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Using the Courts under the Environmental Bill of Rights: A Public Interest Plaintiff's Perspective

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USING THE COURTS UNDER THE ENVIRONMENTAL BILL OF RIGHTS: A PUBLIC INTEREST PLAINTIFF'S PERSPECTIVE

By
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1. Introduction

The Terms of Reference for the Minister's Task Force on the Environmental Bill of Rights expressly provided that the EBR should be based on a number of policy objectives and principles, including:

- the public's right to a healthy environment;
- the enforcement of this right through improved access to the courts and tribunals, including an enhanced right to sue polluters;
- increased public participation in environmental decision-making by government; and
- increased government responsibility and accountability for the environment.[2]

The Terms of Reference also listed a number of potential tools which could be incorporated into the EBR to achieve these objectives, such as:

- an expanded civil cause of action for environmental harm;
- an expanded right of standing for environmental claims; and

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[2] Report of the Task Force on the Ontario Environmental Bill of Rights (July, 1992), p.2.

- expanded provisions for judicial review of government action.[3]

After reviewing these and other options, the Task Force ultimately recommended the passage of an EBR which included mechanisms to ensure legal accountability for environmental misconduct. In particular, the Task Force's draft EBR included: a new cause of action to protect public resources; standing reform with respect to public nuisances causing environmental harm; and opportunities for judicial review of certain governmental activities under the EBR.[4] After undertaking extensive public consultation on the draft EBR, the Ontario government enacted Bill 26,[5] which was proclaimed in force on February 15, 1994. Significantly, Bill 26 includes the legal reforms recommended by the Task Force, thereby significantly enhancing public access to the courts to protect the environment.

The purpose of this article is twofold: first, to briefly review the rationale for increasing public access to environmental justice; and second, to analyze the new legal reforms and identify some litigation strategies for public interest plaintiffs wishing to use the courts under the EBR.

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[3] Ibid., p.3.

[4] Ibid., pp.59-60 and pp.91-111.

[5] An Act respecting Environmental Rights in Ontario. The short title of the act is the Environmental Bill of Rights, 1993: see s.124.

2. Rationale for Increasing Access to Environmental Justice

In general, the causes of action used in the environmental context (i.e. nuisance, negligence, trespass, riparian rights, and strict liability) evolved at common law to permit persons to seek redress for personal harm, property damage, or pecuniary loss caused by tortious conduct. Since these causes of action are primarily aimed at protecting private interests, it has been exceptionally difficult for public interest plaintiffs to use these causes of action to protect public resources such as air, land or water from degradation or contamination. For example, the law of standing and the public nuisance rule have presented serious barriers to public interest environmental litigation in Ontario and elsewhere in Canada.[6] These barriers have prompted some commentators to question the utility of existing causes of action to protect the environment.[7]

These procedural and substantive hurdles to public interest litigation are unfortunate since litigation can achieve a number of worthy environmental objectives, including:

- stopping or delaying environmentally harmful projects or unsustainable

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[6] See, for example, Fillion v. New Brunswick International Paper Co., [1934] 3 D.L.R. 22 (N.B.C.); Hickey v. Electric Reduction Co. (1970), 21 D.L.R. (3d) 368 (Nfld. S.C.); Green v. The Queen in Right of Ontario, [1973] O.R. 396 (Ont. H.C.); and Rosenburg v. Grand River Conservation Authority (1976), 12 O.R. (2d) 496 (Ont. C.A.).

[7] See, for example, J.P.S. McLaren, "The Common Law Nuisance Actions and the Environmental Battle: Well-Tempered Swords or Broken Reeds?" (1972), 10 Osg.H.L.J. 505; Andrew J. Roman, "Locus Standi: A Cure in Search of a Disease", in J. Swaigen (ed.), Environmental Rights in Canada (CELRF, 1981); and Ontario Law Reform Commission, Report on the Law of Standing (OLRC, 1989), chapter 3.

development;[8]

- ensuring government compliance with regulatory requirements (i.e. environmental assessment laws);[9] and

- educating and motivating governments and citizens in relation to necessary law and policy reforms.[10]

In light of the benefits associated with public interest environmental litigation, the EBR should be viewed as an important breakthrough in facilitating greater public access to the courts to protect the environment. If used with skill in appropriate cases, EBR litigation has significant potential to positively affect governmental and private sector behaviour in relation to the environment.[11]

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[8] See, for example, Waste Not Wanted Inc. v. Her Majesty the Queen in Right of Ontario (1987), 2 C.E.L.R. (N.S.) 24 (F.C. T.D.).

[9] See, for example, Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment) (1989), 3 C.E.L.R. (N.S.) 287 (F.C. T.D.); affd. 4 C.E.L.R. (N.S.) 1 (F.C.A.); Friends of the Oldman Dam Society v. Canada (Minister of Transport) (1992), 7 C.E.L.R. (N.S.) 1 (S.C.C.).

