Review of the Northwest Territories *Environmental Rights Act*

Submission to the
Standing Committee on Economic Development and Environment

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[1] See short bio at Appendix A.

Summary of Recommendations

1. ***Replace "wise management" with "ecological sustainability" in the Preamble.***
2. ***Recognize the right to a healthy environment in section 1 of the Act.***
3. ***Add a clear definition of "healthy environment" to the definitions section (recommended text provided below).***
4. ***Add a clear definition of "significant" to the definitions section (recommended text provided below).***
5. ***Amend Purposes section to replace the phrase "by the means provided in this Act" with "according to the terms of this Act".***
6. ***Add a new section recognizing key environmental law principles.***
7. ***Restore a paramountcy provision.***
8. ***Delete the requirement to swear statements before a Commissioner for Taking Oaths.***
9. ***Add a reasonableness requirement to the exercise of Ministerial discretion under s. 9(2).***
10. ***Amend the standing provision in s 13(2) to clarify that it applies both to actions under the ERA and in public nuisance under the common law.***
11. ***Amend sections 12 and 13(regarding environmental enforcement) in accordance with best practices (see the template set out in Appendix D).***
12. ***Add a provision allowing residents of the NWT to request a review of an existing policy, Act or regulation or of the need for a new policy, Act or regulation***
13. ***Create an environmental registry.***
14. ***Create a right to appeal Ministerial decisions that may affect the right to a healthy environment.***

Introduction

The Northwest Territories has been a national leader in the realm of environmental rights, setting an example which was followed by other Provinces and Territories at various times since the NWT first introduced its ground-breaking *Environmental Rights Act*. Bill 39 continues this tradition of best practice in some respects. Particular strengths of the Bill include provisions: allowing citizens to file an Application for Investigation, protecting environmental whistleblowers from reprisals, respecting Indigenous rights, and requiring government departments to develop Statements of Environmental Values. The language of the Preamble also includes important acknowledgements of the unique relationship between residents of the NWT and the environment, as well as recognition of the local and global importance of NWT's environment. However, Bill 39 does require substantial amendment in order to fulfill its potential to play a meaningful role in environmental protection in the Northwest Territories.

The most important amendments that could be made to Bill 39 concern the legislative recognition of the right to a healthy environment. To summarize, I recommend codifying the right to a healthy environment in a free-standing provision (rather than in the "Purposes" section where it is currently situated). This approach could provide many significant benefits to the current residents of the Northwest Territories and help to protect the environmental foundation of a healthy economy both now and in the future. In order to accomplish this, the environmental rights and obligations at stake must be clearly articulated and the *ERA* must take precedence over other statutes (except those related to Indigenous land, resources and self-government agreements). My detailed recommendations are set out below.

Background

The connections between ecological sustainability, economic prosperity and human health are beyond doubt, and have been well established in the relevant scholarship.[2] Recognition of environmental rights is one of the key tools for achieving these goals. The right to a healthy environment has arguably emerged as a principle of customary international law and is reflected in the great majority of constitutions that have been enacted or amended over the last four decades.

Around the world, more than 90 states have constitutionalized some form of environmental right, variously described as the right to a healthy, ecologically balanced, safe, or wholesome environment.[3] Taking into account nations that have constitutionalized environmental rights through the interpretation of other rights (*e.g.*, the right to life) or through incorporation of international or regional human rights instruments, the number of nations that accord constitutional protection to environmental rights and/or obligations is 147 (out of a total of 193 UN member states).[4]

There is overwhelming evidence from all around the world that the legal protection of environmental rights produces significant and measurable improvements in environmental performance and empowers citizens to assist their governments in protecting important environmental values.[5] These benefits are seen across an astonishingly diverse range of societies and the data are compelling: compared to

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[2] See eg David Richard Boyd, *Cleaner, Greener Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (Vancouver: UBC Press, 2015).

[3] David Richard Boyd, *The Environmental Rights Revolution* (Vancouver: UBC Press, 2012) at 53-57; David Richard Boyd, *The Right to a Healthy Environment* (Vancouver: UBC Press, 2012)a t 74; Joshua C. Gellers, *The Global Emergence of Constitutional Environmental Rights,* (New York, NY: Routledge, 2017); Erin Daly & James R May, eds., *Implementing Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2018).

