



CANADIAN ENVIRONMENTAL BILL OF RIGHTS



June 2008

ecojustice.ca
formerly Sierra Legal



Friends of the Earth
Les Ami(e)s de la Terre



SIERRA
CLUB
CANADA

CANADIAN ENVIRONMENTAL BILL OF RIGHTS

Introduction

Canadians recognize the importance of environmental protection. They understand the need for transparency, accountability, and public participation in environmental decision-making. They expect individuals and corporations to comply with environmental laws and regulations. They trust that governments will enforce such laws and regulations stringently, so that the environment is preserved for generations to come. These understandings and expectations underlie every Canadian citizen's right to a healthy environment.

The goal of the proposed Canadian Environmental Bill of Rights (CEBR) is to ensure that the right to a healthy environment is upheld in relation to the federal government's environmental responsibilities. It prioritizes the values of transparency, access to information, accountability, public participation in decision-making, and adequate enforcement. It establishes a right to a healthy environment, and imposes a public trust duty upon the federal government to adequately protect the environment. It empowers Canadians, in specific and limited circumstances, to access justice by bringing legal proceedings where federal enforcement is lacking.

The CEBR should be seen as a kind of "environmental contract" between the federal government and the citizens of Canada. Under the CEBR, Canadians explicitly entrust the federal government with the primary responsibilities for environmental protection. However, where such responsibilities are abdicated, Canadian citizens may hold government to account. By empowering Canadians, the CEBR will better ensure that our right to a healthy environment will be respected. In doing so, governments will earn the trust of Canadians on an issue that we cannot afford to mishandle.

No fewer than 118 countries across the world already recognize the right to a healthy environment in their constitutions. Therefore, the Canadian Environmental Bill of Rights is not a new or radical concept. The provisions of this model legislation were drawn from, or inspired by existing environmental statutes across Canada, including the Ontario Environmental Bill of Rights, the Yukon Environment Act, the N.W.T. Environmental Rights Act, and Quebec's Environmental Quality Act.

The Canadian Environmental Bill of Rights would apply only to areas of federal jurisdiction over the environment. It does not encroach upon provincial responsibilities. As well, the proposed CEBR acknowledges and respects constitutionally protected aboriginal rights.

Key Provisions

The key provisions of the proposed bill include the following:

1. Establishment of an Environmental Right

- This is the core of the EBR, from which the other provisions flow. By granting citizens the individual and collective right to a healthy and ecologically balanced environment, they are equipped to address threats to their local environment.
- Canadians would be vested with a right of action against the federal government for breach of this environmental right.

2. Establishment of a Public Trust Duty

- The federal government would be required to uphold its public trust duty to manage and protect the environment for the benefit of current and future generations.
- Canadians would be vested with a right of action against the federal government for breach of this public trust duty.

3. Access to Environmental Information

- Only through unfettered access to environmental information can citizens make informed decisions about how best to protect their environment.

4. Right to Participate in Environmental Decision-Making

- Environmental impacts of government decisions can have significant and wide-ranging impacts on individual and community interests. Citizens must be guaranteed the opportunity to participate in decisions that impact on federal environmental responsibilities.

5. Right to Request Review of Policies, Regulations and Laws

- All Canadians have an interest in ensuring that our environmental policies, regulations and laws are as efficient and effective as possible. By granting citizens a right to request their review we ensure that these instruments will remain most effective.

6. Right to Apply for an Investigation

- If Canadians believe that their environmental rights have been violated, they should have the opportunity to request government investigations.

7. Access to Justice: Right to Bring an Action

- Citizens must be empowered to bring a legal action in court against the federal government to uphold the right to a healthy and ecologically balanced environment, and to ensure the fulfillment of the federal public trust duty.
- Citizens must be empowered to bring a legal action in court against parties who are harming the environment in violation of a statute, regulation, or permit.
- These enforcement mechanisms are important given that the federal government often does not, for reasons of resource shortages or a lack political will, adequately enforce its laws and regulations. It is anticipated that such actions will be used sparingly, and will create an incentive for better enforcement.

8. Whistleblower Protection

- For the CEBR to function optimally it must protect employees under federal jurisdiction from employer reprisal when they assist in [the enforcement of environmental laws, regulations, and policies under the Act.
- Without such environmental whistleblower protection, employees may be intimidated into silence to the detriment of all Canadians.