[10] E.J. Swanson and E.L. Hughes, The Price of Pollution: Environmental Litigation in Canada (Environmental Law Centre, 1990), p.105 and pp.112-14.

[11] See, for example, Andrew J. Roman and Mart Pikkov, "Public Interest Litigation in Canada", in D. Tingley (ed.), Into the Future: Environmental Law and Policy for the 1990's (Environmental Law Centre, 1990), p.165: "The presence or absence of public interest litigation in the environmental field in Canada can have an important impact, not only on specific environmental decisions made but also on the bureaucratic and corporate atmosphere in which such decisions are considered."

3. Harm to Public Resources: The Right to Sue

3.1 Overview of the EBR Cause of Action

The EBR creates a new civil cause of action which permits Ontario residents to sue persons who cause significant harm to public resources in contravention of certain Acts, regulations or instruments. This cause of action may also be used in an anticipatory manner where the significant harm, or the contravention, is imminent but has not yet occurred. The action is to be commenced in the Ontario Court (General Division), and the civil burden of proof is on the plaintiff to prove his or her case on a balance of probabilities.[12] The normal rules of court apply to s.84 actions.[13]

In particular, s.84(1) of the EBR provides as follows:

> Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful.

As described below, there are a number of conditions precedent and preliminary considerations which must be taken into account before a s.84 action is commenced by a public interest plaintiff.

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[12] EBR, s.84(8).

[13] EBR, s.84(10).

3.2 Conditions Precedent and Preliminary Considerations

(a) Contravention of an Act, Regulation or Instrument

In order to bring a s.84 action, the public interest plaintiff must be able to prove an actual or imminent contravention of "an Act, regulation or instrument prescribed for the purpose of Part V" of the EBR. Part V contains provisions which permit residents to submit applications requesting governmental investigation of contraventions under prescribed Acts, regulations or instruments.[14]

At the present time, eighteen of the most important environmental statutes in Ontario[15] have been prescribed for the purposes of Part V in accordance with the following schedule:[16]

Act	Date Subject to Part V
Aggregate Resources Act	April 1, 1996
Conservation Authorities Act	April 1, 1996

[14] EBR, ss.74 to 81.

[15] Although other important statutes, such as the Niagara Escarpment Planning and Development Act and the Planning Act, are conspicuous in their absence from this list of prescribed Acts.

[16] O.Reg.73/94, s.9.

Crown Timber Act	April 1, 1996
Endangered Species Act	April 1, 1996
Energy Efficiency Act	August 15, 1994
Environmental Assessment Act	August 15, 1994
Environmental Protection Act	August 15, 1994
Fisheries Act (Canada)	April 1, 1996
Game and Fish Act	April 1, 1996
Gasoline Handling Act	April 1, 1996
Lakes and Rivers Improvement Act	April 1, 1996
Mining Act	April 1, 1996
Ontario Water Resources Act	August 15, 1994
Pesticides Act	August 15, 1994
Petroleum Resources Act	April 1, 1996
Provincial Parks Act	April 1, 1996
Public Lands Act	April 1, 1996
Waste Management Act	August 15, 1994

Over the next few years, public interest plaintiffs will undoubtedly prefer to plead and rely upon the general prohibitions contained in the Environmental Protection Act,[17] Fisheries

[17] R.S.O. 1990, c.E.19, s.14.

Act,[18] Ontario Water Resources Act,[19] Pesticides Act,[20] and Public Lands Act[21] as triggers for the s.84 action. This is likely for two main reasons: first, these prohibitions are quite broad in scope and they potentially apply to a wide variety of environmentally harmful activities; and second, jurisprudence already exists under these statutes as to what constitutes a "contravention" for the purposes of the legislation. However, as public interest plaintiffs (and their counsel) gain additional experience with s.84 actions, greater reliance will be placed upon the more specific or technical requirements of the prescribed statutes.

Once a prescribed statute is subject to Part V of the EBR, then regulations under that statute are also prescribed for the purposes of Part V and can be used to trigger a s.84 action.[22] Given the extensive nature of the regulatory regime under the above-noted statutes,[23] this provision offers public interest plaintiffs additional options for pleading purposes.

"Instruments"[24] are prescribed for the purposes of Part V if they are considered to be

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[18] R.S.C. 1985, c.F.14, s.35(1) and 36(3).

[19] R.S.O. 1990, c.O.40, s.30.

[20] R.S.O. 1990, c.P.11, s.4.

[21] R.S.O. 1990, c.P.43, s.14.

[22] O.Reg. 73/94, s.10.

[23] See, for example, the regulatory standards in Regulations 346 and 347 under the Environmental Protection Act.

[24] "Instruments" are defined as: "any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act, but does not include a regulation": see EBR, s.1(1).

