would have been no need for an overly broad Exemption Regulation that suspends all public participation in environmental decision-making, as well as the ministry SEVs and public appeal rights regarding instruments.

The goal of the Act is:

The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations. While the government has the primary responsibility for achieving this goal, the people should have means to ensure that it is achieved in an effective, timely, open and fair manner. [Emphasis added.]

Protecting the environment in an effective, timely, open and fair manner can be accomplished by the existing emergency exception in s. 29 of the Act. The Exemption Regulation is unnecessary, overly broad, and should be revoked.

What are the Applicants requesting?

The Applicants request, in addition to the relief requested under paragraph 2(b) below, that:

1. the Minister acknowledge receipt of this Application for Review, immediately give notice of a decision to review, and conduct the review as quickly as possible because there are too many potential adverse effects to the environment over the short-term and long-term;
2. upon completion of an expedited review, the Exemption Regulation be revoked forthwith, and a new policy and regulation be made as requested below under paragraph 2(b);
3. upon revocation of the Exemption Regulation, new proposals regarding COVID-19 and the environment be dealt with on a case-by-case basis under s. 29 of the Act;
4. legislative and regulatory reforms, including amendments or repeals, related to Ontario's environmental laws should be deferred until the 30 days following the termination of the Exemption Regulation;
5. all public comment periods that are currently running under the Act should be extended or suspended for the duration of the Exemption Regulation and begin to run again 30 days following the termination of the Exemption Regulation;
6. the province and prescribed ministries should defer making decisions on any proposed policies, Acts, regulations and instruments posted on the Environmental Registry prior to, and during, the Emergency Interval (or that would have been so posted before the Exemption Regulation), until 30 days following the termination of the Exemption Regulation; and
7. the ministries' Statements of Environmental Values ("SEVs") should continue to apply and be applied to all decision-making of prescribed ministries during the Exemption Interval.

2(b) We also request a review of the need for a new policy and regulation.

The Applicants repeat and rely upon the information and relief requested in paragraph 2(a) above.

Why is there a need for a new policy?

A new policy is required to ensure that s. 29 of the Act is appropriately utilized where emergency measures are required, and until the Act can be amended to that effect. It would be neither onerous nor time-consuming for the Ontario government or prescribed ministries to post information notices on the Environmental Registry from time-to-time using s. 29 in relation to emergency situations such as COVID-19. The Applicants request a new policy directing that:

1. in the event a time-sensitive measure is necessary to address an emergency situation, such as COVID-19, then s. 29 of the Act will be the primary means to exempt a specific proposal for a policy, Act, regulation or instrument or decision from the notice and comment provisions of the Act;
2. any exemptions of public participation rights under Part II of the Act, above-and-beyond those available under s. 29, shall be demonstrably and directly related to the emergency situation. In such case notice of the decision on the exemptions shall be posted forthwith on the Environmental Registry, and subject to public comment and ministry response; and
3. the new policy would be in effect until incorporated in an amendment to the Act, in due course.

Why is there be a need for a new regulation when the Exemption Regulation is “temporary”?

Unfortunately, the effects of the Exemption Regulation will not be “temporary”. As stated in the previous section, the Applicants do not object to reasonable and limited exemptions from Part II of the Act that are demonstrably related to COVID-19. To repeat, the Applicants believe that the Exemption Regulation is overly broad and superfluous given the availability of s. 29 of the Act. The Ontario government bulletins and ministerial assurances that give the impression that public participation under Part II will continue do not have the force of law, are very limited in scope, and do not in any respect answer the concerns of this Application for Review.

After the Emergency Declaration is terminated under the *Emergency Management and Civil Protection Act*, and the Exemption Regulation under the *Environmental Bill of Rights* subsequently ceases to apply, there will be existing and future environmental effects resulting from the implementation of proposals, ministry considerations, and decisions made during the Exemption Interval. These effects will not be temporary, unlike the Exemption Regulation itself, even if the Exemption Regulation is revoked.

The Applicants believe that a new regulation should be made to protect the environment and address potentially significant environmental effects in the aftermath of the termination of the Exemption Regulation (including by revocation). The new regulation would address, and give effect to, the relief requested and set out paragraph 2(a) above, and should:

1. require all ministers and prescribed ministries obligated to give notice of proposals under Part II of the Act to forthwith publicly disclose all proposals for Acts, policies, regulations and instruments that would have been posted on the Environmental Registry but for the Exemption Regulation;
2. require all ministers and prescribed ministries obligated to consider their SEVs in their decision-making to forthwith disclose all decision-making that did not consider the applicable ministry SEV(s) because of the Exemption Regulation; and
3. extend or suspend all rights to seek leave to appeal instruments under Part II of the Act until the later of 30 days following the termination of the Exemption Regulation (including by revocation) and 30 days following the date of disclosure under paragraph 1 above.