Draft Model Legislation

AN ACT TO ESTABLISH A CANADIAN ENVIRONMENTAL BILL OF RIGHTS

Preamble

Recognizing that:

Canadians share a deep concern for our environment and recognize its inherent value;

Canadians understand that a healthy and ecologically balanced environment is inextricably linked to the health of individuals, families and communities, particularly aboriginal communities;

Canadians have an individual and collective responsibility to protect the environment of Canada for the benefit of the present and future generations;

Canadians want to assume full responsibility for their environmental problems, and not pass them on to future generations;

Canadians understand the close linkages between a healthy and ecologically balanced environment and the economic, social, cultural, and intergenerational security of Canada;

Canadians have individual and collective rights to a healthy and ecologically balanced environment;

Section 7 of the Charter of Rights and Freedoms protects against environmental threats to life, liberty, and security of the person;

The Government of Canada is the trustee of the environment of the country within its areas of jurisdiction, protecting the environment for present and future generations of Canadians;

The Government of Canada has consistently made commitments to the international community on behalf of all Canadians to protect the environment for the benefit of the world;

The Government of Canada's ability to protect the environment is enhanced when the public is engaged in environmental protection;

Canadians seek to enhance and protect their ability to participate directly in environmental decision-making, to access to environmental justice, and to hold the Government of Canada accountable in relation to the environmental protection responsibilities within its jurisdiction; and

Canadians want improved access to courts and administrative tribunals so that individuals, communities and public interest organizations may take action to protect our environment;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

1. This Act will be referred to as the Canadian Environmental Bill of Rights.

Interpretation

2. The definitions in this section apply in this Act:

“appropriate Minister” means any federal Minister responsible for the implementation of a statute listed in Schedule 1.

“environment” means the components of the Earth and includes:

- (a) air, land and water;
- (b) all layers of the atmosphere;
- (c) all organic matter and living organisms;
- (d) biodiversity within and among species, and
- (e) the interacting natural systems that include components referred to in paragraphs (a) to (d).

"federal land" means

- (a) land, including any water, that belongs to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the right to dispose of, and the air and all layers of the atmosphere above and the subsurface below that land; and

(b) the following land and areas, namely,

(i) the internal waters of Canada as determined under the Oceans Act, including the seabed and subsoil below and the airspace above those waters, and

(ii) the territorial sea of Canada as determined under the Oceans Act, including the seabed and subsoil below and the air and all layers of the atmosphere above that sea.

"federal source" means

(a) a department of the Government of Canada;

(b) an agency of the Government of Canada or other body established by or under an Act of Parliament that is ultimately accountable through a minister of the Crown in right of Canada to Parliament for the conduct of its affairs;

(c) a Crown corporation as defined in subsection 83(1) of the Financial Administration Act;

"federal work or undertaking" means any work or undertaking that is within the legislative authority of Parliament, including, but not limited to,

(a) a work or undertaking operated for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship;

(b) a railway, canal, telegraph or other work or undertaking connecting one province with another, or extending beyond the limits of a province;

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province;

(d) a ferry between any province and any other province or between any province and any country other than Canada;

(e) airports, aircraft and commercial air services;

(f) a broadcast undertaking;

(g) a bank;

(h) a work or undertaking that, although wholly situated within a province, is before or after its completion declared by Parliament to be for the general advantage of Canada or for the advantage of two or more provinces; and

(i) a work or undertaking outside the exclusive legislative authority of the legislatures of the provinces.

“healthy and ecologically balanced environment” means an environment of a quality that protects human and cultural dignity, health, and well-being, in which essential ecological processes are preserved for their own sake, as well as for the benefit of present and future generations.

“intergenerational equity” means that current generations of Canadians hold the natural environment in trust for future generations, and may only use and enjoy its resources on condition that they deliver the environment to the next generations in as good, or better, condition than originally found;

“policy” means a program, plan or objective and includes guidelines or criteria to be used in making decisions about the issuance, amendment or revocation of statutory instruments but does not include an Act, a regulation or an statutory instrument;

“precautionary principle” means that where there are threats of serious or irreversible damage to the environment, a lack of full scientific certainty should not be used as a reason for postponing action to protect the environment;

“polluter pays principle” means that a polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to society or the exceeding of an acceptable level (standard) of pollution;

“public trust” means the federal government’s responsibility to preserve and protect the collective interest of the people of Canada in the environment for the benefit of present and future generations.