Class I, II and III instruments under the EBR.[25] Thus, in appropriate cases, a public interest plaintiff will be able to plead that a defendant has contravened the terms and conditions of a Class I, II or III instrument, provided that significant harm to a public resource has occurred or will occur. At the present time, the Ministry of Environment and Energy has proposed to classify 29 of its statutory approvals as Class I, II or III instruments, including control orders, certificates of approval, Director's orders, and water-taking permits.[26] It is also noteworthy that many of the above-noted environmental statutes make it an offence not to comply with the terms and conditions of licences, permits, orders or certificates of approval.[27] Again, this provides a plaintiff with considerable latitude and flexibility when drafting pleadings in a s.84 action.

It is important to note that the s.84 action only applies to a contravention of an Act, regulation or instrument that occurs after the Act, regulation or instrument is prescribed for the purposes of Part V.[28] This provision is intended to prevent plaintiffs from pursuing contraventions or environmental harm which occurred years or decades ago. However, in cases where a contemporary contravention has caused further damage to a public resource previously harmed by the defendant, the EBR does not prevent plaintiffs from commencing a s.84 action to enjoin the recent harm and remediate the public resource. In such cases,

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[25] O.Reg.73/94, s.11.

[26] See "Draft Regulation: MOEE Classification of Instruments" (August, 1993).

[27] See, for example, s.186 of the Environmental Protection Act.

[28] EBR, s.83.

the court can address the issue of distinguishing between "historic" harm and recent harm during the development of an appropriate restoration plan. The same principle would arguably apply where a defendant's contravention has harmed a public resource which has been previously degraded by other persons. It should be noted that there is a general two year limitation period governing the commencement of the s.84 action.[29]

As noted above, the contravention must be proven "on a balance of probabilities" rather than "beyond a reasonable doubt." This presents the public interest plaintiff with some strategic considerations where a contravention has occurred: the plaintiff may elect to commence a private prosecution against the defendant (with all of the attendant advantages and disadvantages of prosecution[30]); or the plaintiff may elect to commence a s.84 action under the EBR.[31] Interestingly, the EBR Task Force expressly noted that the new cause of action did not replace or repeal the right of private prosecution.[32]

Factors which may lead the public interest plaintiff to pursue the contravention through a s.84 action rather a private prosecution are as follows:

- lower standard of proof (balance of probabilities versus beyond reasonable doubt);
- ability to use the Rules of Civil Procedure (i.e. discovery);

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[29] EBR, s.102.

[30] For a summary of the advantages and disadvantages of prosecution, see D.Estrin and J.Swaigen, Environment on Trial (CIELAP, 1993), at pp.50-54.

[31] Or, arguably, the plaintiff could do both, although the advisability of doing so is questionable.

[32] EBR Task Force, Supplementary Report.

- ability to recover costs; and
- ability to obtain injunctive relief or restoration plan including interlocutory relief

On the other hand, the following factors may mitigate against pursuing the contravention through a s.84 action:

- greater cost and complexity of civil proceedings;
- length of time to get to trial; and
- potential order to pay costs, post security for costs, or provide an undertaking as to damages.

In summary, the usual factors that should be considered prior to commencing litigation (i.e. likelihood of success, cost risk, judgment proof defendant, etc.) must be taken into account before a s.84 action is commenced.

(b) Significant Harm to a Public Resource

Assuming that a contravention has occurred or will imminently occur, the public interest plaintiff must also prove, on a balance of probabilities, that the contravention has caused, or will imminently cause, "significant harm to a public resource of Ontario."

"Harm" is broadly defined in s.1 as:

> any contamination or degradation and includes harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration or radiation.

"Public resource" is broadly defined in s.82 as:

(a) air,

(b) water, not including water in a body the bed of which is privately owned and on which there is no public right of navigation,

(c) unimproved public land,[33]

(d) any parcel of public land that is larger than five hectares and is used for,

(i) recreation,

(ii) conservation,

(iii) resource extraction,

(iv) resource management, or

(v) a purpose similar to one mentioned in subclauses (i) to (iv), and

(e) any plant life, animal life, or ecological system associated with any air, water or land described in clauses (a) to (d).

The EBR does not attempt to define what constitutes a "significant" harm. Undoubtedly, this is attributable, in part, to the difficulty in establishing a generic definition of "significant" which would be appropriate for the diverse range of cases that are likely to be undertaken under s.84. As occurred in Michigan under the first EBR legislation,[34] it will be up to the courts to develop a common law threshold as to what constitutes "significant" harm to a public resource.

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[33] "Public land" is defined as land owned by the provincial crown, municipalities, and conservation authorities. Note that s.1 defines land as including: land covered by water" to ensure that wetlands are protected by the EBR.

[34] Michigan Environmental Protection Act.