3. We believe that the ministry should undertake our review in order to protect the environment because the public interest warrants a review of the matters raised in this application for the reasons set out below.

A. Steps in the Minister’s Consideration of the Application for Review

1. Preliminary determination whether the public interest warrants a review

The Act requires the Minister, as a first step in an application for review, to consider the application in a preliminary way to determine whether the public interest warrants a review in his or her ministry of matters raised in the application (s. 67). The Act provides a shopping list of matters that the Minister may consider in determining whether the public interest warrants a review. This list appears on the first page of this Form, but is set out here as well for ease of reference.

- In determining whether the public interest warrants a review, the minister may consider,
- (a) the ministry statement of environmental values;
 - (b) the potential for harm to the environment if the review applied for is not undertaken;
 - (c) the fact that matters sought to be reviewed are otherwise subject to periodic review;
 - (d) any social, economic, scientific or other evidence that the minister considers relevant;
 - (e) any submission from a person who received a notice under section 66;
 - (f) the resources required to conduct the review; and
 - (g) any other matter that the minister considers relevant.

The Applicants submit that, in this case, the first two considerations above are of the greatest importance in determining whether the Application for Review is in the public interest.

In the case of an application for review of an existing policy, Act, regulation or instrument, as is the case under paragraph 2(a) above, there are two additional factors that the Minister may consider. They are not set out in this Form. The additional factors are:

- (a) the extent to which members of the public had an opportunity to participate in the development of the policy, Act, regulation or instrument in respect of which a review is sought; and
- (b) how recently the policy, Act, regulation or instrument was made, passed or issued.

The above factors will be discussed below.

(a) Statement(s) of Environmental Values (“SEV”)

Section 11 of the Act provides: “The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry.”

In the ordinary course, an application for review would involve a proposal or decision by one or two ministries. This is an exceptional situation. This Application for Review and the Exemption Regulation

do not just concern the MECP, but all of the ministries to whom Part II applies. Section 1 of O. Reg. 73/94 lists the ministries to whom the SEV requirement in Part II of the Act applies. The same group must give notice of proposals regarding Acts and policies, and a sub-set must give notice of proposed instruments. Proposals for regulations is categorized by Act. There are 15 ministries on the SEV list. It is a large and influential group of ministries. This greatly magnifies the pervasive effects of the Exemption Regulation. The ministries are:

1. Ministry of Agriculture, Food and Rural Affairs.
2. Ministry of Economic Development, Job Creation and Trade.
3. Ministry of Education.
4. Ministry of Energy, Northern Development and Mines.
5. Ministry of the Environment, Conservation and Parks.
6. Ministry of Government and Consumer Services.
7. Ministry of Health and Long-Term Care.
8. Ministry of Indigenous Affairs.
9. Ministry of Infrastructure.
10. Ministry of Labour.
11. Ministry of Municipal Affairs and Housing.
12. Ministry of Natural Resources and Forestry.
13. Ministry of Tourism, Culture and Sport.
14. Ministry of Transportation.
15. Treasury Board Secretariat.

The SEVs are a cornerstone of the Act – their role in upholding the importance and value of protecting the environment cannot be overemphasized. (See the decision of the Ontario Divisional Court in *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, 2008 CanLII 30290 (ON SCDC). <<http://canlii.ca/t/1z17k>>. [35] The SEVs signify the all-important commitment of the ministries taking the lead. They are a touchstone for the Auditor General's oversight (now encompassing the office of the Environmental Commissioner of Ontario) of ministries incorporating their SEV principles in their decision-making.

While each ministry customizes its own SEV, they all recognize and confirm the guiding principles and purposes of the Act, and support public participation in government decision-making to protect the environment in the public interest. The purposes are further discussed below in relation to the limits on the Minister's exercise of discretion under the Act.

The MECP SEV begins by restating the founding principles in the preamble of the Act, and then the purposes from s. 2, as follows:

Purposes of Act

2 (1) The purposes of this Act are,

- (a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act;
- (b) to provide sustainability of the environment by the means provided in this Act; and
- (c) to protect the right to a healthful environment by the means provided in this Act

Same

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

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

Same

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

- (a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;
- (b) increased accountability of the Government of Ontario for its environmental decision-making;
- (c) increased access to the courts by residents of Ontario for the protection of the environment;
- and
- (d) enhanced protection for employees who take action in respect of environmental harm.

The Applicants respectfully submit that the Minister exercise his discretion to conduct a review of the Exemption Regulation in accordance with this Application for Review, on an expedited basis, to protect the environment and be consistent with the general purposes of the Act and the specific purpose of Part II of the Act.