“significant environmental harm” – includes, but is not limited to, harm that is long lasting, difficult or impossible to reverse, widespread in its impact, cumulative, or serious in its effects on the environment;

“statutory instrument” means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other statutory instrument issued, made or established: (a) in the execution of a power conferred by or under an Act of Parliament, by or under which that statutory instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that statutory instrument relates, or (b) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament;

“sustainable development” means development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

Purpose

3. The purpose of the EBR is to:

- (a) safeguard the rights of present and future Canadians to a healthy and ecologically balanced environment;
- (b) confirm the Government of Canada’s public trust duty to protect the environment under its jurisdiction; and
- (c) ensure all Canadians have access to:
 - i. adequate environmental information;
 - ii. access to justice in an environmental context;
 - iii. effective participatory mechanisms in environmental decision-making; and
 - iv. adequate legal protection for employees who take action in respect of environmental harm.

Interpretation

4. The EBR must be interpreted consistently with existing and emerging principles of environmental law, including but not limited to:

- (a) the precautionary principle;
- (b) the polluter pays principle;
- (c) the principle of sustainable development; and
- (d) the principle of intergenerational equity.

Binding on Her Majesty

5. This Act is binding on Her Majesty in right of Canada.

Scope of Application

6. The provisions of this Act apply to all decisions emanating from a federal source, or related to a federal land, work or undertaking.

Environmental Rights and Obligations

7. (1) Every Canadian has a right to a healthy and ecologically balanced environment.

(2) The Government of Canada has an obligation, within its jurisdiction, to protect each Canadian's right to a healthy and ecologically balanced environment.

(3) Every Canadian has an interest in environmental protection and shall not be denied standing to participate in environmental decision-making or to appear before the courts in environmental matters solely because they lack a private or special legal interest in the matter.

Duty to Protect the Environment

8. The Government of Canada is the trustee of Canada's environment and shall conserve it in accordance with the public trust for the benefit of present and future generations.

Aboriginal Rights

9. For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the Constitution Act, 1982.

Right to Access Environmental Information

10. (1) In order to contribute to the protection of Canadians' environmental rights, the government of Canada shall ensure effective access to environmental information by rendering such information available on request to the public in a reasonable, timely, and affordable fashion.

Right to Participate in Government Decision-Making in Environmental Matters

11. (1) In order to contribute to the protection of the Canadians' environmental rights, the Government of Canada shall ensure opportunities for effective, informed and timely public participation in decision-making related to federal policies, Acts, regulations or statutory instruments.

Right to Request Review of, Acts, Regulations, Statutory instruments, and Policies

12. (1) Any resident of Canada or legal person resident in Canada who believes that an existing policy, Act, regulation or statutory instrument of the Government of Canada should be amended, repealed, or revoked, or that a new policy, Act, regulation or statutory instrument should be made or passed in order to protect the environment, may apply to the Commissioner for the Environment and Sustainable Development (Auditor-General) for a review by the Appropriate Minister.

(2) The Appropriate Minister shall acknowledge receipt of a request for review within 20 days.

(3) The Appropriate Minister shall decide whether to conduct a review within 60 days of acknowledgement of the request and communicate to the party requesting review the intended course of action.

(4) The Appropriate Minister shall report on the progress of the review every 90 days.

(5) Upon conclusion of the review the Appropriate Minister shall communicate results of the review in writing to the party making the request and to the Commissioner for the Environment and Sustainable Development.

Right to Request Investigation

13. Any resident of Canada or legal person resident in Canada who believes that an Act, regulation or statutory instrument of the Government of Canada has been contravened may apply to the Commissioner of the Environment and Sustainable Development (Auditor-General) for an investigation of the alleged offence by the Appropriate Minister.

14. The application shall include a solemn affirmation or declaration, stating:

- (a) the name and address of the applicant;
- (b) that the applicant is at least 18 years old and a resident of Canada;
- (c) the particular policy, Act, regulation or statutory instrument alleged to have been contravened;
- (d) the nature of the alleged offence and the name of each person alleged to have contravened, or to have done something in offence of, the specified Act, regulation or statutory instrument; and
- (e) a concise statement of the evidence supporting the allegations of the applicant.

15. (1) The Appropriate Minister must acknowledge receipt of the application within 20 days after receiving it and, subject to subsections (2) and (3), investigate all matters that he or she considers necessary to determine the facts relating to the alleged offence;

(2) No investigation is required if the Appropriate Minister determines that the application is frivolous or vexatious;

(3) If the Appropriate Minister decides not to conduct an investigation, he or she must, within 60 days after the application for investigation is received, give notice of the decision, with reasons, to the applicant;

(4) The Appropriate Minister need not give the notice as required by 15(3) if an investigation in relation to the alleged offence is ongoing apart from the application.

