CLEAN UP YOUR ACT

ENVIRONMENTAL RIGHTS IN CANADA

WHEN
Women's Healthy Environments Network

This report was prepared by the Women's Healthy Environment Network

About WHEN:
Since 1994, WHEN has been educating the general public, media and policy makers that environmental health is a key determinant of public health, and has promoted public action for the prevention of environmental health harms. WHEN uses the influence and knowledge of women to become champions for change, and is a trusted source of credible tools and information on today's relevant and emerging environmental health topics.

SUMMARY

The Canadian Environmental Protection Act (CEPA) is overdue for reform, and Bill C-28 proposes several changes to the Act.

Bill C-28 is the first piece of Canadian legislation to evoke the use of environmental rights, **but it falls short in two significant and detrimental ways:**

- Bill C-28 limits environmental rights to the right of human individuals to a healthy environment, and **does not recognize the integrity of ecological entities**.

- Bill C-28 frames the protection of the right of every individual in Canada to a healthy environment as a balancing act, notably with economic factors. This qualifying language could be used to undermine applications of the right. Such framing also incorrectly assumes a potentially antagonistic relationship between individual health and economic considerations, rather than **working towards building an economy that is inherently just, equitable, and safe for all.**

Environmental rights are powerful discursive, conceptual, and legislative tools that can both protect Canadians from environmental harms and help them navigate the climate crisis; however, that requires the full implementation of environmental rights as preclusive of ecological rights and **commensurate with constitutional rights.**

WHAT ARE ENVIRONMENTAL RIGHTS?

156 COUNTRIES RECOGNIZE A RIGHT TO A HEALTHY ENVIRONMENT.

CANADA IS NOT ONE OF THESE.

Environmental Rights include:

procedural rights: public participation, access to information, access to justice

legal recognition: national constitutions, environmental legislation, a bill of rights

substantive rights: healthy and sustainably-produced food, access to safe water and sanitation, non-toxic environments, clean air, healthy ecosystems, a safe climate

156 countries recognize various types of this right to a healthy environment; Canada is not one of these, with provinces and territories (Ontario, Quebec, Yukon) providing a few examples of these rights in their respective environmental legislation.

UNGA, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, HRC, 43rd Sess, UN Doc A/HRC/43/53 (30 December 2019).

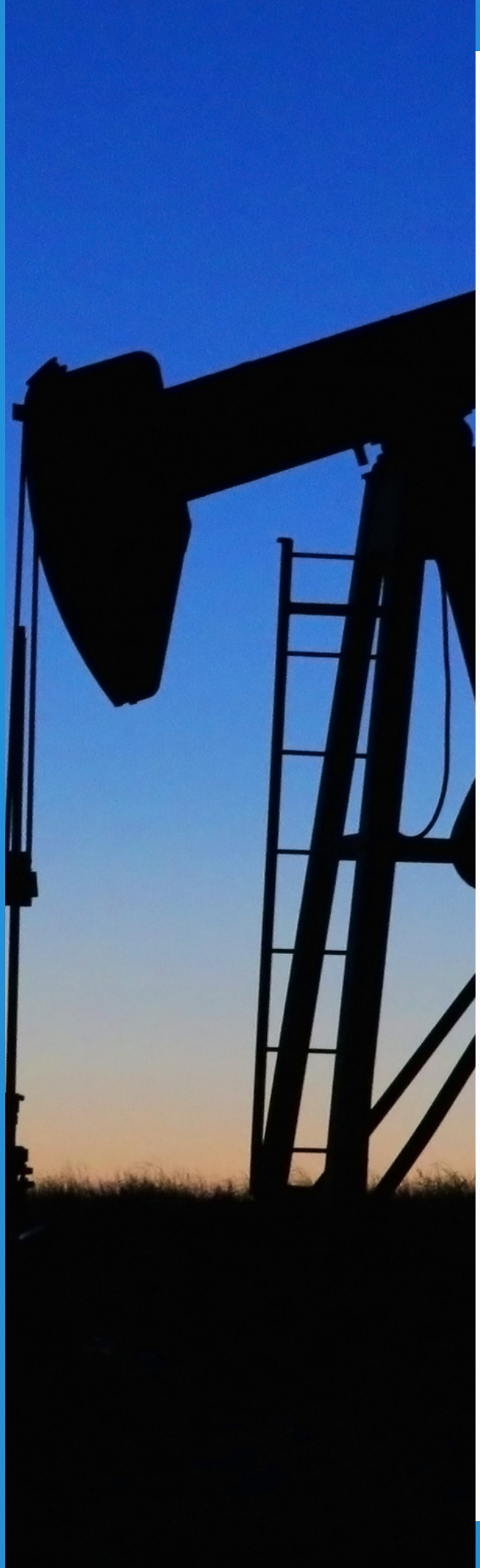
INCLUSIVE ENVIRONMENTAL RIGHTS

THE UNITED NATIONS DEFINES ENVIRONMENTAL RIGHTS AS “ANY PROCLAMATION OF A HUMAN RIGHT TO ENVIRONMENTAL CONDITIONS OF A SPECIFIED QUALITY”.