The MECP SEV explains:

Statements of Environmental Values (SEV) are a means for designated government ministries to record their commitment to the environment and be accountable for ensuring consideration of the environment in their decisions. A SEV explains:

- How the purposes of the EBR will be applied when decisions that might significantly affect the environment are made in the Ministry; and
- How consideration of the purposes of the EBR will be integrated with other considerations, including social, economic and scientific considerations, which are part of decision-making in the Ministry.

It is each Minister's responsibility to take every reasonable step to ensure that the SEV is considered whenever decisions that might significantly affect the environment are made in the Ministry. [Emphasis added.]

The Applicants submit that there is absolutely no need or justification for the Exemption Regulation to eliminate consideration of the ministry SEVs during the Emergency Declaration and thereafter during the even longer Exemption Interval. The SEVs are balanced and not absolute – exempting the SEVs

only defeats protection of the environment and is not in the public interest. The extent of the effect of exempting consideration of the ministry SEVs in their decision-making is enormous. It can best be appreciated by specific examples of what the MECP does not have to consider when it develops proposed Acts, regulations and policies because of the Exemption Regulation (emphasis added and wording altered accordingly):

- The Ministry **NEED NOT** adopt an ecosystem approach to environmental protection and resource management. This approach views the ecosystem as composed of air, land, water and living organisms, including humans, and the interactions among them.
- The Ministry **NEED NOT** consider the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society.
- The Ministry **NEED NOT** consider the effects of its decisions on current and future generations, consistent with sustainable development principles.
- The Ministry **NEED NOT** use a precautionary, science-based approach in its decision-making to protect human health and the environment.
- The Ministry's environmental protection strategy **WILL NOT** place priority on preventing pollution and minimizing the creation of pollutants that can adversely affect the environment.
- The Ministry **NEED NOT** endeavour to have the perpetrator of pollution pay for the cost of clean up and rehabilitation consistent with the polluter pays principle.
- In the event that significant environmental harm is caused, the Ministry **WILL NOT** work to ensure that the environment is rehabilitated to the extent feasible.
- Planning and management for environmental protection should strive for continuous improvement and effectiveness through adaptive management, **but the Ministry NEED NOT ensure that this happens**.
- The Ministry **NEED NOT** support and promote a range of tools that encourage environmental protection and sustainability (e.g. stewardship, outreach, education).
- The Ministry **NEED NOT** encourage increased transparency, timely reporting and enhanced ongoing engagement with the public as part of environmental decision making.
- Decisions on proposed Acts, regulations and policies **NEED NOT** reflect the above principles. The ministry **NEED NOT** work to protect, restore and enhance the natural environment.

Furthermore, the MECP and all listed ministries need NOT “provide opportunities for an open and consultative process when making decisions that might significantly affect the environment.” Specifically, even though the MECP SEV states that the ministry “believes that public consultation is vital to sound environmental decision-making”, the Ministry need NOT “provide opportunities for an open and consultative process when making decisions that might significantly affect the environment.” (See para. 6 of the MECP SEV.)

When making decisions that might significantly affect the environment, the Ministry need NOT “provide opportunities for involvement of Aboriginal peoples whose interests may be affected by such decisions so that Aboriginal interests can be appropriately considered.” (See para. 7 of the MECP SEV.) They can only rely upon the Ontario government’s constitutional obligation to consult with Aboriginal peoples.

The Applicants submit that exempting the MECP and listed ministries from applying their SEVs for non-COVID-19 proposals is not a reasonable step, and will likely mean that the SEVs are not considered “whenever decisions that might significantly affect the environment are made in the ministry.”

Again, this exemption is not necessary to respond to the COVID-19 emergency. Ministries were not required to necessarily conform to the values stated in their SEV in every situation, but they were required to at least explain how they considered them when making a decision. A ministry would not have been required to conform to the values set out in a SEV if the decision-maker considered that the COVID-19 emergency made compliance impossible or unreasonable; however, the Ministry would have been required to explain how the SEV was considered. The removal of the legal obligation for ministries to consider their SEVs undermines government accountability for decisions that might significantly affect the environment.

(b) The potential for harm to the environment if the review applied for is not undertaken

This factor is related to all of the other factors. The Applicants repeat and rely on their submissions in the rest of the Application for Review.

The Exemption Regulation undermines protection of the environment by dispensing with three key public participation rights in Part II of the Act:

1. ministries giving notice of proposals for Acts, regulations, policies and instruments, and the attendant public comment and review period;
2. the ministries’ SEV commitments; and
3. the public’s right to seek leave to appeal instruments.

