

**An Introduction to Environmental Rights for  
Prince Edward Island, New Brunswick and Nova Scotia**

**Prepared by East Coast Environmental Law**

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## **A. INTRODUCTION**

The objective of East Coast Environmental Law Association's (ECELAW) Environmental Rights Project is to organize an effective east coast campaign promoting the need for, and recognition of, federal and provincial environmental rights. ECELAW is conducting province-specific legal research, providing resources, starting community dialogue, creating strategic partnerships and developing campaign action plans.

The purpose of this document is to introduce the concept of environmental rights, analyze the current status of environmental rights in Canada, and explore options for incorporating environment rights in the Maritime Provinces.

ECELAW is a non-profit society that provides public interest environmental law assistance to Atlantic Canadians. ECELAW envisions a future where innovative and effective environmental laws provide Atlantic Canadians with a clean, healthy environment that contributes positively to the quality of life of present and future inhabitants and visitors.

ECELAW received funding from the Catherine Donnelly Foundation to raise awareness about environmental rights in the Atlantic region. The Catherine Donnelly Foundation, established in 2003, is the financial and human legacy of the efforts of The Sisters of Service, and a testament to their work in communities across Canada. We are working alongside the David Suzuki Foundation and Ecojustice in their nation-wide campaign for environmental rights.

This report is intended for members of the public, environmental non-profit organizations, and community groups in Nova Scotia, New Brunswick, and Prince Edward Island. It is intended to provide background information to stimulate discussions on environmental rights as they relate to the specific needs of each province.

## **B. WHAT IS AN ENVIRONMENTAL RIGHT?**

The environmental rights advocated in this report are those based on the idea that all humans have the right to live in a healthy environment. They recognize that humans require healthy environments in order to be healthy themselves. Environmental rights are designed to protect and restore the environment, which, in turn, supports healthy people and communities.

Though the idea of environmental rights has been around for a long time, environmental rights were first recognized on the international stage in the 1972 Declaration of the United Nations Conference on the Human Environment. Principle 1 of the Stockholm Declaration (developed at this conference) states:

[Each human] has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he [or she] bears a solemn responsibility to protect and improve the environment for present and future generations.<sup>1</sup>

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<sup>1</sup> U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

Environmental rights are generally split into two categories. Substantive environmental rights focus on providing tangible environmental protection to ensure a healthy, livable environment. Procedural rights, on the other hand, ensure that the public can participate in the environmental protection process. They focus on the right to environmental information, the right to participate in environmental decision-making, and the right of access to justice when one objects to decisions.<sup>2</sup>

In the past 50 years, the concept of environmental rights has gained considerable acceptance worldwide. Over 90% of the United Nations member states recognize a right to a healthy environment.<sup>3</sup> Most of these countries have incorporated the right to a healthy environment into their national constitutions. Constitutions are the ‘supreme’ law of a nation, meaning that all other laws and regulations in these countries must respect environmental rights. Other countries recognize environmental rights through statutes at various levels of government. The remaining countries have implicitly incorporated environmental rights into their laws through court decisions.

Establishing a legal right reflects the core values of a society. Creating a legal right to a healthy environment demonstrates a societal commitment to place a high value on the health and well-being of its members. As an example, environmental rights would allow ‘the rights of those who seek to pollute and degrade the environment for economic gain to be balanced against the rights of those individuals and communities that suffer the burden of that pollution.’<sup>4</sup>

### **C. ENVIRONMENTAL RIGHTS IN CANADA**

Canada is one of only 16 United Nations countries that do not recognize the right to a healthy environment. A right to a healthy environment is not mentioned in our Constitution. None of the attempts at passing a federal bill of environmental rights has been successful, and environmental rights have yet to be explicitly recognized by the Supreme Court of Canada.

In his book, *The Right to a Healthy Environment, Revitalizing Canada’s Constitution*,<sup>5</sup> David Boyd argues for entrenching a right to a healthy environment in our national Constitution.

“Entrenching environmental rights and responsibilities in the constitution would force Canadians to make sustainability a genuine priority, resulting in changes that would make Canada a greener, leaner, wealthier, healthier, happier nation in the long run.”<sup>6</sup>

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<sup>2</sup>Margot Venton, *Restoring the Balance: Recognizing Environmental Rights in British Columbia*, 2009. Online: Ecojustice <<http://www.ecojustice.ca/publications/reports/restoring-the-balance/attachment>> [Venton]

<sup>3</sup>Boyd, David R. *The Right to a Healthy Environment: Revitalizing Canada’s Constitution*. UBC Press: Vancouver, 2012. [Boyd]

<sup>4</sup>Venton, *supra* at note 2.

<sup>5</sup>Boyd, *supra* at note 3.

<sup>6</sup>David Boyd, *Paper #1: The Importance of Constitutional Recognition of the Right to a Healthy Environment*, online: David Suzuki Foundation <<http://www.davidsuzuki.org/publications/reports/2013/right-to-a-healthy-environment-papers>>.

Boyd provides five compelling reasons for recognizing this right:

1. Environmental protection has evolved into a fundamental value held by the overwhelming majority of Canadians.
2. There is an urgent need to improve Canada's poor environmental performance and preserve this country's magnificent landscapes, natural wealth, and biodiversity.
3. It is vital to protect Canadians' health from environmental hazards such as air pollution, contaminated food and water, and toxic chemicals.
4. Uncertainty regarding the responsibility of all levels of government for environmental protection has undermined efforts to make Canada more sustainable and therefore needs to be clarified.
5. Environmental rights and responsibilities are fundamental elements of Indigenous law, and acknowledging them would mark an important step toward reconciliation with Aboriginal people.<sup>7</sup>

Canadians often speak of our love for Canadian landscapes and our connection to the natural world. Images of vast untouched landscapes – be they mountains, coastlines, prairies, tundra, or the Canadian Shield – evoke a sense of pride and contribute to our national identity. Yet, out of 25 of the wealthiest OECD countries,<sup>8</sup> Canada has the second worst environmental record according to a study conducted for the David Suzuki Foundation.<sup>9</sup> In this study, each country's environmental record was evaluated by reviewing 28 environmental indicators including efficiency and clean energy, waste and pollution, and nature conservation. Our environmental performance is only slightly better than the United States.