The UN definition of environmental rights allows the concept to have an expansive scope capable of covering the many factors that make up a healthy environment. We recommend that Canada develops an inclusive understanding of a healthy environment - this means identifying both rights to necessities, such as drinkable water and clean air, and rights to leisure and fulfillment, such as through green spaces and conservation, as integral to a healthy environment. An environment that is healthy is capable of supporting biodiversity, and promoting both physical and mental health.

Beyond these substantive rights, the right to a healthy environment also has procedural components. This means providing everyone with the opportunity, power, and information to participate in environmental decision-making, especially when it pertains to their own individual health.

PNUE, Qu'est-ce que les droits environnementaux ? https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what



INDIGENOUS RIGHTS

With the Government's commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), an illustrative example of environmental rights would be transferring decision-making power to Indigenous communities most affected by pipeline or industry proposals.

As a more specific recommendation that focuses explicitly on rights as a source of justice, the implementation of the right to a healthy environment should focus explicitly on the disproportionate burdens faced by Indigenous peoples, many of whom still lack access to running, drinkable water. Such access is both a fundamental human right and necessary for an environment to be able to support human health. By committing to provide such access for all Indigenous communities, the Government can uphold its responsibilities under CEPA, UNDRIP, and Bill C-28's articulation of environmental rights and the need to consider vulnerable populations.

WHANGANUI RIVER, INDIGENOUS RIGHTS AND DECISION-MAKING

In New Zealand, there is a shift towards recognizing the rights of nature in order to see it as subject rather than object. The Whanganui River is the country's longest navigable waterway. Its surrounding areas are agriculturally significant due to the rich alluvial soil. However, over many years, the River has become degraded by effluents, nutrient run-off, and various forms of pollution. It has also become depleted by dams and diversions that changed or stopped its natural flow. After years of legal battles, the Māori tribes (iwi) of the Whanganui River claimed an important victory for both the River and themselves with the ratification of the Te Awa Tupua (Whanganui River Claims Settlement) Act in 2017. The Act declares the Whanganui River a legal person with rights and duties that can be litigated upon in a court of law. Legal personhood includes the provision of both rights and powers —the right to itself and its own needs as protected by the law and the power to exercise that right within a legal setting, such as to sue or be sued.

This is a precedential piece of legislation because **it seeks to protect the right of the Māori peoples**—who live along and around the river and depend on it for water, transport, food, and spiritual connections to ancestors—**to a healthy environment by recognizing the inherent rights of the River itself.**

Specifically, the Act relies on the idea of guardianship stemming from Christopher Stone's 1972 article "Should Trees Have Standing?".

Stone conceptualizes nature as capable of obtaining legal personhood, which endows the non-human entity with legal rights that can be used by guardians to seek legal restitution for environmental damages. The guardians act on behalf of nature to exercise its rights. This differs from ownership in that guardians are expected to act in the interest of nature—for its well-being and health—and not in their own interests.

Guardianship emphasizes a relationship where humans represent nature rather than have control over it. This idea of guardianship is incorporated in the Act as Te Pou Tupua, where both the Crown and local kin groups each appoint a guardian to represent the River and protect its rights.

Salmond, D. A. (2018). Rivers as ancestors and other realities. In ResponsAbility: Law and Governance for Living Well with the Earth (pp. 183-192). London, UK: Routledge.
Hsiao, E. C. (2012). Whanganui River Agreement: Indigenous Rights and Rights of Nature. Environmental Policy and Law, 42(6), 371-375
Collins, T., & Esterling, S. (2019). Fluid Personality: Indigenous Rights and the Te Awa Tupua
(Whanganui River Claims Settlement) Act 2017 In Aotearoa New Zealand. Melbourne Journal of International Law, 20(1), 197-220
Stone, C. D. (1972). Should Trees Have Standing?—Toward Legal Rights for Natural Objects.
Southern California Law Review, 45, 450-501
Argyrou, A., & Hummels, H. (2019). Legal personality and economic livelihood of the Whanganui River: a call for community entrepreneurship. Water International, 44(6-7),
752-768.
Good, M. (2013). The river as a legal person: evaluating nature rights-based approaches to environmental protection in Australia. National Environmental Law Review, 15(1), 34-42.