[4] Boyd, *The Right to a Healthy Environment* at 88.

[5] See in particular David Richard Boyd, *The Environmental Rights Revolution* (Vancouver: UBC Press, 2012); David Richard Boyd, *The Right to a Healthy Environment* (Vancouver: UBC Press, 2012).

countries that lack such protection, nations that legally protect environmental rights (particularly through a constitutional right to a healthy environment) rank higher on multi-indicator assessments of environmental performance, have smaller "ecological footprints", and have been more successful in reducing dangerous air pollutants (including greenhouse gases).[6]

These relative improvements apply whether nations are compared with all other countries around the globe or with only those in their own region (*e.g.*, Africa, the Americas, Asia-Pacific, Europe and the Middle East/Central Asia). Importantly, legal recognition of environmental rights has not compromised economic wellbeing in the adopting countries. In fact, countries very similar to Canada – such as Norway – have recognized and protected the right to a healthy environment while enjoying a thriving economy.[7]

Canada does not enjoy a constitutional right to a healthy environment but several provinces and territories have filled this gap by protecting environmental rights through legislation.[8] Moreover, the right to a healthy environment is emerging as a quasi-constitutional principle in Canada. The Supreme Court of Canada has long recognized the overwhelming imperative of environmental protection.[9] The Court summarized its own holdings on this point in *British Columbia v. Canadian Forest Products Ltd*:[10]

> ...As the Court observed in *R. v. Hydro-Québec*..., legal measures to protect the environment 'relate to a public purpose of *superordinate importance*'.... In *Ontario v. Canadian Pacific Ltd.* ... 'stewardship of the natural environment' was described as *a fundamental value* ... Still more recently, in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Town)*... the Court reiterated, at para. 1:
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> ...Our common future, that of every Canadian community, depends on a healthy environment....This Court has recognized that '(e)veryone is aware that individually and collectively, we are responsible for

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[6] Boyd, *The Right to a Healthy Environment*, *supra*, note 19, at 107-121. See also Christopher Jeffords & Lanse Minkler, 2014, "Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes ", Working papers 2014-16, University of Connecticut, Department of Economics, online: <https://ideas.repec.org/p/uct/uconnp/2014-16.html> (last visited April 1, 2015) [hereinafter "Jeffords & Minkler"].

[7] See "Norway Economic Outlook", on-line: https://www.focus-economics.com/countries/norway Norway protects the right to a healthy environment in Article 112 of its Constitution.

[8] Quebec, Ontario, the Yukon, the Northwest Territories, and Nunavut.

[9] See generally Jerry V DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?" (2007) 17(3) J Envtl L & Prac 159.

[10] [2004] 2 SCR 74 (SCC).

> preserving the natural environment ... environmental protection [has] emerged as a *fundamental value* in Canadian society' ....[11]

In *Ontario v. Canadian Pacific Ltd.*,[12] the majority of the Supreme Court adopted the following passage from the Law Reform Commission of Canada's report, *Crimes Against the Environment*: "... [A] fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the *right to a safe environment*."

What does the right to a healthy environment mean? The United Nations Special Rapporteur on Human Rights and the Environment (currently Canada's own Dr David Boyd) has clarified that environmental rights include substantive, procedural and distributive aspects – the latter is generally known as "environmental justice", defined as the equitable distribution of environmental benefits and burdens.