Boyd highlights this contradiction in his book by noting, "...contrary to the myth of a pristine green country providing environmental leadership to the world, a huge pile of studies proves beyond a reasonable doubt that Canada lags behind other nations in terms of environmental performance."<sup>10</sup>

Most Canadians wrongly believe that they already have a right to a healthy environment. Nine in ten Canadians polled by Angus Reid believed that governments should recognize their right to a healthy environment. The same poll found that a majority of Canadians erroneously believe their right to a healthy environment is already included in the Charter of

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<sup>7</sup>Boyd, *supra* at note 3 at page 4.

<sup>8</sup> The Organization for Economic Co-operation and Development is an international economic organization founded in 1961 to stimulate economic progress and world trade. Member states include European countries and other countries committed to market economies.

<sup>9</sup> Gunton, T., and K.S. Calbrick. 2010. *The Maple Leaf in the OECD: Canada's Environmental Performance*. Study prepared for the David Suzuki Foundation. Vancouver: David Suzuki Foundation School of Resource and Environmental Management, Simon Fraser University.

<sup>10</sup>Boyd, *supra* at note 3 at page 6.

Rights and Freedoms.<sup>11</sup> Canadian perceptions appear to be disconnected from the facts, highlighting the need to educate Canadians about the lack of environmental rights in Canada.

## 1.0 Where are we headed? Current Trends in Environmental Rights in Canada

As mentioned above, Canada remains one of only 16 countries that do not recognize a right to a healthy environment. But perhaps good news is on the horizon. Here are some examples of current trends in environmental rights across Canada:

- In 2009, NDP Member of Parliament Linda Duncan introduced a comprehensive *Canadian Environmental Bill of Rights* (Bill C-469).<sup>12</sup> The Bill received unanimous support of the opposition parties in 2011. The Bill was not passed as Parliament was prorogued before a final vote was taken but it continues to provide a template for a federal statute recognizing environmental rights.
- In 2012, Ecojustice launched the first environmental rights-based lawsuit on behalf of Ron Plain and Ada Lockridge, two members of the Aamjiwnaang First Nation located in the Chemical Valley of Sarnia, Ontario.<sup>13</sup>
- David Boyd, environmental lawyer and professor, authored the book, *The Right to a Healthy Environment, Revitalizing Canada's Constitution*, which detailshow Canada's Constitution could be used to enshrine the right to a healthy environment. Following its release, Boyd toured the country to discuss and promote the right to a healthy environment for all Canadians.<sup>14</sup>
- The David Suzuki Foundation is working on a national campaign promoting environmental rights in Canada with the message that every Canadian deserves a right to a healthy environment. They argue that the best way to achieve this is through constitutional recognition of environmental rights. They have published several papers on the topic including one on the history of environmental rights in Canada and one on possible methods of recognizing environmental rights in Canada.<sup>15</sup>

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<sup>11</sup>Boyd, *supra* at note 3 at page 6.

<sup>12</sup> Bill C-469, *An Act to establish a Canadian Environmental Bill of Rights*, 2<sup>nd</sup> Sess, 40<sup>th</sup> Parl, 2009 (first reading 29 October 2009).

<sup>13</sup> Justin Duncan. *Chemical Valley Charter Challenge*, online: Ecojustice <<http://www.ecojustice.ca/cases/chemical-valley-charter-challenge-1>>. Ecojustice contends that the Canadian Charter of Rights and Freedoms section 7 “right to life, liberty and security of the person” implicitly includes a right to a healthy environment. Ecojustice argues that Canadians require a healthy environment in order to be healthy, safe, and secure. Specifically, Ecojustice submits that the Ontario Minister of Environment is violating Mr. Plain and Ms. Lockridge’s right to a healthy environment by continuing to approve permits for pollution in the Chemical Valley. If successful, this case will establish an implicit right to a healthy environment under section 7 of the Charter.

<sup>14</sup>David Boyd is a Trudeau Scholar at the Institute of Resource, Environment and Sustainability and a professor at Simon Fraser University and Royal Roads University.

<sup>15</sup> Online: David Suzuki Foundation <<http://www.davidsuzuki.org/publications/reports/2013/right-to-a-healthy-environment-papers>>.

- In the fall of 2014, David will tour Canada with the message that every person has the right to a healthy environment.

While the efforts to gain support for a constitutional right to a healthy environment in Canada are well underway, two provinces and all three territories have already taken steps to recognize this right in their own laws.

- Quebec's *Environmental Quality Act* has included a right to a healthy environment since 1978.<sup>16</sup> In 2006, the government of Quebec also added the right to its provincial Charter of Human Rights and Freedoms.
- In 1993, Ontario passed the *Environmental Bill of Rights*, which includes a comprehensive series of procedural rights available to its citizens.<sup>17</sup>
- Yukon, NWT, and Nunavut all have modest environmental rights legislation. Yukon's *Environment Act* recognizes that the people of Yukon have a right to a healthful natural environment.<sup>18</sup> However, the substantive right is limited by weak enforcement mechanisms. Both Nunavut and the Northwest Territories have an *Environmental Rights Act* that recognizes a right to protect the environment, although the right only applies to protection from contaminants.<sup>19</sup>

None of the Maritime Provinces has legislation that specifically recognizes the right to a healthy environment. However, the New Brunswick Environmental Law Society drafted a proposed New Brunswick Environmental Bill of Rights, covering a comprehensive set of procedural rights including access to environmental information, public participation in environmental decision-making, and access to environmental justice. As well, the Conservation Council of New Brunswick drafted a declaration of fundamental principles on which an Environmental Bill of Rights should be built, titled, Charter for Environmental Justice.