The broad definition of public resource gives public interest plaintiffs the potential to bring a s.84 action in a variety of circumstances where a contravention of a prescribed statute has caused significant harm to:

- conservation authority land
- provincial parks
- Crown land and timber
- fish and wildlife
- water courses
- wetlands
- airsheds

(c) Request for Investigation

In general, where the plaintiff believes that an actual contravention has occurred, a s.84 action cannot be commenced unless the plaintiff has applied for an investigation under Part V of the EBR and the government's response is not reasonable or is not received in a reasonable period of time.[35] Significantly, the EBR does not attempt to define what is "reasonable" with respect to the content or timing of the government response.[36] Accordingly, the courts will undoubtedly make the determination of "reasonability" on a case-by-case basis until some common principles or standards are developed and understood.

The policy objective underlying this preliminary step is clear: since the plaintiff is alleging

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[35] EBR, s.84(2). However, see also s.84(6), which negates the need to take this preliminary step where the delay in requesting an investigation would result in significant harm or serious risk of significant harm to a public resource.

[36] However, when assessing whether a government response was received within a "reasonable time", the court is directed to consider the timeframes for the response prescribed in ss.78-80: see EBR, s.84(3).

harm to a public resource, the responsible public agency should be notified and be given the opportunity to take appropriate action. This is because the public agency presumably has the mandate, resources and interest in pursuing such matters. However, where the agency refuses to respond to the request, or has responded in an inadequate and unreasonable fashion, then the public interest plaintiff may elect to proceed with the s.84 action. It should also be noted that filing an investigation request may provide the plaintiff with the tactical advantage of receiving additional proof of the contravention at government expense. However, it is less clear how this might work in practice where the contravention is alleged to have been committed by Her Majesty the Queen in Right of Ontario.

The plaintiff's request for an investigation is an important preliminary step in s.84 litigation which should be carefully pleaded in the Statement of Claim. In particular, the plaintiff's pleadings should include: the date and content of the investigation request; the grounds for the request; the date and content of the government response, if any; and an indication why the government response, if any, is unreasonable. In some ways, this requirement parallels current practice in private prosecutions where informants often build a "paper trail" of complaints to government prior to attending before a justice of the peace to lay an information.

It is noteworthy that under Part V, two persons are required to prepare, swear and submit the application for an investigation.[37] However, since s.84 only speaks of "plaintiff" in the

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[37] EBR, s.74.

singular, it appears that only one of the applicants needs to be named as the plaintiff in a s.84 action, although there is no barrier to naming both applicants as co-plaintiffs. It should also be kept in mind that only "persons" (i.e. natural persons or corporations) are able to file investigation requests under the EBR. Thus, counsel should avoid filing investigation requests in the name of unincorporated associations or other entities which lack the capacity to sue or be sued. Similarly, it may also be advantageous for strategic reasons (i.e. cost exposure) to bring a s.84 action in the name of a corporation where both a person and a corporation have jointly filed an investigation request under Part V of the EBR.

(d) Farm Practices Protection Act

Where actual or imminent harm to a public resource results from odour, noise or dust from an agricultural operation, the plaintiff may not commence a s.84 action unless he or she has applied to the Farm Practices Protection Board under the Farm Practices Protection Act.[38] Under this statute, a hearing is held to determine if the noise, odour or dust results from a "normal farming practice", in which case the farmer is protected from liability.[39] If the conduct complained of is determined by the Board not to be a "normal farming practice", then the litigation may proceed in the normal course. Thus, if the public interest plaintiff is obliged by the facts to take this preliminary step, it should be undertaken and pleaded in the Statement of Claim to avoid arguments down the road that the action is statute-barred

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[38] EBR, s.84(4) to (5). Again, it is not necessary to take this preliminary step if the delay in doing so would result in significant harm or serious risk of harm to a public resource.

[39] See Farm Practices Protection Act, R.S.O. 1990, c.F-6, s.2(1).

by reason of the Farm Practices Protection Act.

Although there appear to be very few successful nuisance claims against Ontario farmers, the EBR Task Force recommended that the Farm Practices Protection Act should continue to provide protection to normal farming practices within the province.[40] However, given the limited scope of the statutory protection (i.e. odour, noise and dust), it is unlikely that the Farm Practices Protection Act will be used to preempt appropriate s.84 actions where significant harm to a public resource has resulted from agricultural operations.

(e) Exception to the Preliminary Steps

Given the various requirements associated with applying for investigations under Part V of the EBR, it is not unreasonable to expect that it may take time for some requests to be prepared, submitted, investigated, and reported or acted upon by government. Similarly, where the complaint arises from odour, noise or dust from an agricultural operation, it may take some time to prepare, present and process the complaint under the Farm Practices Protection Act. Because such delay may threaten a public resource which has been harmed, or is being harmed, by a contravention or continuing contravention, the EBR Task Force recommended that "a resident should not be required to await the outcome of an Application for Investigation prior to instituting proceedings to protect the public

[40] See f.n. 2, pp.178-179.

resource".[41] Accordingly, the EBR provides that plaintiffs do not have to file an investigation request, or go to the Farm Practices Protection Board, where the delay involved would result in significant harm or serious risk of significant harm to a public resource.[42]

Aside from linking "significant harm" to "delay", the EBR contains no explicit criteria as to when a public interest plaintiff can rely upon this exception and avoid the prescribed preliminary steps in s.84 litigation. However, it is at least arguable that where an actual contravention has caused, or continues to cause, significant harm to a public resource, then the public resource is clearly in considerable jeopardy and the public interest plaintiff should be permitted to commence the action immediately (i.e. to seek interlocutory relief) rather than wait for several months or more for a governmental response. By any objective standard, such a situation can clearly be regarded as an emergency or serious occurrence which should be properly brought to court without delay.