Again, this Application for Review is not directed at proposals genuinely related to COVID-19, such as a temporary medical facility project, or the manufacture and distribution of needed personal protection equipment.

While the Exemption Regulation is in force, it will be difficult and may be impossible to determine what harm to the environment is, or will be, caused by the exemption of proposals and decisions from Part II of the Act. Some examples of potential environmental harm from proposals and decisions that might be made under the Exemption Regulation are: air and water pollution from industrial facilities; species at risk habitat destruction by new or expanded infrastructure development; sale or decommissioning of provincial parklands; and allowing ground water takings for water bottling.

There is both short-term and long-term potential harm to the environment if the Exemption Regulation is not reviewed and/or revoked. In the short-term, there is no requirement of public participation in proposals and decisions made or considered by ministries while the Exemption Regulation is in effect. There does not need to be any notice, on the Environmental Registry or otherwise, of proposals for Acts, regulations, policies or instruments that might have a significant effect on the environment. There is no required comment period for such proposals, and no right to seek leave to appeal decisions on instruments.

As discussed in the previous section, ministries will not have to meet their SEV commitments to incorporate protection of the environment into their internal considerations of proposals and decisions, which can have a significant environmental effects in years down the road. Also discussed is the concern that non-compliance by the 15 ministries with SEVs can result in exponential adverse environmental effects well into the future.

Government bulletins[10,11] and statements that the MECP “expects” that ministries will continue to honour their commitments to public participation in government decision-making, transparency and accountability do not carry great weight. Such pronouncements are not law and, with respect, only heighten the concern that the public will not know about proposals with significant environmental effects because now the government can selectively reveal what it chooses to reveal without any safeguards. Even worse, the discretionary posting of some proposals (at the whim of prescribed ministries) may give the public the false impression that all proposals are being posted when they are not.

Clearly, the vast majority of proposals for policies, Acts, regulations and instruments will have no direct connection to the Emergency Declaration and COVID-19. For example, proposals for new or expanded mines, roads, water takings, landfills are highly unlikely to have a nexus with COVID-19. But such proposals might have significant effects on the environment and yet they are exempted from public input and scrutiny by the Exemption Regulation.

The importance of public participation and government accountability has also been recognized in recent reports produced by the former Environmental Commissioner of Ontario and the Auditor General of Ontario. For example, in the 2018 Environmental Protection Report [13], the then Environmental Commissioner of Ontario stated (emphasis added):

The Environmental Bill of Rights gives Ontarians the right to participate in decision making that affects the environment. ... While environmental protection is the primary responsibility of the government, the people of Ontario play a critical role. The history of citizen involvement in environmental protection shows that Ontarians take their role seriously, and everyone benefits when stewardship is shared and properly supported.

The 2019 Annual Report of the Auditor General of Ontario [14] states (emphasis added):

The EBR gives Ontarians the ability to comment on environmental issues, and hold prescribed ministries accountable for environmental decision-making. The EBR ensures that the public can obtain information and participate in decisions that affect the environment. These rights exist to protect, conserve and restore the natural environment for the benefit of all Ontarians – present and future generations.

Public participation and government accountability are critical aspects of the environmental protection framework in Ontario – they are undermined by the Exemption Regulation. As such, the Applicants request that the MECP undertake a review of the Exemption Regulation in the public interest, revoke the regulation, and repair or pre-empt its environmental harm.

(c) The fact that matters sought to be reviewed are otherwise subject to periodic review

This an exceptional situation with immediate and long-term consequences for the protection of the environment. The Exemption Regulation is intended to be temporary and is not subject to periodic review. These circumstance warrant an immediate review with expedited timelines.

(d) Any social, economic, scientific or other evidence that the minister considers relevant

The public is attuned to the concept of sustainability, the interplay of environmental, social, economic and scientific principles and concerns, and government’s decision-making role. It is in the public interest for government to respond to emergency situations quickly and effectively. It is not in the public interest to let drop environmental protection or negate public participation in relation to matters not directly related to the root cause of the emergency situation. The Exemption Regulation is not a measured response; instead, it is an overreach to exempt all of Part II of the Act when utilizing s. 29 would suffice.

Social evidence

The social evidence is that Ontarians accept curtailment of certain freedoms in order to combat COVID-19 - for example, social distancing, testing and the closure of non-essential services. However, there is also evidence in letters, news reports and articles of the public speaking out against suspending environmental protection as the Exemption Regulation has done. [16, 17, 21, 22, 23, 24, 25, 28, 29, 31, 32, 33, 34]

To further illustrate the inconsistent and arbitrary nature of the Exemption Regulation, on the one hand the Ontario Premier has been giving daily live media updates on the Province’s response to COVID-19 in a gesture of transparency and accountability, while concurrently the Exemption Regulation has taken away public participation and government transparency and accountability regarding the environment by suspending Part II of the EBR. Fighting COVID-19 makes it abundantly clear that transparency and

accountability need not, and should not, be sacrificed to convenience and expediency in government decision-making.