(5) The Appropriate Minister shall report on the progress of the investigation every 90 days until resolution of the investigation.

(6) The Appropriate Minister shall communicate results of the investigation in writing to the applicant and to the Commissioner of the Environment and Sustainable Development.

Right to Review a Government Decision Affecting the Environment

16. (1) Any resident of Canada or legal person, regardless of whether they are directly affected by the matter in respect of which relief is sought, has standing before the Federal Court to review a government decision that would otherwise be open to judicial review pursuant to section 18.1 of the Federal Court Act provided that:

- i. The matter arises in the context of environmental protection;
- ii. The applicant raises a serious issue;
- iii. The applicant has a genuine interest in the matter;
- iv. There is no other reasonable or effective way for the matter to get before the court.

(2) An application for judicial review brought under this section must be brought in accordance with the provisions of the Federal Court Act and Federal Court Rules.

Right to Access Environmental Justice

17. (1) Every resident of Canada or legal person resident in Canada may seek recourse in the Federal Court of Canada to protect the environment by:

- (a) bringing a public trust action against the Government of Canada for failing to fulfill its duties as trustee of the environment;
- (b) bringing an environmental protection action against the Government of Canada for violating the right to a healthy and ecologically balanced environment; and, or
- (c) bringing a civil action where a person has contravened, or is likely to contravene an Act, regulation or statutory instrument pursuant to the statutes listed in Schedule 1, and where the offence has resulted or will likely result in significant environmental harm.

(2) Actions under paragraphs 17(1)(a), (b), or (c) are subject to a civil standard of proof and will be adjudicated on the basis of a balance of probabilities.

(3) In civil action under paragraph 17(1)(c), once the plaintiff has demonstrated a prima facie case of environmental harm, the burden of proof is shifted and the onus is on the defendant to prove that its actions will not result in harm to the environment.

(4) It is not a defence to a civil action under paragraph 17(1)(c) that:

- (a) the activity was authorized by an Act listed in Schedule 1, or any regulation or statutory instrument pursuant to such an Act, unless the defendant proves that the environmental harm is or was the inevitable result or consequence of carrying out the activity permitted by such Acts, regulations or instruments; and,
- (b) there is no reasonable or prudent alternative to the activity.

(5) It is not a defence to a public trust action or an environmental protection action under paragraphs 17(1)(b) and (c) that the appropriate Minister has the power to authorize an act which may result in significant environmental harm.

Interim Relief

18. (1) A plaintiff bringing an environmental protection action under section 17(a),(b) or (c) may make a motion to the court for an interim order to protect the subject matter of their action, where, in the court's opinion, serious environmental harm may occur before the action can be heard.

(2) Interim relief under section 18(1) will not be withheld on the grounds that the plaintiff is unable to provide an undertaking to pay damages.

(3) Any requirement to provide an undertaking to pay damages in support of its application shall not exceed \$1000.

Costs

19. (1) A plaintiff bringing an action under paragraphs 17(1)(a),(b), or (c) may only be ordered by a court to pay costs if the action is found to be frivolous, vexatious or harassing;

(2) A plaintiff bringing an action under paragraphs 17(1)(a), (b), or (c) may be:

- (a) entitled to counsel fees regardless of whether or not they were represented by counsel;
- (b) entitled to an advance cost award upon application to the Court if, in the opinion of the Court, it is in the public interest.

(3) In exercising its discretion with respect to costs with respect to an action under paragraphs 17(1)(a), (b), or (c) of this Act, the court may consider any special circumstances, including whether the action is a test case or raises a novel point of law.

Remedial Provisions

20. On application to the Court, a plaintiff may request relief in the nature of an interim order to prevent significant environmental harm from occurring during the course of an action under paragraphs 17(1)(a), (b) or (c).

21. In making an interim order under this Act, the Court is entitled to consider:

- (a) the nature of the environmental harm that has occurred or may occur;
- (b) whether the harm resulted from or may result from an attempt to maximize business profits;
- (c) the past conduct of the party;
- (d) the precautionary principle.