Substantive environmental rights form the core of the right to a healthy environment. The UN's Framework Principles on Human Rights and the Environment (reproduced in full in Appendix B), provide in particular that "States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights".[13] A healthy and sustainable environment is one in which ecological integrity is preserved such that ecosystems can remain healthy both in the immediate and long-term, and which includes clean air, safe food and drinking water, a stable climate, a non-toxic environment, and flourishing biodiversity.[14]

Procedural rights include access to information, public participation in environmental decision-making and access to the courts to resolve environmental disputes.[15] Opening up government decision-making with respect to the environment empowers citizens, enhances the legitimacy of proposed projects (thus reducing public controversy), enhances opportunities for sharing local and Traditional Knowledge, and broadens the range of concerns and solutions considered by decision-makers, resulting in better decisions.[16]

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[11] *Id.*, at para. 7 (emphasis added, citations omitted). See also *R. v. Wholesale Travel Group Inc*, [1991] 3 SCR 154, at para 234 ("Regulatory legislation is essential to the functioning of our society and to the protection of the public. It responds to the compelling need to protect the health and safety of the members of our society and to preserve our fragile environment.")

[12] [1995] 2 SCR 1031 (SCC).

[13] On-line: https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf.

[14] See Appendix C, excerpt from submission by Dr David Boyd to the federal Standing Committee on Environment and Sustainable Development.

[15] See Framework Principles 6, 7, 8, 9, and 10.

[16] See also National Academies of Science, *Public Participation in Environmental Assessment and Decision Making,* on-line: https://www.nap.edu/catalog/12434/public-participation-in-environmental-assessment-and-decision-making.

Environmental justice rights refer to the just distribution of environmental benefits and burdens, without discrimination based on race (including Indigeneity), class, gender, age dis/ability etc. The UN Special Rapporteur explains that "States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment." Environmental justice also requires that respect be given to Indigenous laws governing our relationship with the natural world, and that the environmental rights contained in the *United Nations Declaration on the Rights of Indigenous Peoples* be respected (for example the right to access and protect Indigenous sacred sites).

All three aspects of the right to a healthy environment should be captured in the Northwest Territories *Environmental Rights Act.* Of all of the recommendations that follow, the most important is to amend Bill 39 to include a free-standing provision recognizing the right to a healthy environment, coupled with a detailed definition of this right in the definitions section and a paramountcy provision. This would be the minimum content required in order to truly modernize Bill 39 and make it an effective environmental rights statute.

BILL 39 – RECOMMENDED AMENDMENTS

Recommendation: *Replace "wise management" with "ecological sustainability" in the Preamble.* Paragraph one of the Preamble should refer to the ecological sustainability of the environment, rather than the wise management of the environment.

Explanation: The principle of ecological sustainability is far more consistent with modern approaches to environmental legislation. The term implicitly recognizes that every aspect of our society, including the economy, rests on the foundation of a healthy environment. While "wise management" is an inherently subjective and somewhat ambiguous concept, "ecological sustainability" is a scientific and legal term that provides more precise guidance to decision-makers at all levels.[17] It is increasingly recognized as a fundamental legal principle at both national and international levels.[18]

Recommendation: *Recognize the right to a healthy environment in section 1 of the Act*. Section 1 of the Act should read:

> 1(1) Every resident of the Northwest Territories has the right to a healthy environment.

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[17] See generally Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Aldershot, England; Burlington, VT: Ashgate, 2008).

[18] *Ibid.*

(2) The Government of the Northwest Territories has an obligation, within its jurisdiction, to protect the environmental rights of Northwest Territories residents.

(3) Every resident of the Northwest Territories has the right to protect the integrity, biological diversity and productivity of the ecosystems in the Northwest Territories.

(4) Every department of the Government of the Norwest Territories must make environmental information accessible to the public in a reasonable, timely, culturally appropriate and affordable manner.

The above amendments would mean that all section numbers would need to be amended; the definitions section would now be section 2 and so on. If there is concern about changing existing section numbers in the bill, it would also be possible to insert the provisions above into a new section 1.1 following section 1.

Explanation: <u>This is the most important recommended amendment to Bill 39.</u> The many benefits of a legally protected right to a healthy environment are most likely to be realized if the *ERA* clearly recognizes such a right in a free-standing section, without the modifications currently contained in section 2, and with an appropriately clear definition. Further elaboration of environmental rights would be even better, and I have offered one example, from the federal context, in Appendix C. This would be another helpful source of possible language for fleshing out the content of the right to a healthy environment in Bill 39.