Economic evidence

Ontario's Minister of Environment, Conservation and Parks Jeff Yurek has stated that the Exemption Regulation is part of the government's plan to improve "the flow of products and goods in the province". [25] Beyond the need to move quickly to maintain the flow of PPE and health services, there is no evidence that the Emergency Declaration or economic considerations require putting on hold all public participation in government environmental decision-making. To the contrary, at the federal level the government hopes to boost the economy and of Western Canada and protect the environment in the public interest by funding the remediation of orphan oil and gas wells. It is simply not reasonable for the Ontario government to proceed on the basis that what is good for the environment is bad for business or, conversely, what is bad for the environment, i.e., exempting proposals from all of Part II of the Act, is good for business. In the currency, and aftermath, of COVID-19 it is doubly important and in the public interest to continue to protect the environment. [See references for "social evidence" above.]

Scientific evidence

The MECP SEV states: "The Ministry uses a precautionary, science-based approach in its decision-making to protect human health and the environment." (Emphasis added.) However, there is no evidence that the Ontario government and the MECP followed a precautionary, science-based approach in passing the Exemption Regulation. It is accepted science that air pollution causes or contributes to respiratory diseases and our federal and provincial health officials have underscored that people with respiratory ailments are at higher risk to viruses such as COVID-19. It has been suggested, but not scientifically established, that the COVID-19 virus could spread, in part, by becoming airborne by being attached to particles of air pollutants. [26] The Exemption Regulation can result in proposals for new or expanded projects that might cause air pollution not being adequately scrutinized because they are exempted from Part II of the Act.

(e) Any submission from a person who received a notice under section 66

By letter dated April 17, 2020 [17], the Canadian Environmental Law Association ("CELA") wrote to Premier Doug Ford and various ministers (Minister of Environment Conservation and Parks, Minister of Natural Resources and Forestry, Minister of Energy, Northern Development and Mines, Minister of Indigenous Affairs, Minister of Municipal Affairs and Housing), the Ontario Commissioner of the Environment, Office of the Auditor General, and the Attorney General of Ontario about the widespread public concern that the Exemption Regulation inappropriately suspends key rights of the people of Ontario under the Act. The letter was endorsed and signed by almost 50 other groups in Ontario. The Applicants submit that CELA and the groups who signed the letter are persons with a direct interest in the matters raised in this application and, therefore, their concerns satisfy this factor as well as being social evidence.

(f) The resources required to conduct the review

The Applicants do not anticipate that the resources required to conduct the review would be onerous. The MECP and the various ministries are accustomed to keeping the relevant information regarding Part II of the Act, and in particular proposals for Acts, regulations, policies and instruments and, therefore, should already be keeping that information or it should be able to be produced very quickly. Furthermore, as the Exemption Regulation is only temporary, the relevant information to be provided by the MECP and other ministers may only cover a relatively short period of time.

(g) Any other matter that the minister considers relevant

The Applicants suggest that other matters the Minister should consider relevant include:

- there is a better alternative: the use of the exemption powers in s. 29 of the Act is the right way to protect the environment and preserve the application of Part II of the Act and public participation in government decision-making in the public interest;
- the Ontario Planning Act exemptions linked to the Emergency Declaration are not across-the-board like the Exemption Regulation and, although also problematic, do not limit public participation to anywhere near the same extent; [18]
- other jurisdictions (e.g., the United States' *Environmental Protection Act*) have very limited exemptions for monitoring and reporting and only if that is demonstrably COVID-19 related; [19, 20, 27] and
- in addition to the "precautionary approach" of the MECP SEV discussed above, the Minister should consider and be guided by the common law "precautionary principle" formulated by the *Supreme Court of Canada in 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 SCR 241, <<http://canlii.ca/t/51zx>> [36], and its many subsequent reformulations, to the extent that the "principle" and the "approach" supplement one another

Additional considerations on the preliminary review of an application to review an existing regulation

Public participation and recent passing of the regulation

The minister may consider the following two additional factors under s. 67 (3) of the Act on the preliminary view to determine whether the public interest warrants a review of an existing policy, Act, regulation or instrument, such as the Exemption Regulation.

- (a) the extent to which members of the public had an opportunity to participate in the development of the policy, Act, regulation or instrument in respect of which a review is sought

The public had no opportunity to participate in the development of the Exemption Regulation, and there was no review comment period. It was not posted on the Environmental Registry, except as a "bulletin" after the fact, and there was no other venue for public participation. The public only became aware of the Exemption Regulation after it had already entered into force.