RECOGNIZE THE RIGHTS OF NATURE

Environmental rights also include "the rights of non-human species, elements of the natural environment and…inanimate objects to a continued existence unthreatened by human activities", as defined by David Boyd in The Rights of Nature. These rights are missing from Bill C-28 and CEPA more broadly.

Yet the importance of ecological rights lies beyond this in its recognition of the inherent right of any ecological entity to life, regardless of the entity's benefit to humans. Expanding environmental rights in CEPA to include considerations for the living beings with whom we work, play, and live would not only build towards a more healthy environment for all but also move Canada to the forefront of the environmental movement. Currently, Canada does not recognize nature's inherent rights to exist, flourish, and/or to be restored, meaning that Canada has fallen behind other countries such as New Zealand and India which have already begun to recognize ecological rights.

CANADA DOES NOT RECOGNIZE NATURE'S INHERENT RIGHTS TO EXIST, FLOURISH, OR TO BE RESTORED

If Canada were to adopt similar legislation to the New Zealand example, it would both protect natural ecosystems from degradation, which is directly related to protecting human health, and move towards reconciliation with Indigenous nations. Canada, like New Zealand, exists within a settler-colonial context. Therefore, such legislation would not only return ecological entities to the stewardship of Indigenous nations from which they were taken, but also recognize the integral relationship between Indigenous peoples and the land and seek to entrench this within the law.

Nation-to-nation relations would also be upheld as guardianship is shared equally between Indigenous nations and the Government. The recognition of ecological rights then, as the granting of legal personhood and therefore guardianship responsibilities, is also a step towards furthering Indigenous rights.

David R Boyd, 2017. The Rights of Nature. ISBN: 9781770412392 ECW Press.

UNBALANCED LANGUAGE

The "right may be balanced with relevant factors, including…economic…factors"
Bill C-28

It is not uncommon for economic interests to take priority over environmental concerns. Canada's landscape is evidence of such decision-making: expanding pipelines despite consistent leaks, toxic production sites as threats to human and environmental health, and extensive resource extraction to the detriment of biological diversity.

Bill C-28 uses language that would allow such prioritizations of the economy to occur, namely by adding that the "right may be balanced with relevant factors, including…economic…factors". The idea of relevancy is highly ambiguous and the act of balancing is subject to determinations of importance or at least, the weighing of consequences. This is problematic because those individuals most likely to be subject to an unhealthy environment—such as Indigenous peoples and marginalized peoples of colour—are the least likely to be represented among those who will be determining the contours of such qualifying language.

The consequences of building pipelines, generating toxins, and over-extracting resources are disproportionately felt by individual people from marginalized communities, manifest in their disproportionate rates of cancer for example, meaning that the importance of environmental protection versus economic development and the weighing of consequences such as illness and profit may skew differently for them than for industry or government officials.

The risk that such qualifying language poses to the vulnerable populations that Bill C-28 specifically seeks to address, such as through its adherence to the principle of environmental justice, is high and potentially life-threatening.

At the very least, if such language is not removed, then the Minister should be required to consult and prioritize the concerns of these most-affected communities when establishing the implementation framework.

We must prioritize those most-at-risk which includes mediating potential risks—such as unclear language that provides avenues for infringements of individual rights—to their health and safety. Otherwise, environmental justice remains a mere speaking point rather than a guiding principle for CEPA.

ALIGN ECONOMIC AND ENVIRONMENTAL INTERESTS

Rather than trying to balance economic factors with health concerns, we should be working towards a future where the two are aligned in promoting a better society. A healthy population and a healthy environment capable of sustainably regenerating the resources and conditions we depend on for life are integral to a fully-functioning and long-term economy.

An ethical economy that provides meaningful job opportunities, security of life for all, and room for innovation is integral to sustaining a thriving population and a prosperous nation. Instead of seeking to balance the right to a healthy environment with economic development, we should be reforming, regulating, and transforming our economy to support practices that do not come at the cost of human or environmental health.

That way, the economy supports health instead of potentially detracting from it. By using a balancing framework, Bill C-28 directs attention away from the important work of aligning economic and environmental interests, assuming instead that the two are inherently conflictual and will require 'balancing'.

AN ETHICAL ECONOMY THAT PROVIDES MEANINGFUL JOB OPPORTUNITIES, SECURITY OF LIFE FOR ALL, AND ROOM FOR INNOVATION

ENVIRONMENTAL RIGHTS AS CONSTITUTIONAL RIGHTS

Ultimately, in order for environmental rights to reach their full potential, they must be rendered constitutional and thereby recognized as foundational to the preservation of Canada as a free and democratic society.