Recommendation: ***Add the following definition of "healthy environment" to the definitions section***

The term "healthy environment" means "an environment that is ecologically sustainable over time and that includes clean air, safe food and drinking water, a stable climate, a non-toxic environment, and flourishing biodiversity".

Explanation: The above is offered in order to provide clarity on the right to a healthy environment and the recommended terms are used because they are meaningful and capable of being interpreted by both scientists and legal decision-makers.

Recommendation: ***Add the following definition of "significant" to the definitions section:***

"Significant harm to the environment means any non-trivial harm to the environment, taking into account the cumulative impacts of all human activities on the ecosystem or resource in question"

Explanation: This amendment would provide important clarity on the "significant harm" threshold, which recurs several times in the bill.

Recommendation: ***Amend Purposes section to replace the phrase "by the means provided in this Act" with "according to the terms of this Act".***

Explanation: The phrase "according to the terms of" is more expansive than "by the means provided" since the latter seems to refer only to procedures or mechanisms whereas the former would encompass broader substantive components of the Bill, such as the important existing provisions in the definitions section, and the free-standing right to a healthy environment provision proposed above.

Recommendation: ***Add a new section recognizing key environmental law principles.*** A new provision should be added that states:

X (1) This Act is to be applied in a manner consistent with the following principles of environmental law:

1. *Precautionary principle* — If an activity raises threats of serious harm to the environment, precautionary measures should be taken even if it has not been scientifically proven that the activity is harmful. In this context, the proponent of the activity, rather than the public, should bear the burden of proof.

2. *Polluter pays principle* — A polluter should bear responsibility for remedying contamination for which the polluter is responsible and must bear the costs of remediation.

3. *Principle of ecological sustainability* — The Government of The Northwest Territories has the duty to protect and restore the integrity of the ecological systems of the Northwest Territories.

4 *Principle of intergenerational equity* — The current generation holds the environment in trust for future generations and has an obligation to use its resources in a way that leaves that environment in the same or better condition for future generations.

5. *Principle of environmental justice* — There should be a just distribution of environmental benefits and burdens among residents of The Northwest Territories.

X (2) Every department must consider the environmental principles set out in subsection (1) when making a decision on a matter that may have a significant effect on the environment.

Explanation: These principles have been widely recognized globally and within Canada as the basic building blocks of sound environmental policy. They give meaning to the generalities necessarily used in describing environmental rights and environmental protection and they provide helpful guidance to government decision-makers at every level (including courts).

Recommendation: ***Restore a paramountcy provision.*** Section 5 regarding land, resources and self-government agreements should be amended to include sub-section 2, stating:

> (2) Subject to subsection 5(1), where there is a conflict between the terms of this Act and the terms of any other enactment, this Act shall prevail to the extent of the conflict.

Explanation: The previous statute included a paramountcy provision in section 2(3). This is appropriate for statutes designed to protect citizens' rights (eg human rights codes), since these statutes are intended to provide high-level guidance to regulators and courts.[19] Although section 5 appropriately establishes that instruments related to Indigenous land, resources and self-government agreements are superior to the *ERA*, this does not require (or justify) dispensing with a general paramountcy provision.

Recommendation: ***Delete the requirement to swear statements before a Commissioner for Taking Oaths*****.** Subsection (4) of section 8 should be deleted.

Explanation: Section 8(4) in the bill requires those applying for an Investigation to swear a statement as to their good faith before a Commissioner for taking oaths. There is no evidence of frivolous or abusive use of the Investigation process by citizens acting in bad faith, so the provision is unnecessary. More importantly it is unhelpful, as it would restrict the participatory rights of NWT citizens who live in remote communities where it may be difficult or costly to access a Commissioner. International evidence demonstrates that public input into environmental decision-making is most effective when governments remove bureaucratic barriers to participation.

Recommendation: ***Add a reasonableness requirement to s. 9(2).*** Section 9(2) should be amended to read: "(2) The Minister shall investigate all matters that are reasonably necessary for a determination of the facts respecting an application under section 8".

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[19] See eg, *Manitoba Human Rights Code,* s 58: "Paramountcy of Code: Unless expressly provided otherwise herein or in another Act of the Legislature, the substantive rights and obligations in this Code are paramount over the substantive rights and obligations in every other Act of the Legislature, whether enacted before or after this Code."