If the public interest plaintiff intends to rely upon this exception, then the relevant facts must be articulated carefully and forcefully. Otherwise, this manoeuvre may inadvertently provide the defendant(s) with the basis to raise an additional roadblock (i.e. motion to strike on the grounds of non-compliance with s.84(2)), and the failure to give the government any opportunity to act may lead the Attorney General to seek a stay or dismissal of the action under s.90 of the EBR.

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[41] See f.n. 2, p.100.

[42] EBR, s.84(6).

(f) Class Proceedings

The EBR expressly provides that the s.84 may not be brought as a class proceeding under the Class Proceedings Act.[43] The origin of this provision is somewhat unclear since previous drafts of the EBR did not include this prohibition, and the EBR Task Force viewed "class proceedings reform as an integral part of an EBR".[44] In any event, the s.84 action cannot be framed or brought as a class proceeding. However, there is nothing precluding a representative plaintiff under an environmental class proceeding from including a s.84 action as an alternative claim in his or her personal capacity, provided that the elements of the s.84 action are available on the facts. Nevertheless, as a practical matter, the resulting complexity may prove to be unwieldy and undesirable.

(g) Other Proceedings

The EBR provides that the new cause of action does not limit any other right to bring or maintain a proceeding.[45] In the environmental context, this means, inter alia, that plaintiffs are still free to bring common law actions (i.e. nuisance, negligence, trespass, riparian rights, strict liability). However, in such claims, the plaintiff may elect to include a

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[43] EBR, s.84(7).

[44] See f.n.2, p.90. In commenting on an earlier draft of the EBR, a former member of the Attorney General's Advisory Committee on Class Action Reform observed that there was no reason why a s.84 action could not be certified as a class proceeding, provided that the certification criteria were satisfied: see T.J. O'Sullivan, "Public Access to the Courts under the Proposed Environmental Bill of Rights" (Canadian Institute, October 9, 1992), p.19.

[45] EBR, s.84(9).

s.84 action as an alternative claim in the pleadings, particularly if the plaintiff's emphasis is upon obtaining injunctive relief or environmental restoration rather than damages.

3.3 Practice and Procedure

(a) Notice of Action

Once the public interest plaintiff prepares a Statement of Claim, it is to be issued by the court and served upon the defendant(s) in the normal course. Since the EBR binds the Crown,[46] it is possible to name the Crown as a defendant in appropriate cases.[47]

Regard must be had for s.86 of the EBR, which provides that the Statement of Claim is to be served upon the Attorney General within ten days of service upon the first defendant.[48] Once served, the Attorney General is entitled to present evidence, make submissions, and undertake appeals.[49]

The plaintiff must also provide public notice of the action by giving a notice to the

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[46] EBR, s.120.

[47] See f.n.2, p.98.

[48] EBR, s.86(1).

[49] EBR, s.86(2).

Environmental Commissioner, who shall promptly place it on the Environmental Registry established under Part II of the EBR.[50] Moreover, within thirty days after the close of pleadings, the plaintiff is required to bring a motion for directions from the court with respect to public notice of the action.[51] It is noteworthy that the court is empowered to order parties other than the plaintiff to give or fund notice of the s.84 action.[52] Similarly, the court is empowered to order any party at any stage in the proceeding "to give any notice that the court considers necessary to provide fair and adequate representation of the private and public interests, including governmental interests, involved in the action".[53] It goes without saying that in appropriate cases, counsel for public interest plaintiffs should consider arguing in favour in vesting the cost and the responsibility of giving notice upon the defendants.

(b) Participation in the Action

Given the broad public interest in s.84 litigation, the EBR gives the court broad powers to permit the participation of a variety of interests in the action, as parties or otherwise.[54] This should enable other persons to participate in s.84 actions, but the court can limit the

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[50] EBR, s.87(1) and (2).

[51] EBR, s.87(3).

[52] EBR, s.87(5) and (6).

[53] EBR, s.88.

[54] EBR, s.89(1).

scope and nature of such participation through terms, including terms as to costs.[55] Significantly, an order permitting additional persons to participate in the action cannot be made after the court has ordered the parties to negotiate a restoration plan or has made other orders under s.93 of the EBR.[56]

By permitting additional persons to participate in s.84 litigation for the purpose of representing "private and public interests" involved in the action, the EBR appears to contemplate a broader right of intervention than is currently found in Rule 13 of the Rules of Civil Procedure. It will be interesting to observe whether the court will develop new categories of intervention (i.e. non-party participant), or whether the court will stick to traditional categories (i.e. party, friend of the court, etc.).