Higher standards

Infringements of constitutional rights are taken seriously and are accepted sparingly within Canadian law. The Supreme Court of Canada has consistently upheld that constitutional rights are inviolable unless the limitations proposed upon them can be "demonstrably justified in a free and democratic society". This standard of protection is much higher than for rights that exist in legislations outside of the Canadian Charter of Rights and Freedoms and would shield environmental rights from interests or motives that are potentially harmful to the public and in particular vulnerable communities.

Sex and gender-based protections

The Charter recognizes the constitutional right of women to liberty and security, including the security of their bodily integrity. The right to environmental health is integral to upholding this already recognized constitutional right. The endocrine system oversees biological processes such as the development and functioning of reproductive organs. However, such processes, as well as the overall system, are threatened by hormone-disrupting substances which can be found in industrial, agricultural, and municipal waste, in by-products of industrial activity, and in the use of pesticides. Such substances, when amassed in the physical environment, threaten female bodily integrity by harming the system necessary for reproduction and thereby infringing upon the bodily autonomy of women to choose whether or not to bear children. Enshrining environmental rights as constitutional rights would not only better protect the health of everyone—because toxic substances are detrimental to not just women but all people—but also further bolster a right already guaranteed by the Charter. The individual right to a healthy environment is integral to and supported by the right of women to liberty and security.

Responding to the crisis

Constitutionality would elevate environmental rights to a level of prominence and protection that is commensurate with the problem of environmental degradation and its accompanying deleterious effects for all living beings. Simply put, constitutionality is long overdue considering the serious risks to life and security posed by unhealthy environments. A society can neither be free nor democratic if the fundamentals of life and security are under threat.

A TEST FOR RIGHTS: THE OAKES TEST

THE OAKES TEST, WHICH IS A WELL-ESTABLISHED WAY OF SCRUTINIZING LIMITATIONS TO CHARTER RIGHTS AND FREEDOMS, SERVES AS AN EXAMPLE OF WHAT SUCH A TEST MIGHT ENTAIL.

The Ministers must develop a rigorous, transparent, and fair test that can be applied consistently to determinations that seek to strike a balance between the right to healthy environmental and economic factors. The Oakes test, which is a well-established way of scrutinizing limitations to Charter rights and freedoms, serves as an example of what such a test might entail.

Importantly, the test should follow Oakes' principle of flexibility meaning that the test "should be applied flexibly" rather than in "a mechanistic fashion". This requires paying careful attention to the "factual and social context of each case".

One important context that is invariably tied to all cases of environmental rights is climate change. Environmental degradation, such as the loss of a healthy and functioning environment, further exacerbates the lived effects of climate change, while worsening the phenomenon for future generations. Factually, climate change is undeniable. Socially, climate change is already impacting everyday aspects of Canadian life, appearing in the form of wildfires and heatwaves, for example.

Severe and frequent weather disasters threaten economic stability. Worsening air conditions threaten environmental and human health. Therefore, the implementation framework should explicitly consider changing factual and social contexts, such as climate change, which may significantly influence the balancing of factors.

While a test akin to the Oakes test might be constraining, it is necessary if the Government seeks both to uphold the right it has proposed—and the underlying purpose of protecting people from the risks posed by unhealthy environments—and to prevent the undermining of the right by near-sighted and/or profit-driven interests. Failing to develop such a test would render the implementation of environmental rights both ambiguous and opaque. This would make it difficult for those protected by the right, those everyday people, to understand the decision-making of the Government and/or to participate in it democratically, while making it easier for those who seek to undemocratically influence or manipulate decisions in their favour.

Department of Justice, Government of Canada. The Canadian Charter of Rights and Freedoms, 1982. https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/

CONCLUSION

BILL C-28 WOULD SET A NARROW AND INADEQUATE PRECEDENT FOR HOW ENVIRONMENTAL RIGHTS ARE TO BE CONCEPTUALIZED WITHIN CANADIAN LEGISLATION.

Bill C-28 risks diluting the meaning of environmental rights by failing to represent both its breadth and depth. The conception of environmental rights as preclusive of ecological rights or rights of nature risks co-opting the language of environmental rights for narrow means, while divorcing the term from its expansive meaning within academic literature and international discourse.

The failure to entrench the individual right to a healthy environment as a constitutional right risks producing a piece of legislation that is inadequate for privileging human health and the sanctity of life over economic interests or the profit motive. If allowed to go forward as is, Bill C-28 would set a narrow and inadequate precedent for how environmental rights are to be conceptualized within Canadian legislation.

WHEN

Women's Healthy Environments Network