Explanation: The current language of section 9(2) provides an almost absolute discretion to the Minister as to whether or not to take an Application for Investigation seriously. This substantially undermines the utility of the entire provision. The proposed language would provide an appropriate constraint on Ministerial discretion, without limiting the Minister's ability to make reasonable choices based on rational reasons.

Recommendation: ***Amend the standing provision in s 13(2) to clarify that it applies both to actions under the ERA and in public nuisance under the common law.*** Section 13(2) should read:

> (2) No person is prohibited from commencing an action under subsection (1) *or under the common law of public nuisance* by reason only that the person is unable to show
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> 1. (a) any greater or different right, harm or interest than any other person; or
> 2. (b) any pecuniary or proprietary right or interest in the subject matter of the proceeding.

Explanation: Like all common law countries, Canada has two legal systems that protect environmental quality. The first is the set of environmental statutes and regulations passed by the legislature. The second is the common law of torts, in particular the tort of "public nuisance" which has the potential to be very helpful in allowing citizens to protect public resources such as air or water. However, courts have traditionally held that citizens could only sue for public nuisance if they had a "special injury" different from that of the general public and this has been a major barrier to public nuisance. The standing provision in section 13(2) needs to clarify that it is solving the standing problem for the common law of public nuisance in addition to the statutory action created in section 13(1).

Recommendation: ***Amend sections 12 and 13 in accordance with the template set out in Appendix D.***

Explanation: In his comprehensive review of the *Canadian Environmental Protection Act,* Dr David Boyd, now UN Special Rapporteur on Human Rights and the Environment, formulated a detailed proposal for environmental enforcement provisions, based on a rigorous data set from both Canada and abroad. I would recommend amending ss 12 and 13 of Bill 39 to comport with Dr Boyd's proposed draft, set out in Appendix D.

Recommendation: ***Add a provision allowing residents of the NWT to request a review of an existing policy, Act or regulation of the need for a new policy, Act or regulation.***

Explanation: This allows citizens to participate with government in developing big-picture environmental policy and is important for environmental democracy. Provisions could be similar to those in ss 15-18 of Ontario's *Environmental Bill of Rights*.

Recommendation: ***Create an "Environmental Registry".*** Add a provision requiring the Government of the NWT to provide public notice of and an opportunity to comment on, any instrument, project, policy or proposal that may affect the environment.

Explanation: It is nationally and internationally recognized that the first step to public participation in environmental decision-making is access to information. If the public does not know about environmentally significant developments, then it has no hope of influencing the relevant government decision-making processes. An Environmental Registry would allow members of the public to get educated about, and to participate in, important decisions affecting their environment. Thus, Bill 39 should include provisions establishing a public registry giving timely notice of, and an opportunity to comment on: government decisions, approvals or issuances of authorizations, directions, and orders that might impact the environment, including any new or updated policies, Acts or regulations; Departmental Statements of Environmental Values; and regulatory prosecutions and convictions for environmental offenses. With respect to the specific language framing these provisions, I would recommend adding provisions to the bill similar to those in ss 5, 6 and 22-28 of Ontario's *Environmental Bill of Rights.*

Recommendation: ***Create a right to appeal Ministerial decisions that may affect the right to a healthy environment.***

Explanation: Untrammelled government discretion has been identified as the single biggest barrier to effective environmental regulation in Canada.[20] As it currently stands, Bill 39 is riddled with such discretion, which threatens to undermine its important potential as a tool for environmental protection and economic sustainability. While any Ministerial decision is presumptively subject to judicial review, best practice in environmental rights legislation is to provide an explicit statutory right of appeal. In particular, I would recommend adding provisions to the bill similar to those in ss 38-48 of Ontario's *Environmental Bill of Rights.*

Conclusion

The Northwest Territories' initiative to codify environmental rights in a modernized *Environmental Rights Act* is a laudable effort to bring the NWT in line with national and international best practices in this area. It has the potential to make a