(c) Stays, Dismissals, Discontinuances, Abandonments and Settlements

The court has been empowered to stay or dismiss a s.84 action if it is in the "public interest" to do so.[57] While the term "public interest" has not been defined, the court is directed to have regard for environmental, economic and social concerns, and the court may consider whether the issues are better resolved in another process or whether there is an adequate

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[55] EBR, s.89(2).

[56] EBR, s.89(3).

[57] EBR, s.90(1).

government plan in place to address the public interest issues raised in the action.[58] Presumably, a motion for a stay or dismissal may be brought at any stage of the proceeding by the defendant(s) or Attorney General, although such motions are likely to be brought at the earliest possible opportunity. In addition, in order to apprise the court of the relevant facts, the moving party will have to adduce evidence, presumably in affidavit form although viva voce evidence may also be appropriate in some cases. When faced with a motion for a stay or dismissal, counsel for public interest plaintiffs should consider cross-examining the moving party's affidavits, and must, of course, present persuasive evidence outlining the reasons against a stay or dismissal.

Once commenced, the s.84 action may only be discontinued or abandoned with the approval of the court, which may impose appropriate terms.[59] Similarly, a settlement of a s.84 action is not binding unless approved by the court; however, once approved, the settlement is binding on all past, present and future residents of Ontario.[60] Interestingly, when the court is considering the dismissal of an action, or the approval of a discontinuance, abandonment or settlement of an action, the court is expressly directed to consider whether public notice should be given.[61]

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[58] EBR, s.90(2).

[59] EBR, s.91(1).

[60] EBR, s.91(2) and (3).

[61] EBR, s.91(4).

3.4 Defences

The EBR recognizes three specific defences to the s.84 action:[62]

- where the defendant satisfies the court that it exercised "due diligence" in complying with the prescribed Act, regulation or instrument;
- where the defendant satisfies the court that the act or omission alleged to be a contravention is statutorily authorized; and
- where the defendant satisfies the court that it complied with an interpretation of an instrument that the court considers reasonable.

It therefore appears that the evidentiary burden is on the defendant to prove these defences to the satisfaction of the court. It is also noteworthy that the EBR does not limit any other defence which otherwise may be available.[63]

3.5 Remedies

Prior to the trial of a s.84 action, the public interest plaintiff may seek an interlocutory injunction or mandatory order. This pre-trial relief may be particularly appropriate where the harm to the public resource is significant, continuing or possibly irreparable.[64] However, where such relief is sought, the defendant(s) may request that the plaintiff provide

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[62] EBR, s.85.

[63] EBR, s.85(4).

[64] As noted above, it may be appropriate in such urgent cases to dispense with the prerequisite of filing a request for an investigation.

an undertaking to pay damages. It is noteworthy that the EBR codifies the court's discretion to dispense with this undertaking if the court finds that "special circumstances" exist (i.e. if the action is a test case or raises a novel point of law").[65] Given the novel, complex and public interest nature of s.84 actions, counsel for public interest plaintiffs should be able to point to sufficient "special circumstances" to dispense with the undertaking to pay damages.

After the trial of a s.84 action, the court is empowered to grant various remedies, including:[66]

- granting an injunction against the contravention;
- ordering the parties to negotiate a restoration plan;
- granting declaratory relief; and
- making any other orders, including cost orders, that the court considers appropriate.

However, the court cannot award damages to the plaintiff, nor can the court make an order that is inconsistent with the Farm Practices Protection Act.[67]

The court has been given broad powers respecting the negotiation and content of restoration plans. In particular, the court shall not order the parties to negotiate a restoration plan

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[65] EBR, s.92.

[66] EBR, s.93(1).

[67] EBR, s.91(2) and (3).

where adequate restoration has already occurred (i.e. voluntary remedial work by the defendant), or where an adequate restoration plan has been ordered under the law of Ontario (i.e. a cleanup order under the Environmental Protection Act) or any other jurisdiction (i.e. a restoration order under the federal Fisheries Act).[68] The term "adequate" has not been defined under the EBR, meaning that the courts will have to determine the adequacy of previous or ongoing restoration efforts on a case-by-case basis. It is clear that partial restoration or emergency cleanup measures previously undertaken by the defendant do not preclude the court from ordering the parties to negotiate a plan for comprehensive, long-term restoration.

Where a restoration plan is necessary, then the court may order the parties to negotiate a reasonable, practical and ecologically sound plan which provides for:

- the prevention, diminution or elimination of the harm;
- the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource affected by the contravention;
- the restoration of all uses, including enjoyment, of the public resource affected by the contravention.[69]

Establishing the need for, and developing the content of, a restoration plan will obviously require close work between counsel and consultants for public interest plaintiffs. In many

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[68] EBR, s.94.