(b) how recently the policy, Act, regulation or instrument was made, passed or issued

The Emergencies Regulation was made and filed on April 1, 2020. Despite this recent passage, it can have immediate and long-term enormous detrimental effects on the protection of the environment, as discussed above.

Review of a Recent Decision

The Act contains a *caveat* (s. 68) that the Minister “shall not determine that the public interest warrants a review of a decision made during the five years preceding the date of the application for review if the decision was made in a manner that the minister considers consistent with the intent and purpose of Part II.”

The purpose of Part II is set out in s. 3 of the Act:

3 (1) This Part sets out minimum levels of public participation that must be met before the Government of Ontario makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments. [Emphasis added.]

The Exemption Regulation was made during the five years preceding the Application for Review. However, the regulation exempts all of Part II of the Act, and was not made in a manner consistent with the intent and purpose of the Act. The intent and purpose of Part II is to set out minimum levels of public participation in government decision-making on certain environmentally significant proposals, including regulations. It cannot be consistent with the intent of Part II to exempt all of Part II so that there is no minimum level of public participation – the Exemption Regulation means that there is no required minimum level of public participation. In fact, it creates a free-for-all situation that gives prescribed ministries virtually unfettered discretion to do what they want during the Exemption Interval. And, again, this change was made without public notice and input.

The Applicants submit that s. 68 of the Act is not a bar to the Application for Review. The exemption of all of Part II of the Act regarding all environmental proposals does not, and cannot possibly, meet the minimum level of public participation required by Part II of the Act.

While it is not necessary to rely on the s. 68(2) exception, the five year caveat also does not apply here because “there is social, economic, scientific or other evidence that failure to review the decision could result in significant harm to the environment; and the evidence was not taken into account when the decision sought to be reviewed was made.” Social, economic and scientific factors are discussed above. There is social and scientific evidence that a failure to review the Exemption Regulation could result in significant harm to the environment and there is no evidence that these things were considered in passing the regulation.

The Exemption Regulation undermines public participation, environmental protection, and government accountability which are key to Part II of the Act. Failure to review the Exemption Regulation decision could result in significant harm to the environment, considering the importance of government

accountability and public participation in Ontario's environmental protection framework - the public interest warrants a review.

2. Next Steps of Application for Review

The Minister must acknowledge receipt of the Application for Review within 20 days (s. 65).

Within sixty days of receiving the Application for Review the Minister shall give notice of his or her decision whether to conduct a review, together with a brief statement of the reasons for the decision (s. 70).

When the minister determines that the public interest warrants a review under section 67 then he or she shall conduct the review "within a reasonable time" (s. 69).

B. Expediting the timelines for the preliminary determination, acknowledging receipt, and conducting the review

The Applicants repeat and rely upon the submissions above that while the Exemption Regulation may be temporary it will have long-term significant effects on the environment that are not in the public interest.

The Applicants submit that there is urgency in this Application for Review and they request that the timelines for the preliminary determination, receipt, decision and conducting the Review be expedited and completed as soon as possible while the Emergency Declaration or Exemption Regulation is in effect. As matters stand right now, there is no legal requirement for any public participation and accountability under Part II of the Act regarding government proposals and decisions by any of the ministries listed in the Act.

The Minister should be able to review the Exemption Regulation as quickly as it was passed and because it is only one and a half months old as of the date of this application. Further, substantially shortening the usual lengthy timelines of a review would be consistent with a stated goal of the Act: to protect the environment in an effective and timely, open and fair manner (Preamble).

C. Minister's Discretion and Purposes of the Act

The Application for Review process is subject to the Minister's discretion in many respects. The Applicants respectfully submit that the Minister should exercise his discretion in favour of conducting an expedited review.

The exercise of discretion in determining a preliminary assessment of the Application for review is guided by the principles and purposes of the Act. (See *Katz Group Canada Inc v Ontario (Health and Long-Term Care)* and *Canada (Minister of Citizenship and Immigration) v. Vavilov.*) [37] The specific purpose of Part II is found in s. 3 of the Act. While it is set out above, due its importance it is repeated here: "This Part sets out minimum levels of public participation that must be met before the Government

of Ontario makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments.” The Exemption Regulation does not even require a minimum level of public participation in decisions about any kinds of environmentally significant proposals. With respect, it would be contrary to the purpose of Part II of the Act to not proceed with the Application for Review.