[20] See eg Lynda Collins & Lorne Sossin "In Search of and Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52:1 UBC Law Rev 293; David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 231-238.

meaningful difference for present and future residents of the NWT and to provide leadership for the rest of Canada. However, several amendments are necessary in order to allow Bill 39 to fulfill its potential as a tool for environmental protection, sustainable prosperity, and social well-being. Most importantly, the *Act* should include a substantive, free-standing provision recognizing the right to a healthy environment, coupled with a clear definition of the term, and a paramountcy provision to maintain the existing status of *Environmental Rights Act* in the hierarchy of NWT laws (subject to instruments related to Indigenous land rights).

Appendix A – Lynda Collins Short Bio

Lynda M. Collins is a Full Professor in the Centre for Environmental Law & Global Sustainability at the University of Ottawa. She is a nationally and internationally recognized expert in environmental human rights including constitutional environmental rights, Indigenous environmental rights and environmental rights in private law. She publishes and presents globally on these topics and has testified in environment committee hearings at the Canadian House of Commons and Senate. She has advised multiple national and international organizations including the United Nations Association in Canada, the European Parliament, and the United Nations Special Rapporteur on Human Rights and the Environment., and has participated in expert gatherings and participatory processes with the United Nations Human Rights Council, United Nations Environment Program, the International Bar Association. She co-Chaired the Toxic Reduction Scientific Expert Panel (by Ministerial appointment) and is co-author of *The Canadian Law of Toxic Torts*.

Appendix B – United Nations Framework Principles on Human Rights and the Environment

Framework principle 1 - States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.

Framework principle 2 - States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.

Framework principle 3 - States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.

Framework principle 4 - States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.

Framework principle 5 - States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.

Framework principle 6 - States should provide for education and public awareness on environmental matters.

Framework principle 7 - States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.

Framework principle 8 - To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.

Framework principle 9 - States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process.

Framework principle 10 - States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.

Framework principle 11 - States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.

Framework principle 12 - States should ensure the effective enforcement of their environmental standards against public and private actors.

Framework principle 13 - States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent,

reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.

Framework principle 14 - States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.

Framework principle 15 - States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:

(a) Recognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used; (b) Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources; (c) Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources; (d) Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.

Framework principle 16 - States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.

Appendix C –
Environmental Rights Provisions

The following proposed language is excerpted from the submission of Dr David Boyd to the federal Standing Committee on Environment and Sustainable Development during its review of the *Canadian Environmental Protection Act*. This formulation may also be considered by the Committee in its deliberations.

Environmental Rights

(1) Everyone has the right to live in a healthy and ecologically balanced environment, including access to clean air, safe water, fertile soil, nutritious food, a stable climate, non-toxic environments, and flourishing biodiversity

(2) Everyone has the right to:

> *(a) free, timely, and useful environmental information, including information about toxic substances contained in consumer products, toxic substances used in industrial processes, and releases of toxic substances in their communities;*
>
> *(b) effective mechanisms for participating in environmental decision making; and*
>
> *(c) fair, fast, and affordable judicial and administrative processes to prevent or remedy violations of their environmental rights.*[21]

(3) Everyone has the right to environmental standards that are as strong or stronger than the environmental standards enjoyed by citizens of other nations in the Organization for Economic Cooperation and Development.[22]

Environmental Responsibilities

(1) Everyone has the responsibility to make best efforts to protect, conserve, and where possible, restore the environment.

(2) The Government of Canada is a trustee responsible for protecting, conserving, and restoring the environment within its jurisdiction as a public trust, for the benefit of present and future generations.

(3) The Government of Canada must, within its jurisdiction, protect the right of every resident of Canada to a healthy and ecologically balanced environment.

(4) The Government of Canada must complete a national environmental health inequality assessment to comprehensively identify current environmental injustices.[23]

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[21] These provisions are drawn from the *Aarhus Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters*, 1998, 38 ILM 515.

[22] See s. 17(2) of the *Pest Control Products Act*, S.C. 2002, c. 28, for a specific example of the implementation of this principle.