[69] EBR, s.95(2). Note the similarity between this section and Part X of the Environmental Protection Act respecting spills.

cases, this will likely require extensive expert evidence from a variety of disciplines (i.e. hydrology, hydrogeology, wildlife management, forest ecology, landscape design), depending on the severity of the harm and the nature of the public resource. Significantly, the court is empowered to make orders respecting the costs of negotiating a restoration plan.[70] As a matter of practice, counsel for public interest plaintiffs should seek to recover the costs of retaining experts for negotiating restoration plans and undertaking other litigation-related work.

In appropriate cases, a restoration plan may include provisions requiring: research into pollution prevention or abatement technology; community, education or health programs; or the transfer of property by the defendant so that the property becomes a public resource.[71] However, such provisions can only be included in the restoration plan with the consent of the defendant.[72] Similarly, a restoration plan may provide for the payment of money by the defendant; however, the money must be payable to the Minister of Finance; the money must be used for general restoration or similar purposes; and both the Attorney General and the defendant must consent to the payment.[73] Counsel for public interest plaintiffs should keep these provisions in mind during settlement discussions, particularly where it is unfeasible or prohibitively expensive to undertake a full and complete restoration

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[70] EBR, s.96(b)(i).

[71] EBR, s.95(3).

[72] EBR, s.95(4).

[73] EBR, s.95(8).

of the damaged public resource or its uses. It is also important to ensure that the restoration plan includes provisions respecting monitoring and implementation.[74]

Where the court orders the parties to negotiate a restoration plan, the court may make a number of interim orders (i.e. short-term remedial work) and other ancillary orders (i.e. requiring a party to prepare a draft plan).[75] If the parties successfully negotiate a restoration plan, then it must be approved by the court and the defendant will be ordered to comply with the plan.[76] If the parties cannot agree upon an acceptable restoration plan, then the court may develop its own restoration plan with the assistance of court-appointed experts.[77] The EBR Task Force expected that this provision would provide an incentive for the parties to work out an acceptable restoration plan.

The judgment of the court in the s.84 action is binding on all residents of Ontario by reason of the doctrines of cause of action estoppel and issue estoppel.[78] This provision does not apply where an action has been discontinued, abandoned or dismissed without a decision on the merits of the case.[79]

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[74] EBR, s.95(6).

[75] EBR, s.96.

[76] EBR, s.97.

[77] EBR, s.98(1).

[78] EBR, s.99(1).

[79] EBR, s.99(2).

While the normal cost rules apply to a s.84 action (i.e. costs follow the event), the EBR codifies the court's discretion not to order costs against an unsuccessful plaintiff where "special circumstances" exist (i.e. is the action a test case or does it raise a novel point of law?).[80] It is noteworthy that s.31 of the Class Proceedings Act contains a similar provision. In many cases, it should not be difficult for counsel for unsuccessful public interest plaintiffs to argue that costs should not follow the event because the action was a test case, raised novel points, or otherwise raised important matters which were in the public interest to bring to court in order to protect a public resource.

Finally, the EBR provides that the filing of an appeal from an order under the EBR does not operate as a stay of the order; however, a motion may be brought before an appellate judge to stay the order under appeal.[81]

3.6 Are the "Floodgates" Open?

Having regard for the experiences of other jurisdictions with EBR-like provisions, it is unlikely that s.84 will result in a floodgate of new environmental litigation in Ontario. As noted above, the new cause of action has a number of built-in safeguards and procedural requirements which should serve to weed out frivolous or vexatious lawsuits. In addition, the new cause of action is still subject to the existing rules of practice which permit Ontario's

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[80] EBR, s.100.

[81] EBR, s.101.

courts to dismiss or discourage unmeritorious actions. Moreover, it is clear that environmental groups generally prefer using non-judicial means (i.e. policy work, political lobbying, public education, media campaigns, etc.) to achieve their objectives.[82]

Although environmentalists now have a new cause of action to use in Ontario, the practical reality is environmentalists will continue to carefully and strategically focus their litigation activity on the most appropriate cases, particularly in light of the costs, risks, and time-consuming nature of litigation. Initially, it is reasonable to expect public interest plaintiffs to focus on traditional "end-of-pipe" industrial pollution cases where contraventions and environmental damages are sometimes easier to document. However, as public interest plaintiffs and their counsel gain experience with the s.84 action, it is reasonable to expect increasing interest in using the new cause of action in the context of resource management activities.