#### **D. THE BENEFIT OF ENVIRONMENTAL RIGHTS IN THE MARITIMES**

We believe that legal recognition of environmental rights will benefit the Maritime Provinces in several ways. The Atlantic region has a long history of resource-based economies. For centuries, we have depended on the land and sea for our livelihoods. Many survived on small-scale agriculture, fishing, and other types of harvesting. In recent years, there has been a shift away from subsistence harvesting towards more large-scale natural resource industries. However, the natural resource sector is still a large part of the Maritime economy. Major industries such as forestry, agriculture, fishing, and tourism depend on a healthy, productive environment. Ongoing environmental degradation threatens the viability of these

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<sup>16</sup>*Environmental Quality Act*, R.s.Q. 1978, c.14.

<sup>17</sup> Ontario *Environmental Bill of Rights*, R.s.On. 1993, c.28.

<sup>18</sup> Yukon *Environment Act*, R.s.Y. 2002, c. 76, s. 6.

<sup>19</sup> Northwest Territories *Environmental Rights Act*, R.S.N.W.t. 1988, c.83 (supp.), s. 6(1). Nunavut *Environmental Rights Act*, R.S.N.W.T. 1988, c.83 (supp.), s.6(1).

Maritime industries and impacts the ability of individuals to sustain themselves from the land and sea.

Examples below highlight situations in each province where community members have not been able to participate in environmental decision-making because of a lack of environmental rights.

### **1.0 Nova Scotia: Pulp Mill Wastewater in Boat Harbour**

In 1967, a pulp mill built near Pictou Landing, Nova Scotia began pumping wastewater containing various toxic substances into Boat Harbour, an estuary near Pictou Landing. When the mill was first built, members of the Pictou Landing First Nation reserve were told that the wastewater would have little impact on the environment.<sup>20</sup> They were told that the water would be safe to drink. Over 40 years later, despite improvements to the treatment process, the Boat Harbour estuary remains contaminated with mercury, dioxins, furans, and cadmium.<sup>21</sup>

The trillion litres of toxic wastewater dumped into Boat Harbour over the past 40 years affects the ability of local community members to live in a healthy environment. Locals have noticed an increase in health issues in their community and fear the toxic waste is to blame.<sup>22</sup> As a result, they no longer feel safe swimming in these waters, or harvesting traditional foods such as clams. Research is currently underway to find out whether wastewater is in fact causing these health problems.<sup>23</sup> Without environmental rights, concerned community members trying to protect their local environment face considerable challenges. They have trouble accessing important information and have few opportunities to participate in decisions that impact their communities.

The wastewater contamination of Boat Harbour also represents an example of environmental racism. Environmental racism is defined as any policy that differentially affects or disadvantages individuals, groups or communities based on race or colour.<sup>24</sup> As a result, members of these communities bear a disproportionate burden of the harm caused by environmental pollutants. A common example of environmental racism is when a government encourages polluting industries to locate close to marginalized communities. The Pictou Landing First Nation is directly affected by the contamination of Boat Harbour and the decision by the government of Nova Scotia to allow the toxic industry and waste discharge to continue.<sup>25</sup>

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<sup>20</sup> Thompson, S. *From a Toxic Economy to Sustainability: Women Activists Taking Care of Environmental Health in Nova Scotia*. Canadian Woman Studies, Vol 23, No. 1, pg. 109.

<sup>21</sup> Michael Gorman, *Boat Harbour cleanup 'past due'* (12 September 2010) online: <<http://aboriginalenlightenment.blogspot.com/2010/09/boat-harbour-cleanup-past-due.html>>.

<sup>22</sup> Schneider, *Assessing the health of Boat Harbour* (5 March 2012) online: <<http://www.dal.ca/news/2012/03/05/assessing-the-health-of-boat-harbour.html>>

<sup>23</sup> *Ibid.*

<sup>24</sup> Nathalie J. Chalifour, "Bringing Justice to Environmental Assessment: An Examination of the Kearl Oil Sands Joint Review Panel and Health Concerns of the Community of Fort Chipewyan" (2010) 21 J. Env. L. & Prac. 31. at 44.

<sup>25</sup> Another examples of environmental racism in Nova Scotia is the provincial government's decision to open a second landfill site in Lincolnville, an African Nova Scotian community. See, Hillary Bain Lindsay, *Race and*



## 2.0 Prince Edward Island: Fish Kills in Barclay Brook

Major fish kills in Barclay Brook, PEI over the past three years have resulted in thousands of fish deaths.<sup>26</sup> Evidence suggests that these fish kills were caused by pesticide run-off from nearby farmers' fields. Over the past 14 years, agricultural pesticide use in PEI has increased by 571% as farmers have shifted towards a potato monoculture.<sup>27</sup> This drastic increase in pesticide use has caused concern among local community members who fear that pesticides will harm their health through air pollution and groundwater contamination. They are concerned that the same pesticides causing these fish kills are entering their water supply. They have no right to know which pesticides are sprayed, nor when they are going to be applied.

Environmental legislation in PEI does not sufficiently protect against these environmental harms. The only provision in the PEI *Environmental Protection Act* that minimizes harm from pesticide applications is a requirement for a 15-metre buffer zone between waterways and farm fields.<sup>28</sup> One farmer was investigated in connection with a 2011 fish kill and pled guilty to farming within the 15-metre buffer zone.<sup>29</sup> Another farmer pled guilty to violating the federal *Fisheries Act*. However, without environmental rights, community members have little recourse to address their environmental and health concerns with respect to increased pesticide use.

## 3.0 New Brunswick: Increased Forestry on Crown Land

In spring of 2014, the New Brunswick government released a new forestry strategy titled 'Putting our Resources to Work: A Strategy for Crown Lands Forest Management'.<sup>30</sup> This forestry plan allows the forestry sector to take 20 percent more softwood from Crown land, which will result in cutting an additional 660,000 cubic metres of wood. Under the new policy, the area of land reserved for selection-based cutting (i.e., non-clear-cut methods) for habitat and other conservation purposes is reduced from 28 percent to 23 percent.

Community members and scientists alike are concerned about the overharvesting of forests in New Brunswick. Some scientists believe that at least 30 percent of forests need to be managed with harvesting practices other than clear-cuts and plantations to maintain

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*Waste in Nova Scotia: Accusations of 'environmental racism' take centre stage during fight against new landfill development* (7 December 2006) online: <[http://www.dominionpaper.ca/environment/2006/12/07/race\\_and\\_w.html](http://www.dominionpaper.ca/environment/2006/12/07/race_and_w.html)>.