22. In making an order under this Act, the Court may issue:

- (a) clean up orders;
- (b) restoration orders;
- (c) fine provisions that direct moneys to go to environmental protection, or monitoring programs;

23. (1) Notwithstanding remedial provisions in other Acts, if the court finds that the plaintiff is entitled to judgment in an action under sections 17(1)(a), (b) and (c), the court may:

- (a) grant declaratory relief;
- (b) grant an injunction against the contravention;
- (c) order the parties to negotiate a restoration plan in respect of harm to the public resource resulting from the contravention and to report to the court on the negotiations within a fixed time;
- (d) order the defendant to establish and maintain a monitoring and reporting system in respect of any of its activities that may impair the natural environment;
- (e) order the defendant to restore or rehabilitate any part of the natural environment;
- (f) order the defendant to take specified preventative measures;
- (g) order the defendant to prepare a plan for or present proof of compliance with the order;
- (h) order the Appropriate Minister to monitor compliance with the terms of any order;
- (i) make any other order that the Court considers just.

(2) If the court finds that the plaintiff is entitled to judgment in an action under sections 17(1)(c), the court may:

- (a) suspend or cancel a permit or authorization issued to the defendant, or the defendant's right to obtain or hold a permit or authorization;
- (b) order the defendant to provide financial assurance for the performance of a specified action;
- (c) order the defendant to pay an amount to be used for the restoration or rehabilitation of the part of the natural environment impaired by the defendant;
- (d) order the defendant to pay an amount to be used for enhancement or protection of the natural environment generally.

Employer Reprisal (Whistleblower) Protection

24. This Part applies in respect of employees who are employed on or in connection with the operation of any federal source, work, undertaking or business, and in respect of the employers of all such employees in their relations with those employees.

25. For the purposes of this provision, an employer has taken reprisals against an employee if the employer has dismissed, disciplined, penalized, coerced, intimidated or harassed, or attempted to coerce, intimidate or harass the employee.

26. (1) Any person may file a written complaint with the Canada Industrial Relations Board alleging that an employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer, has taken reprisals against an employee on a prohibited ground.

(2) An employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following for the purpose of protecting the environment or the public trust in relation to the environment:

- a) participate in environmental decision-making as provided for in this or any other Act, regulation, policy or other statutory instrument;
- b) apply for a review of an Act, regulation, statutory instrument or policy pursuant to section 12;
- c) apply for an investigation pursuant to section 13;
- d) seek the enforcement of any federal Act, regulation or instrument that seeks to protect the environment;
- e) provide information to an appropriate authority for the purposes of an investigation, review or hearing under this Act or the regulations;

- f) gives evidence in a proceeding under this Act or the regulations;
- g) refuses or states an intention of refusing to do anything that is an offence under this Act, if acting in good faith and on the basis of reasonable belief.

(3) An employer who contravenes subsection (2) is guilty of an offence and is liable on summary conviction to a fine of not more than \$25 000.

(4) If an employer is convicted of an offence under subsection (3), the Court may, in addition to any other penalty imposed, order the employer to take or refrain from taking any action in relation to the employee, including the reinstatement of the employee to their former position or equivalent position or the payment to the employee of wages and benefits lost because of the offence of subsection (2).

Regulations

27. The Governor-in-Council may make regulations in order to fulfill the purposes of this Act.

Examination of Bills and Regulations

28. The Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the Statutory Instruments Act and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Canadian Environmental Bill of Rights and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Consequential Amendments

29. Section 1(a) of the Canadian Bill of Rights is amended in the following manner to include a right to a healthy and ecologically balanced environment as defined under this Act:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person, including the right to a healthy and ecologically balanced environment, and enjoyment of property, and the right not to be deprived thereof except by due process of law;]

Schedule 1

30. For the purposes of this Act, Schedule 1 establishes a list of statutes for the purpose of the application of section 17(1)(c).

31. Subject to section 32, the Governor in Council may, by order, for the purpose the application of subsections 17(1)(c), amend Schedule 1 by adding a statute to the list, if the Governor in Council is satisfied that this addition will help further protect the environment.

32 (1) Any proposed amendment to Schedule 1 that would result in the removal of a listed statute shall be tabled in each House of Parliament, together with a report that explains the reasons for removing the statute, and an amendment so tabled stands referred to the standing committee of each House that normally considers matters relating to environmental protection or to any other committee that that House may designate for the purposes of this section.

(2) The committee of each House may, within 30 sitting days after an amendment under subsection (1) is tabled, report to the House that it disapproves the amendment, in which case a motion to concur in the report shall be put to the House in accordance with its procedures.

(3) A proposed amendment to Schedule 1 under subsection (1) may be made if 31 sitting days have elapsed after the tabling of the amendment in both Houses and no motion referred to in subsection (2) has been proposed in either House.

(4) A proposed amendment to Schedule 1 under subsection (1) may not be made if either House passes a motion referred to in subsection (2).