[23] Recommended by the World Health Organization. WHO (Regional Office for Europe). 2012. *Environmental Health Inequalities in Europe: An Assessment*. Copenhagen: WHO.

Appendix D – Environmental Enforcement Provisions

The following proposed language is excerpted from the submission of Dr David Boyd to the federal Standing Committee on Environment and Sustainable Development during its review of the *Canadian Environmental Protection Act*. This formulation may also be considered by the Committee in its deliberations.

Environmental Protection Actions

1. (1) Any person may commence a civil environmental protection action in the Federal Court:

(a) against the Government of Canada for

a) violating the right to a healthy and ecologically balanced environment;

b) failing to perform any act or duty under federal environmental law which is not discretionary; or

c) failing to fulfill its duties as trustee of the environment

(b) against any person, organization, or government body violating or threatening to violate a federal environmental Act, regulation, or statutory instrument.

(2) A person intending to commence a civil environmental protection action referred to in subsection 1(b) must provide the Minister and any potential defendants with at least sixty days notice prior to filing the lawsuit.

(3) A civil environmental protection action referred to in subsection 1(b) cannot be commenced if the Government of Canada has already completed or commenced enforcement proceedings against the potential defendants.

(4) Civil environmental protection actions are subject to a civil standard of proof and will be adjudicated on the basis of a balance of probabilities.

Mediation

2. All civil environmental protection actions must be referred to mediation for a period of thirty days after issuance of the originating notice of motion, extendible upon agreement of all parties.[24]

Powers of the Federal Court

3. (1) Notwithstanding remedial provisions in other Acts, if the Federal Court finds that the plaintiff is entitled to judgment in an action under subsection 1 (1), the Federal Court may

(a) grant declaratory relief;

(b) grant an injunction to halt the contravention;

(c) suspend or cancel a federal permit or authorization issued to a defendant;

(d) order the defendant to cleanup, restore, or rehabilitate any part of the environment;

(e) order a defendant to take specified preventative measures;

(f) order a defendant to pay a fine to be used for the restoration or

[24] See Supreme Court of the Philippines, 2010. *Rules of Procedure for Environmental Cases*. Referred to as a global "good practice" by the UN's Special Rapporteur on Human Rights and the Environment.

rehabilitation of the part of the environment harmed by the defendant;

(g) order a defendant to pay a fine to be used for the enhancement or protection of the environment generally;

(h) order the Minister to monitor compliance with the terms of any order; and

(i) make any other order that the court considers just.

(2) In making an order under subsection (1), the Federal Court may retain jurisdiction over the matter so as to ensure compliance with its order.

Dismissal

4. A defendant may apply to the Federal Court to have a civil environmental protection action dismissed if

(a) the action duplicates another legal proceeding that involves the same actions, omissions, or environmental damages;

(b) the action is frivolous, vexatious or harassing; or

(c) the action has no reasonable prospect of success.

Interim Orders

5. (1) A plaintiff bringing an action under subsection 1(1) may make a motion to the Federal Court for an interim order to protect the subject matter of that action, when, in the court's opinion, significant environmental harm may occur before the action can be heard.

(2) An interim order will not be denied on the grounds that the plaintiff is unable to provide an undertaking to pay costs or damages.

(3) Any requirement to provide an undertaking to pay costs or damages in support of the plaintiff's application shall not exceed $1,000.[25]

Costs

6. (1) A plaintiff bringing an action under subsection 21(1) that is successful in whole or in part is entitled to their costs, regardless of whether or not they were represented by counsel.[26]

(2) A plaintiff bringing an action under subsection 21(1) that is unsuccessful may only be ordered to pay costs if the action is found to be frivolous, vexatious or harassing.

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[25] Quebec's *Environmental Quality Act*, c. Q-2, s. 19.4 sets a limit of $500 in similar situations.

[26] This approach to costs is used in American environmental legislation (e.g. *Clean Water Act*, s. 1365(d)) as well as in Ireland. See *Environment (Miscellaneous Provisions) Act, 2011*, Number 20 of 2011, s. 3. http://www.irishstatutebook.ie/eli/2011/act/20/enacted/en/pdf