<sup>26</sup> CBC News, *PEI Fish Kill Larger than Initial Estimates* (10 July 2012) online: <<http://www.cbc.ca/news/canada/prince-edward-island/p-e-i-fish-kill-larger-than-initial-estimates-1.1167445>>.

<sup>27</sup> Labchuk, S. *Potato Paradise Lost – Harmful Pesticides on PEI*, online: Watershed Sentinel (15 October 2012) <<http://www.watershedsentinel.ca/content/potato-paradise-lost-harmful-pesticides-pei>>.

<sup>28</sup> *Environmental Protection Act: Watercourse and Wetland Protection Regulation*, R.S.P.E.I. 2012, c. E9, s.3(1).

<sup>29</sup> CBC News, *Farmer guilty in P.E.I. fish kill*, (13 September 2011) online: <<http://www.cbc.ca/news/canada/prince-edward-island/farmer-guilty-in-p-e-i-fish-kill-1.977591>>

<sup>30</sup> New Brunswick Department of Natural Resources, *Putting our Resources to Work: A Strategy for Crown Lands Forest Management*, (12 March 2014) online: <<http://www2.gnb.ca/content/dam/gnb/Departments/nrn/pdf/en/ForestsCrownLands/AStrategyForCrownLandsForestManagement.pdf>>.

minimum viable populations of those forest species that have been studied and monitored in the province.<sup>31</sup>

Residents of New Brunswick were not given an opportunity to participate in the development of this forestry strategy. According to University of New Brunswick law professor David Bell, there is little opportunity to challenge the policy, insofar as it has been ‘enshrined’ in a contract signed with the forestry company J.D. Irving Ltd. Dr. Bell suggests that the contract with J.D. Irving Ltd. could only be nullified by an act of the legislature.

## **E. MODEL ENVIRONMENTAL RIGHTS**

ECELAW has developed a few tools to help facilitate a conversation on environmental rights in the Maritime Provinces. The first tool is a list of model environmental rights provisions, attached as Appendix A to this report. These model environmental rights provisions could be used in stand-alone environmental rights law, or added to existing laws.<sup>32</sup>

The ideal provisions are divided into the two broad categories of substantive and procedural environmental rights. An overview is provided below:

- 1.0 Substantive Rights
- 2.0 Procedural Rights
  - 2.1 Access to Information
  - 2.2 Public Participation in Environmental Governance and Decision-Making
  - 2.3 Access to Justice
  - 2.4 Protection from SLAPP Suits
  - 2.5 Whistleblower Protection
  - 2.6 Independent Oversight

### **1.0 Substantive Rights**

A substantive right to a healthy environment provides a tangible human right to live in a healthy environment. In essence, this right should serve to protect, restore, and conserve the natural environment for the benefit of present and future generations.

*“Every person has the right to a healthy environment in Nova Scotia [New Brunswick, Prince Edward Island], including a right to unpolluted air, clean water and uncontaminated land.”*

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<sup>31</sup> CBC News, *J.D. Irving scientific adviser blindsided by new forestry plan*, (19 March 2014), online: <<http://www.cbc.ca/news/canada/new-brunswick/j-d-irving-scientific-adviser-blindsided-by-new-forest-policy-1.2578781>>.

<sup>32</sup> This list of rights was compiled by researching several sources including: Federal Bill 469 - the Canadian Bill of Environmental Rights; Draft of New Brunswick Children’s Environmental Health Bill of Rights; Ontario Environmental Bill of Rights; “The Right to a Healthy Environment” by David R. Boyd; “Restoring the Balance, Recognizing Environmental Rights in British Columbia” by Margot Venton and “Statutory Environmental Rights: Lessons Learned from Ontario’s Experience” by Richard D. Lindgren.

A substantive right to a healthy environment may exist on its own or may be supported by one or more procedural rights that support environmental protection in practice.

## **2.0 Procedural Rights**

### 2.1 Access to Information

Public access to information is an important component of environmental rights because it gives members of the public the tools to ensure their government is accountable in its responsibility to protect the right to a healthy environment. Transparency allows citizens to hold governments accountable for their environmental record.

As a basic right, members of the public should be informed of any toxic substances that may be found in consumer products and notified of any environmental emergencies. A more proactive approach to environmental information would also require governments to regularly publish 'state of the environment' reports that inform the public about the health of their environment.

### 2.2 Public Participation in Environmental Governance and Decision-making

Public participation in government decision-making processes is a fundamental component of the democratic process. It gives concerned citizens the opportunity to affect environmental change. Meaningful public participation builds on the right to environmental information by providing informed citizens with avenues to use the information they receive. An example is the right to comment on proposed government initiatives and the right to request a review of existing policies, regulations and programs. Citizens should also be given the opportunity to propose new environmental initiatives.

### 2.3 Access to Justice

Public participation in the environmental decision-making process may not always result in decisions that support environmental rights. Concerned citizens who want to challenge government decisions are often confronted with legal and financial barriers. Access to justice provisions remove these barriers and facilitate broader opportunities to challenge decisions. For example, a concerned citizen may be granted the legal standing to challenge a decision even where she or he is not directly impacted. A right to pursue a private prosecution or civil action to protect the environment may also facilitate access to justice. To make these legal challenges financially feasible, individuals should have access to affordable proceedings.

### 2.4 Protection from SLAPP Suits

A Strategic Law Suit Against Public Participation (SLAPP) is a civil law suit typically brought by large companies in an attempt to silence individuals and citizen groups through allegations of defamation, slander or libel. SLAPP suits are used to discourage environmental activism by burdening citizen groups with high legal costs. Protection from SLAPP suits is an important component of an environmental rights statute because it encourages public participation in contentious environmental issues. Meaningful public participation is only

achieved when citizens are free to engage in debates about environmental harm without threat of intimidation.