The Minister’s discretion is also subject to the overarching purposes of the Act. They are all relevant to the determination of this Application for Review because the Exemption Regulation is not focused but exempts all of Part II of the Act. The purposes of the Act are set out above in the discussion of the SEVs. Their theme is that public participation has an essential role in government decision-making and the protection of the environment. Part II of the Act embodies that theme - the Exemption Regulation does not. The Applicants submit that the Minister should exercise his discretion to proceed with the Application for Review, not only because that would be consistent with the specific purpose of Part II of the Act, it would also be consistent with general purposes in Part I of the Act.

4. The following is a summary of the evidence that supports our belief that the review applied for should be undertaken to protect the environment (for example, scientific studies and reports):

The evidence in support of the Application for Review has been referred to above and is set out in the table below. Copies of the documents are attached by hyperlink, given the circumstance of office closure. They are part of the Applicants’ answer to Questions #3 and #4.

The Applicants do not have access to any evidence in respect of public consultation prior to the passing of the Exemption Regulation because there was not any consultation. Any other form of consultation that may have occurred is solely within the knowledge of the government and the persons with whom the government consulted, and not within the knowledge of the Applicants.

Likewise, the Applicants do not know what proposals or decisions that might have significant effects on the environment have been made during the Exemption Interval but have not been posted on the Environmental Registry.

Item #	Document or material, including description	Copy included
1.	<i>Emergency Management and Civil Protection Act</i> (“EMCPA”) https://www.ontario.ca/laws/statute/90e09	Yes, by hyperlink.
2.	EMCPA - Ontario Regulation 50/20: Declaration of Emergency. https://www.ontario.ca/laws/regulation/200050	“
3.	EMCPA - Ontario Regulation 105/20: Order Made Under the Act – Extension of Emergency. https://www.ontario.ca/laws/regulation/200105	“
4.	EMCPA - Ontario Regulation 106/20: Order Made Under the Act – Extensions and Renewals of Orders. https://www.ontario.ca/laws/regulation/200106	“

5.	EMCPA – Ontario Regulation 73/20: Order under Subsection 7.1(2) of the Act – Limitation Periods https://www.ontario.ca/laws/regulation/200073	“
6.	<i>Environmental Bill of Rights, 1993</i> , SO 1993, C 28 (“EBR”) https://www.ontario.ca/laws/statute/93e28	“
7.	EBR - Ontario Regulation 73/94: General. https://www.ontario.ca/laws/regulation/940073	“
8.	Statement of Environmental Values: Ministry of the Environment and Climate Change. https://ero.ontario.ca/page/sevs/statement-environmental-values-ministry-environment-and-climate-change	“
9.	EBR - Ontario Regulation 115/20: Temporary Exemptions Relating to Declared Emergency. https://www.ontario.ca/laws/regulation/200115	“
10.	ERO #019-1599: Temporarily exempting proposals from the application of the Environmental Bill of Rights (EBR). https://ero.ontario.ca/notice/019-1599	“
11.	EBR - Important notice: Temporary changes to posting requirements during the COVID-19 pandemic. https://ero.ontario.ca/page/emergency-covid-19	“
12.	<i>Legislation Act, 2006</i> , SO 2006, C 21. https://www.ontario.ca/laws/statute/06l21	“
13.	Environmental Commissioner of Ontario, <i>Back to Basics: 2018 Environmental Protection Report</i> . https://docs.assets.eco.on.ca/reports/environmental-protection/2018/Back-to-Basics.pdf	“
14.	Office of the Auditor General of Ontario, <i>Annual Report 2019: Reports on the Environment</i> , vol 2. https://www.auditor.on.ca/en/content/annualreports/arreports/en19/2019AR_v2_en_web.pdf	“
15.	Environmental Registry of Ontario – Postings During the State of Emergency. https://ero.ontario.ca/search?search=&date%5Bmin%5D=2020-03-17&date%5Bmax%5D=2020-04-30	“
16.	Ecojustice, Press Release, “Ecojustice reacts: Ford suspends public participation in proposed Ontario government environmental decisions” (7 April 2020). https://www.ecojustice.ca/pressrelease/ford-suspends-public-participation/	“
17.	Letter from CELA and numerous environmental organizations to Premier Doug Ford (17 April 2020) regarding O Reg 115/20: Temporary Exemptions Relating to Declared Emergency. https://cela.ca/wp-content/uploads/2020/04/EBRExemptionLetter2020.pdf	“