4. Public Nuisance Causing Environmental Harm

4.1 The Public Nuisance Rule

The EBR's creation of a new civil cause of action to protect public resources does not necessarily assist persons who have suffered private loss or injury from a public nuisance

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[82] See f.n.11, p.166.

which causes harm to the environment. Traditionally, widespread or communal harm has been actionable only at the instance of the Attorney General, who was presumed to be the guardian of the public interest. Tort law, however, developed a distinction between "public" and "private" nuisance, and the courts have generally recognized that persons who suffer "special" or "unique" damages above that suffered by the community at large could sue in respect of the private loss or injury caused by the public nuisance. In practice, however, the distinction between private and public nuisance has been blurred by many courts.[83] As a result, actions to recover private loss arising from public nuisance have been dismissed on the grounds that the plaintiffs lacked standing or lacked "special" damages that set them apart from other members of the community.[84]

4.2 Public Nuisance Actions under the EBR

The EBR reforms the public nuisance rule by expressly providing that where direct economic loss or personal injury results from a public nuisance causing environmental harm, the plaintiff shall not be barred from court because the Attorney General has not consented to the action, or because other persons have suffered loss or injury of the same kind or degree. In particular, the EBR provides:[85]

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[83] Beth Bilson, The Canadian Law of Nuisance (Butterworths, 1991), chapter 3.

[84] See f.n. 6.

[85] EBR, s.103.

> No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action without the consent of the Attorney General in respect of the loss or injury only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.

The EBR goes on to specify that this provision does not limit a right or defence under the Farm Practices Protection Act.[86]

4.3 Remaining Barriers

The EBR's reform of the public nuisance rule does not confer "wide-open" standing to environmentalists concerned about public nuisances causing environmental harm. In public nuisance cases, the prospective plaintiff must still be able to demonstrate direct economic loss or personal injury; otherwise, the plaintiff will still lack standing to sue in respect of the public nuisance. It is noteworthy that the Supreme Court of Canada has relaxed standing requirements in a number of well-known constitutional and administrative law challenges to governmental action. In Ontario, however, standing must still be pleaded and proven by plaintiffs in public nuisance cases. Accordingly, where an environmentalist lacks direct economic loss or personal injury arising from a public nuisance, he or she should consider whether it is possible to bring a s.84 action to enjoin the public nuisance and restore the public resources harmed by the activity in question.

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[86] EBR, s.103(2).

5. Judicial Review under the EBR

5.1 General

Arguably, the most important component of the EBR is Part II, which establishes a public notice-and-comment regime for environmentally significant policies, Acts, regulations and instruments. If this regime is implemented properly to ensure meaningful public participation in environmental decision-making, then the need for environmental litigation should be diminished and the courts will only be used as a last resort.

To ensure compliance with Part II's requirements respecting instruments, the EBR permits Ontario residents to bring applications under the Judicial Review Procedure Act on the grounds that a minister or his or her delegate failed "in a fundamental way" to comply with the requirements of Part II.[87] No guidance is provided with respect to what constitutes "fundamental" non-compliance with Part II; however, situations involving: a failure to place a notice on the Registry; a decision to abridge mandatory comment periods; an improper exercise of discretion respecting emergency powers; or a failure to provide adequate notice, may invite judicial review by public interest applicants. Such judicial review applications must be brought within 21 days after the Minister provides notice of his or her decision respecting the issuance of the instrument.[88] The right to undertake judicial review in these

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[87] EBR, s.118(2).

[88] EBR, s.118(3).

circumstances is in addition to the right under Part II to appeal certain instruments to an appellate tribunal.

5.2 Privative Clause

Significantly, the EBR contains a broad privative clause which is intended to immunize most governmental activity under the EBR from judicial review:[89]

> Except as provided in section 84 and subsection (2) of this section, no action, decision, failure to take action or failure to make a decision by a minister or his or her delegate shall be reviewed in any court.

Therefore, while there are opportunities to seek legal accountability for certain government actions (i.e. s.84 actions or judicial review applications respecting instruments), the EBR also depends upon mechanisms for political accountability (i.e. Office of the Environmental Commissioner) to ensure compliance with the EBR.

6. Conclusions

As described above, it is anticipated that the EBR will not result in a floodgate of new public interest environmental litigation in Ontario, particularly since environmentalists will

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[89] EBR, s.118(1).

continue to use the courts as a last resort for resolving environmental disputes. At the same time, however, the EBR provides a carefully crafted cause of action which permits Ontario residents to enjoin unlawful conduct which has significantly harmed a public resource. Similarly, the EBR modifies the public nuisance rule in order to facilitate claims arising out of public nuisances which have caused environmental harm. In addition, the EBR provides the right to bring judicial review applications to ensure governmental compliance with EBR requirements respecting public notice-and-comment on instruments.

For these reasons, Ontario's EBR has been properly described as "evolutionary" rather than "revolutionary", and it creates no new liability for private and public sector actors who are complying with the province's environmental laws:

> Companies which are already making serious and sustained efforts to comply with the law have little to fear from this Bill. Lawbreakers, however, will have additional headaches.[90]

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[90] D.Saxe, "The Bill of Rights: Evolutionary, not Revolutionary", Hazardous Waste Management (August, 1992), p.25.