## 2.5 Whistleblower Protection

Employees are often in the best position to report on environmental problems in their workplace. However, they may decide not to report such problems out of fear that their employer will discipline them for speaking out. Whistleblower protection offers these individuals protection from recourse by their employers. It ensures that those who have voiced their environmental concerns cannot be unfairly disciplined, dismissed, or intimidated. Without this protection, citizens will be less likely to share important environmental concerns.

## 2.6 Independent Oversight

An independent body is a useful way to oversee the overall protection of environmental rights within a province. This body should be specialized in environmental issues and removed from the political decision-making associated with government departments. It can act as a third party in specific environmental disputes, oversee the compliance of environmental statutes, and encourage environmental education through regular reporting.

### Flowchart of Procedural Environmental Rights



## F. CURRENT STATUS OF ENVIRONMENTAL RIGHTS IN THE MARITIMES

ECELAW completed an analysis of the current environmental legislation in PEI, New Brunswick and Nova Scotia to assess environmental rights that may already exist in these Provinces. Following is an overview of what we found.

### 1.0 Prince Edward Island Gap Analysis

The primary environmental statute is the *Environmental Protection Act*.<sup>33</sup> A substantive right to a healthy environment is not mentioned in this statute.

Procedural Right	Content
Access to Information	There is no ability for members of the public to access environmental information in PEI unless they submit a request under the <i>Freedom of Information and Protection of Privacy Act</i> . <sup>34</sup> The Department of Environment is not required to make available any environmental information.
Public Participation in Environmental Governance and Decision-Making	There are limited opportunities for members of the public to participate in environmental decision-making. They are able to comment on certain environmental proposals but the time limits are restrictive and there is no mechanism for ensuring that their comments are considered. PEI citizens cannot request environmental investigations, propose new initiatives or review existing environmental laws.
Access to Justice	Concerned citizens in PEI who want to protect the environment face considerable barriers, as there are few options for enforcing environmental laws. Individuals cannot get legal standing to challenge government decisions. There are no provisions that allow citizens to undertake a private prosecution outside of the common law or to initiate a civil action to protect the environment. Members of the public can only appeal decisions to refuse or revoke specific permits when their interests are affected.
Protection from SLAPP Suits	In PEI, citizen groups who speak out against environmental harms may be the subjects of a SLAPP suit.
Whistleblower Protection	There is no whistleblower protection for employees who want to speak out about environmental violations in their workplace. In PEI, employees might fear that they will be disciplined, dismissed or otherwise punished for voicing their environmental concerns.
Independent Oversight	In PEI, there is no independent oversight of environmental issues. The PEI government oversees the implementation of the <i>Environmental Protection Act</i> with limited input from members of the public. All environmental disputes are dealt with in the regular legal system without any opportunity for alternative dispute resolution.

### 2.0 New Brunswick Gap Analysis

<sup>33</sup>*Environmental Protection Act*, R.S.P.E.I., 1988, c. E-9.

<sup>34</sup>*Freedom of Information and Protection of Privacy Act*, R.S.P.E.I., 2002, c. F-15.

The three primary environmental statutes in New Brunswick are the *Clean Environment Act* (CEA),<sup>35</sup> the *Clean Air Act* (CAA)<sup>36</sup> and *Clean Water Act* (CWA)<sup>37</sup>. A substantive right to a healthy environment is not mentioned in any of these statutes.

<b>Procedural Right</b>	<b>Content</b>
Access to Information	Under the <i>Clean Air Act</i> , the government must publish all approvals of air contaminants in an online database. Other than these selected air contaminants, there is no ability for members of the public to access environmental information in New Brunswick unless they submit a request under the <i>Freedom of Information and Protection of Privacy Act</i> . There are no provisions in either the <i>Clean Environment Act</i> or the <i>Clean Water Act</i> that require the government to make information accessible to the public.
Public Participation in Environmental Governance and Decision-Making	In New Brunswick, there are limited opportunities for members of the public to participate in environmental decision-making. Only the <i>Clean Air Act</i> includes provisions that allow the public to comment on changes to the Act and to request an investigation under the Act. However, the public cannot request reviews of existing environmental legislation or propose new environmental initiatives.
Access to Justice	In New Brunswick, only property owners, or individuals applying for specific permits, are able to appeal decisions that directly affect their interests. Other citizens have no ability to challenge environmental decisions because they have no legal standing to do so. There are no specific provisions that allow citizens to undertake private prosecutions outside of the common law or to initiate civil actions to protect the environment. There are no mechanisms in place to make court proceedings more affordable.
Protection from SLAPP Suits	In New Brunswick, citizen groups who speak out against environmental harms could be the subjects of a SLAPP suit. There is nothing stopping companies from filing SLAPP suits in an attempt to silence community groups.
Whistleblower Protection	In New Brunswick, the <i>Public Interest Disclosure Act</i> <sup>38</sup> prevents employers from retaliating against employees because they made a good faith disclosure about an issue in the public interest. This provision protects employees who want to speak out about environmental violations.
Independent Oversight	In New Brunswick, the <i>Ombudsman Act</i> <sup>39</sup> allows individuals to have their grievances heard by an independent third party. However, there is no independent body specialized in environmental issues. The New Brunswick government oversees the implementation of its environmental laws with limited input from members of the public.

### 3.0 Nova Scotia Gap Analysis

<sup>35</sup>*Clean Environment Act*, R.S.N.B., 1973, c. C-6.

<sup>36</sup>*Clean Air Act*, R.S.N.B., 1997, c. C-5.2.

<sup>37</sup>*Clean Water Act*, R.S.N.B., 1989, c. C-6.1.

<sup>38</sup>*Public Interest Disclosure Act*, R.S.N.B., 2007, c. P-23.

<sup>39</sup>*Ombudsman Act*, R.S.N.B., 1973, c. O-5.

The primary environmental statute in Nova Scotia is the *Environment Act* (NSEA).<sup>40</sup> The purpose section of the NSEA includes a goal of "maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society."<sup>41</sup> This is not a binding provision or a substantive environmental right but it provides some guidance when interpreting the rest of the Act.