18.	ERO #019-1653: Bill 189, Coronavirus (COVID-19) Support and Protection Act, 2020 amendments to the Planning Act and Ontario Regulation 149/20 Special Rules Relating to Declared Emergency. https://ero.ontario.ca/notice/019-1653	“
19.	United States Environmental Protection Agency, Memorandum, “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program” (26 March 2020). https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf	“
20.	United States Environmental Protection Agency, News Release, “EPA Corrects the Record after Reckless Reporting on Temporary Compliance Guidance” (30 March 2020). https://www.epa.gov/newsreleases/epa-corrects-record-after-reckless-reporting-temporary-compliance-guidance	“
21.	Emma McIntosh, “Ontario suspends environmental oversight rules, citing COVID-19”, <i>National Observer</i> , (8 April 2020). https://www.nationalobserver.com/2020/04/08/news/ontario-suspends-environmental-oversight-rules-citing-covid-19	“
22.	Sabrina Spencer, Dufferin Harper, Jonathan W. Kahn and Charles Kazaz, “Environmental Regulatory Compliance in B.C., Alberta, Ontario and Quebec During COVID-19”, <i>Lexology</i> (16 April 2020). https://www.lexology.com/library/detail.aspx?q=1b5b21ea-b3f4-4a47-a12e-d1025252a926	“
23.	Earthroots, “The Ford government has created a Black Hole of Environmental Public Accountability, hidden behind the COVID-19 response” (21 April 2020). https://earthroots.org/79-uncategorised/440-they-have-created-a-black-hole-of-environmental-public-accountability	“
24.	Kerrie Blaise, “Earth Day report: perils of reducing environmental rights during COVID-19”, <i>Lawyer’s Daily</i> (22 April 2020). https://www.thelawyersdaily.ca/naturalresources/articles/18729	“
25.	Angelina King, “Environmentalists slam Ontario for suspending oversight regulation amid pandemic”, <i>CBC News</i> (23 April 2020). https://www.cbc.ca/news/canada/toronto/ontario-temporarily-suspends-environmental-oversight-law-citing-covid-19-1.5541875	“
26.	Isabelle Gerretsen, “How air pollution exacerbates Covid-19”, <i>Future Planet</i> (27 April 2020). https://www.bbc.com/future/article/20200427-how-air-pollution-exacerbates-covid-19	“
27.	Rachel Frazin, “More than 150 groups write in opposition to EPA coronavirus compliance policy”, <i>The Hill</i> (28 April 2020). https://thehill.com/policy/energy-environment/495136-more-than-150-groups-write-in-opposition-to-epa-coronavirus	“

28.	Greg Derbyshire, "Government must protect environment, too", Letter to the editor, <i>Brantford Expositor</i> (28 April 2020). https://www.brantfordexpositor.ca/opinion/letters/letters-to-the-editor-216	"
29.	Jorge Barrera, "Northern Ontario First Nations want pause to mining permits until COVID-19 subsides", <i>CBC News</i> (30 April 2020). https://www.cbc.ca/news/indigenous/first-nations-mining-permits-ontario-covid19-1.5550033	"
30.	Emma McIntosh, "Ontario allowing 'secret lobbying' amid COVID-19: critic", <i>National Observer</i> (1 May 2020). https://www.nationalobserver.com/2020/05/01/news/ontario-allowing-secret-lobbying-amid-covid-19-critic	"
31.	Andrea Kirkwood, "Suspension of EBR shortsighted", Letter to the editor, <i>Oshawa Express</i> (4 May 2020). https://oshawaexpress.ca/suspension-of-eb-r-shortsighted/	"
32.	Erin Hayward, "We must protect our environment", Letter to the editor, <i>Oshawa Express</i> (4 May 2020). https://oshawaexpress.ca/we-must-protect-our-environment/	"
33.	Saul Chernos, "Mining companies using the cover of COVID to push through projects", <i>NOW</i> (May 7, 2020). https://nowtoronto.com/news/coronavirus-ontario-environment-doug-ford-essential-service/	"
34.	Sasha Kutuzyan, "Suspending environmental requirements of Environmental Bill of Rights may lead to extensive environmental damage" Letter to the editor, <i>The Star</i> (May 12, 2020). https://www.thestar.com/opinion/letters_to_the_editors/2020/05/12/suspending-environmental-requirements-of-environmental-bill-of-rights-may-lead-to-extensive-environmental-damage.html	
35.	<i>Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)</i> , 2008 CanLII 30290 (ON SCDC), < http://canlii.ca/t/1z17k >. Other citations: 241 OAC 156 — 36 CELR (NS) (3d) 191 — [2008] CarswellOnt 3658 — [2008] OJ No 2460 (QL).	"
36.	<i>114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)</i> , 2001 SCC 40 (CanLII), [2001] 2 SCR 241, < http://canlii.ca/t/51zx >	"
37.	<u><i>Katz Group Canada Inc v Ontario (Health and Long-Term Care)</i></u> , 2013 SCC 64, [2013] 3 SCR 810, at paras. 24-28. <i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i> , 2019 SCC 65 (CanLII), note 9 at para. 11, and para. 20. < http://canlii.ca/t/j46kb >	"