<b>Procedural Right</b>	<b>Content</b>
Access to Information	In Nova Scotia, the Minister of Environment is required to make information collected under the NSEA available to the public in an environmental registry. In practice, most requests for information require a <i>FOIPOP</i> request. The Minister is required to regularly publish state of the environment reports, but this rarely occurs. In practice, there is no easy way for members of the public to receive environmental information in Nova Scotia.
Public Participation in Environmental Governance and Decision-Making	There are more opportunities in Nova Scotia for members of the public to participate in environmental decision-making than in New Brunswick and PEI. Members of the public can request to have a suspected environmental offence investigated. The NSEA requires a public review of all regulations and a mandatory review of the Act. Members of the public cannot request a review of the NSEA or propose new environmental initiatives.
Access to Justice	In Nova Scotia, there are considerable barriers that prevent concerned citizens from enforcing environmental laws. Members of the public can appeal specific decisions if they are considered an 'aggrieved person' under the NSEA. Other citizens do not have legal standing to challenge a decision. There is no specific statutory ability for members of the public to undertake a private prosecution outside of the common law. There are no mechanisms in place to make court proceedings more affordable or accessible to members of the public.
Protection from SLAPP Suits	Citizen groups based in Nova Scotia who speak out against environmental harms could be the subjects of SLAPP suits. There is nothing stopping companies from filing SLAPP suits in an attempt to intimidate community groups into silence.
Whistleblower Protection	In Nova Scotia, the NSEA contains whistleblower protection for employees who report or intend to report environmental violations. Employers face fines as high as \$1 million if they intimidate, discipline, punish, or dismiss employees for reporting violations.
Independent Oversight	In Nova Scotia, the <i>Ombudsman Act</i> <sup>42</sup> allows individuals to have their grievances heard by an independent third party. However, there is no independent body specialized in environmental issues. The Nova Scotia government oversees the implementation of its environmental laws with limited input from members of the public.

<sup>40</sup>*Environment Act*, R.S.N.S. 1994, c.1.

<sup>41</sup>*Environment Act*, R.S.N.S. 1994, c.1 at s. 2.

<sup>42</sup>*Ombudsman Act*, R.S.N.S. 1989, c.6.

## **G. WHERE DO WE GO FROM HERE?**

As the gap analyses demonstrate, none of the three provinces has comprehensive environmental rights provisions in their environmental legislation. In this section, we present a couple of options to incorporate environmental rights into provincial legislation.

### **1.0 Introduce an Environmental Bill of Rights**

Each Maritime province could adopt a standalone law containing a substantive right to a healthy environment along with procedural rights to allow public participation.

As mentioned earlier, the government of Ontario enacted the *Environmental Bill of Rights* in 1993. This provincial law recognizes the environmental rights of everyone in Ontario and provides them with a strong set of procedural rights. The Bill also created the Environmental Commissioner of Ontario, an independent body tasked with monitoring and reporting on environmental compliance. The Bill has been criticized for focusing too heavily on procedural rights without providing real environmental protection.<sup>43</sup> However, it provides some guidance to Maritime Provinces that might consider adopting a comprehensive Environmental Bill of Rights.

The New Brunswick Environmental Law Society has already drafted a proposed New Brunswick Environmental Bill of Rights (NBEBR). It covers a comprehensive set of procedural rights including access to environmental information, public participation in environmental decision-making, and access to environmental justice.

The benefit of starting with a comprehensive new law, as opposed to amending existing legislation, is that it shows commitment to environmental rights. Adopting comprehensive legislation also allows the public and specific stakeholders to engage in its development. The main drawback of starting with a new, standalone environmental rights law is that it requires political will to adopt a new piece of legislation. It could also be costly to develop and implement a new environmental rights regime.

### **2.0 Amend Existing Legislation**

It is possible to add substantive and procedural rights to existing environmental laws. This would require expanding the provisions already in place in each province over a number of years.

This approach is beneficial because it builds on already established legal frameworks, and thus may make political favor for environmental rights easier to gain. It is also more cost effective to work with existing departments and government systems.

Amending existing laws, however, does not demonstrate the same level of commitment to environmental rights, and might not result in a comprehensive set of rights. It may be

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<sup>43</sup>Mark S. Winfield, "A Political and Legal Analysis of Ontario's Environmental Bill of Rights" (1998) 47 UNB LJ 325.



necessary to amend the language of environmental rights to fit the approach of an existing statute, which may change the meaning or effectiveness of the right. There is a risk that governments will prioritize certain environmental rights provisions over others in an attempt to gain political favour.

### **3.0 Tailored Approach for Each Province**

Nova Scotia, New Brunswick and PEI are distinct provinces with different social, economic, and political climates. ECELAW wishes to engage groups and individuals in each of the three provinces to facilitate discussion on the most effective approach for each province. Ultimately, it is up to individuals in each province to determine the best approach to advance environmental rights.

## **H. CONCLUSION**

For many Canadians, the environment is an important part of our national identity. Yet Canada is one of only 16 countries that have yet to recognize a right to a healthy environment. Several provinces and territories have included environmental rights in their legislation, with varying degrees of effectiveness.

Environmental rights must start with a substantive right to live in a healthy environment, including a right to unpolluted air, water, and uncontaminated land; this right is then supported by procedural rights that allow citizens to hold their governments accountable to the public for their environmental records.

Our analysis of environmental legislation in Nova Scotia, New Brunswick and Prince Edward Island found that none of these provinces recognize a substantive right to a healthy environment. Nor do these provinces include an adequate right to environmental information, the right to participate in environmental decision-making, or the right of access to justice. We suggest that it is time for Nova Scotia, New Brunswick and Prince Edward Island to provide their citizens with the right to a healthy environment. We have the necessary tools and information to establish environmental rights. We have the evidence to demonstrate the need for and benefits of environmental rights. We have models from around the world of governments that have implemented environmental rights. Now is the time to take this information and engage our citizens and politicians to achieve a better understanding of the value of environmental rights as a means of protecting the health and well being of current and future generations.

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## Appendix A: Model Environmental Rights Provisions

<b><i>Substantive Rights</i></b>		
The right to a healthy environment	Every person has the right to a healthy environment in Nova Scotia [New Brunswick, Prince Edward Island], including a right to unpolluted air, clean water and uncontaminated land. The provincial government, as the trustee of the environment, is responsible to protect the health of the environment for the benefit of present and future generations. Every person is responsible to protect the health of the environment in the province for the benefit of present and future generations.	
Definitions	Environmental Rights Commissioner, Environmental Tribunal, Public Registry, State of the Environment Report, Environment	
Purpose	The purpose section of the statute should recognize the public right participate in the formulation of decisions affecting the environment, including opportunities to participate in and comment on the review of legislation, regulations and policies and the provision of access to information affecting the environment. The purpose section will also acknowledge principles of sustainability including, ecological value, precautionary principle, intergenerational equity, pollution prevention, polluter pays, stewardship principle, standstill principle, public engagement in decision-making, transparency, government that is responsive, effective, fair and timely.	The Act must be interpreted in a way that complies with the purpose section. Most of this is taken from the NSEA.
<b><i>Procedural Rights</i></b>		
	<b>Access to Information</b>	
The right to access information and receive public notice	<p>The Minister shall establish and maintain an Environmental Registry. The Minister shall proactively place any record or information identified in the Act(s) on the Environmental Registry in a timely and transparent manner. The Minister shall ensure that members of the public have access to the information contained in the Environmental Registry without delay, prohibitive cost and application requirements. The Environmental Registry shall be made available on-line at no cost. The Environmental Registry shall be audited annually with oversight by the Environmental Commissioner. The audit shall be made available to the public on the Environmental Registry.</p> <p>The Minister shall provide public notice of all applications and impending decisions made by the Minister or an Administrator under the [list of</p>	The FOIPOP concept may be too broad because it includes email communications, etc, and may be simply too much information to include in an on-line registry. There is need to determine what documents should be included in the Registry. There is a good starting list in the NSEA. Regulations should be created to provide details on the nature of the on-line database - searchable, regularly updated, free and timely

	statutes for each province e.g. NSEA, CEA, CWA, CAA, EPA]. Public notice shall be given not less than 30 days prior to the final decision. The Notice will include links to any document relevant to the review of the application or impending decision. All final decisions made under the Act(s) shall be posted to the Environmental Registry within 10 days of the decision.	access.
The right to information on environmental emergencies	The Minister shall immediately inform any member of the public who may be affected by an environmental emergency of the emergency and shall share details of any imminent environmental or human health threats, including any measures that may prevent or mitigate harm.	
State of the environment reports	The Minister shall prepare a State of the Environment Report (SOER) for the province every two years and shall post the SOER on the Registry. The SOER will include a statement by the Minister on how the right to a healthy environment has been incorporated into decisions made by the government during the period covered by the Report. The SOER will include measurable environmental objectives for air, water and soil. The SOER will include reports of industry releases where the industry operates under an environmental approval.	
The right to know (what is in the air, water, food, consumer products, etc.).	The Minister shall make available to members of the public information on toxic substances that may be found in products used or consumed by the public, including the nature of the substance and any short- or long-term health or environmental impacts which may be caused by the using or consuming these products. This information shall be made available on the Environmental Registry.	The idea behind this right is similar to the WHMIS that exists for workers.
	<b>Public Participation in Environmental Governance and Decision-Making</b>	
The right to comment	Any new regulations or any substantive amendment to the regulations becomes law only after the regulations or amendments, as the case may be, have been subjected to public review and comment. All proposed regulations, policies, plans, protocols standards or other regulatory instruments (including approvals) or substantive amendments to such shall be posted in the Environmental Registry and be available for comment for not less than 30 days before they are finalized. The Minister shall review all comments received, make all comments available on the public registry and identify ways a proposal has been affected by public input. All EA reports, the terms of reference for an EA report, and Ministerial decisions on an EA must be made	The opportunity to engage in public engagement should not be entirely at the discretion of the Minister.

	available for public review and comment for a minimum of 30 days.	
The right to request a review (of a regulation, policy, statutory instrument, etc.)	Any person can apply to the Minister to have an existing statute, regulation, statutory instrument, or policy amended, repealed or revoked. The Minister shall acknowledge receipt of the request within 10 days and must consider whether to conduct a review. The Minister shall inform the applicant within 60 days of the review or provide rationale for not conducting the review to the applicant. The Minister must report to the applicant every 90 days during the review and at the conclusion of the review. All documents and communications associated with the request and the review shall be available on the Environmental Registry. Where the applicant is not satisfied with the result of the review or the rationale provided by the Minister, the applicant may appeal to have an independent review of the decision by the Environmental Commissioner.	
The right to request an investigation	Any person who has reason to believe that a provision of the Act(s) has been violated may apply to the Environmental Commissioner to have the suspected offence investigated. The Environmental Commissioner shall oversee the investigation to be carried out by the relevant Minister. The Minister shall acknowledge the application and direct enforcement officers to inspect the matter. The Minister must report progress to the Environmental Commissioner and the applicant within 90 days. The Minister can discontinue the investigation but must provide a statement in writing, with reasons, to the Environmental Commissioner, the applicant and the person being investigated.	This provision already exists in Nova Scotia and is not particularly effective because the Minister obtains advice from staff and usually does not investigate. Putting another admin option with an independent commissioner would be a better approach. Requiring the Minister to meet with the complainant may also be an improvement. Boyd raises the idea of an Independent Environmental Law Enforcement Agency.
The right to receive reasons	Where the Minister, administrator or delegated agent makes a decision under any section of the Act or regulations reasons for the decision must be provided to the applicant and must be made available on the Environmental Registry.	
The right to propose an initiative	Any person can apply to the Minister to have an environmental initiative considered, including a policy, program, regulatory tool, project, technology, environmental impact assessment or a strategic environmental impact assessment. The Minister shall acknowledge receipt of the application within 10 days of receipt and shall	Basically, this is a formal means to meet with staff to discuss an initiative.

	facilitate a meeting between the applicant(s) and appropriate departmental staff. The Minister shall post the proposal and response on the Environmental Registry.	
Other public participation opportunities	Other opportunities include: a right to participate in hearings for major developments or economic decisions which may lie outside the 'environmental' statutes, establishing advisory committees, round tables, etc. The GIC shall establish an environmental trust and public engagement fund available to support and facilitate public participation in environmental decision-making, new initiatives proposed by the public, etc.	This requirement should not be entirely discretionary. Currently, citizens have not had adequate avenue to have their concerns taken seriously, e.g. mining, quarries, development, etc.
<b>Access to Justice</b>		
The right to appeal a decision	Any person with a 'sufficient interest' in a decision made pursuant to the Act may appeal the decision to an independent third party. Decisions already made by third party, panel, etc may be appealed to a court.	The concept of 'sufficient interest' should be defined in the statute.
The right to undertake a private prosecution	Any person may pursue a private prosecution where that person has a reasonable belief that there has been a breach of the Act.	As part of environmental rights a private prosecution can be pursued without risk of the AG stopping the proceedings. One way to address this may be to have the EC as part of the AG office with the EC having the capacity to stop the proceedings.
Standing and the right to take a civil action to protect the environment	Any resident of Nova Scotia may initiate a civil cause of action in their own interest or on behalf of the public interest or in the interest of protecting the environment where that person has a reasonable belief that there has been a breach of the [name statute(s)] or a violation of an environmental right and harm to the environment or human health has or is likely to result. Where a person is convicted of an offence under this Act, the conviction is prima facie evidence of negligence and any person who suffers loss or damage as a result of the conduct that constituted the offence may, in a court of competent jurisdiction, sue for an amount equal to the reasonably foreseeable loss or damage proved to have been suffered as a result of the conduct that constituted the offence.	Also need to consider a provision for judicial review. These provisions need to balance rights and responsibilities and need to enable legitimate opportunities to take action to protect the environment from harm.
The right to effective and affordable proceedings.	There is hereby established the Natural Resource and Environmental Appeal Board. The Board has the authority to hear appeals of decisions made by the Minister or the Environmental Commissioner.	Regulations establishing rules for the Appeal Board should list the statutes affected (e.g.

	<p>The Board has the authority to hear a private action brought by a person in their own interest or on behalf of the public interest or in the interest of protecting the environment who has a reasonable belief that there has been a breach of the [name statute(s)] including a violation of an environmental right.</p> <p>Decisions made by the Board may be appealed to the appropriate court. A plaintiff will not be denied interim or injunctive relief solely on the basis of being unable to provide an undertaking to pay damages. Damages shall be capped at \$1000.00 and costs shall not be awarded against either party unless the court deems the litigation to be obstructive, frivolous, vexatious or harassing. The court may award costs, including anticipatory costs, where the court deems the case has as its primary focus the protection of the public interest.</p>	<p>NSEA, <i>Fur Industry Act</i>, other resource based statutes). Does the Board have the authority to issue an injunction or an interim injunction? Should one be able to by-pass the Board if there is an imminent risk and go directly to court for interim injunctive relief?</p>
The right to access Alternative Dispute Resolution	<p>Prior to hearing a dispute the Natural Resource and Environmental Appeal Board may require the parties to submit to alternative dispute resolution arranged by the Board for a period of up to 10 days. Any person seeking to bring a complaint or action to the Board and any person affected by the complaint or action may request alternative dispute resolution. Any settlement reached by the parties will be approved by the Board or the Court as the case may be and shall have the force and effect of law.</p>	<p>NS has provisions on ADR but referring a dispute to ADR is at the discretion of the Minister, so it is never used.</p>
	<b>Protection from SLAPP Suits</b>	
The right to be protected from strategic lawsuits against public participation (SLAPP)	<p>Any person who seeks to initiate a civil cause of action in libel, slander or defamation where the cause of action relates to a comment made by the defendant in the course of a matter subject to this Act, the person seeking to initiate the action must first present the dispute to the Environmental Commissioner. The Environmental Commissioner may refer the matter to alternative dispute resolution or to the Natural Resource and Environmental Appeal Board for consideration. The complainant cannot proceed with a civil action until the matter has been duly considered in accordance with the Act.</p>	<p>This is modeled after the Farm Practices Legislation in NS.</p>
	<b>Whistleblower Protection</b>	
An employee's right to be protected from recourse when reports information to government officials.	<p>No employer shall (a) dismiss or threaten to dismiss an employee; (b) discipline or suspend an employee; (c) impose a penalty on an employee; or (d) intimidate or coerce an employee, because the employee has reported or proposes to report to any person an act or omission that contravenes or that the employee has reasonable grounds to believe may contravene this Act. Any person may file a</p>	

	complaint with the Environmental Rights Commissioner where that person believes that an employer or a person acting on behalf of the employer has taken a prohibited action against them.	
	<b>Independent Oversight</b>	
The right to have concerns considered/reviewed by an independent third party (Auditor/Commissioner)	Any person who is aggrieved or, in the opinion of the Environmental Commissioner, may be aggrieved, the Commissioner, on the written complaint of or on behalf of the person aggrieved or on his or her own motion, may investigate the administration (a) by a department or an officer thereof, of any law of the Province; (b) by a municipal unit or an officer thereof, of any law of the municipal unit or any law of the Province that applies to the municipal unit.	
Overseeing implementation of and compliance with environmental statutes.	The Minister shall establish the Office of the Environmental Commissioner. The Environmental Commissioner shall facilitate education programs on environmental rights, advise the government, audit the implementation of the Act(s) and produce an annual public report to the legislature. The EC shall review and report on the government's progress on environmental rights implementation and sustainability. The Environmental Commissioner shall receive and investigate complaints. The Environmental Commissioner may use alternative dispute resolution to address complaints and appeals under the Act.	The details should be contained in regulation. The EC concept could be contained in an omnibus environmental statute or as part of the provincial Auditor General. The EC needs to have authorities similar to the AG in that they can investigate ministries, compel documents, evaluate government records, etc. EC should report to the legislature not the Minister.