

NEW BRUNSWICK ENVIRONMENTAL BILL OF RIGHTS (NBEER)

Introduction

Over the past two years, the New Brunswick Environmental Law Society (NBELS) has been working on the idea of an Environmental Bill of Rights for New Brunswick.

As the name suggests, an Environmental Bill of Rights would give New Brunswickers various rights and protections when it comes to defending our environment.

The EBR is above all a tool for democracy that will allow New Brunswickers to take part in environmental protection and require of government greater transparency. It seeks to offer mostly procedural rights, including rights of access to information, and rights to force the provincial government to investigate various matters, but also rights against being maliciously prosecuted by corporations for defamation, and whistleblower rights.

The NBEER would also create and define the mandate of an Environmental Commissioner – a sort of ombudsman for the environment – which would allow citizens to review government decisions that affect the environment.

The NBELS has been in consultation with various groups, lawyers and political parties in New Brunswick and indeed around the world in order to assure that this effort, though ambitious, is realistic. We want it to reflect the desires of New Brunswickers and be at the leading edge of environmental legislation.

Key provisions

The key provisions of the proposed NBEER include the following:

1. Establishment of Environmental Rights

This is the heart of the NBEER from which the other provisions flow. The granting of general individual and collective rights to a healthy and ecologically balanced environment will vest New Brunswickers with legal options against parties who would breach those rights.

2. Establishment of a Public Trust Duty

Under the NBEER, the provincial government, as representative of the citizens of New Brunswick, would have a public trust duty to manage and protect the environment for the benefit of current and future generations. New Brunswick citizens would be vested with a right of action for breach of this public trust duty.

3. Access to Environmental Information

It is only through unfettered access to environmental information that citizens can make informed decisions about how best to protect their environment. This NBEER provision would reassert the rights already contained in the *Right to Information and Protection of Privacy Act* and provide new avenues for obtaining information when environmental issues are at play. Notably, an Environmental Registry would be created and located on the Internet.

4. Right to Participate in Environmental Decision-Making

Government decisions can have significant and wide-ranging impacts on individual and community interests. For this reason, all New Brunswick citizens and their representatives in their provincial government have an interest in ensuring that environmental policies, regulations

and laws are as efficient and effective as possible. This provision would compel all ministerial departments to prepare statements of environmental values and provide New Brunswick citizens the opportunity to comment on these statements. Citizens would also be granted a right to request a review of environmental policies, regulations and laws.

5. Creation of an Environmental Commissioner

To ensure openness and transparency, most democracies today have recognized the need to have an independent observer to act as the eyes and ears of the public. This provision would create the position of an Environmental Commissioner capable of oversight and also able to review certain actions of the government on behalf of New Brunswick citizens.

6. Right to Apply for an Investigation

If New Brunswickers believe that their environmental rights have been violated, they should have the opportunity to request government investigations. This provision would set out the procedures to launch such investigations and the various steps to be undertaken for their completion.

7. Right to Bring an Action

It is a fact that sometimes laws and regulations are not adequately enforced. Citizens must be empowered to bring a legal action in court against the responsible authorities to uphold the right to a healthy and ecologically balanced environment and to ensure the fulfillment of the provincial public trust duty. Citizens must also be empowered to bring a legal action in court against parties who are harming the environment in violation of a provincial statute, regulation, or permit.

8. Whistleblower Protection

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

9. Protection from Strategic Lawsuits Against Public Participation

It has become all too common to have frivolous legal actions launched or threats of legal action made against leaders of environmental organizations for having made public their belief that a private corporation is infringing an environmental law or engaging in improper actions. Citizens must be protected from such reprisals. Without such environmental protection, citizens may be intimidated into silence to the detriment of all New Brunswickers and the environment.

SUMMARY DRAFT LEGISLATION

THE NEW BRUNSWICK ENVIRONMENTAL BILL OF RIGHTS

Preamble

Recognizing that:

The people of New Brunswick share a deep concern for the natural environment and recognize its inherent value;

The people of New Brunswick understand that a healthy and ecologically balanced environment is inextricably linked to the health of communities, families and individuals, particularly children's health;

The people of New-Brunswick have as a common goal the protection, conservation and restoration of the environment for the benefit of present and future generations;

The Government of New Brunswick, as representative of the citizens of New Brunswick, is the trustee of the environment and has the primary responsibility for achieving the conservation and restoration of the environment within its area of jurisdiction;

The people of New-Brunswick have individual and collective rights to a healthy and balanced environment and to hold the Government of New Brunswick accountable for the environmental protection responsibilities within its jurisdiction;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of New Brunswick, enacts as follows:

Short Title

This Act will be referred to as the New Brunswick Environmental Bill of Rights (NBEER).

**PART I
DEFINITIONS AND PURPOSES**

Definitions

1.(1) In this Act,

“air” means open air not enclosed in a building, structure, machine, chimney, stack or flue; (“air”)

“environment” means the air, land, water, plant life, animal life and ecological systems of Ontario; (“environnement”)

“harm” means any contamination or degradation and includes harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration or radiation; (“atteinte”)

“instrument” means any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act, but does not include a regulation; (“acte”)

“land” means surface land not enclosed in a building, land covered by water (which, for greater certainty, includes wetland) and all subsoil; (“terre”)

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

“registry” means the environmental registry established under section 3.1; (“registre”)

“water” means surface water and ground water. (“eau”)

Purposes of Act

- 1.(2)** The purposes of this Act are,
- (a) to safeguard the rights of present and future New Brunswick citizens to a healthy and ecologically balanced environment;
 - (b) to confirm the Government of New Brunswick’s public trust duty to protect the environment under its jurisdiction; and
 - (c) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act.
- 1.(3)** The purposes set out in subsection (2) include the following:
- (a) The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment and the health of New Brunswick citizens, especially children;
 - (b) The protection and conservation of biological, ecological and genetic diversity; and
 - (c) The protection and conservation of natural resources, including plant life, animal life and ecological systems.
- 1.(4)** In order to fulfil the purposes set out in subsections (2) and (3), this Act provides for,
- (a) means by which citizens of New Brunswick may become informed and participate in the making of environmentally significant decisions by the Government of New Brunswick;
 - (b) increased accountability of the Government of New Brunswick for its environmental decision-making;
 - (c) increased access to the courts by citizens of New Brunswick for the protection of the environment; and
 - (d) enhanced protection for employees and all New Brunswick citizens who take action in respect of environmental harm.

PART II INTERPRETATION

- 2.(1)** The NBEBR must be interpreted consistently with existing and emerging principles of environmental law, including but not limited to:

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

PART III PUBLIC PARTICIPATION IN GOVERNMENT DECISION-MAKING

GENERAL

Purpose of Part III

3.(1) This Part sets out minimum levels of public participation that must be met before the Government of New Brunswick makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments.

RIGHT TO ACCESS ENVIRONMENTAL INFORMATION

3.(2) In order to contribute to the protection of the environmental rights of New Brunswick citizens, the Government of New Brunswick shall ensure effective access to environmental information by rendering such information available on request to the public in a reasonable, timely, and affordable fashion.

RIGHT TO PARTICIPATE IN GOVERNMENT DECISION-MAKING IN ENVIRONMENTAL MATTERS

3.(3) In order to contribute to the protection of the environmental rights of New Brunswick citizens, the Government of New Brunswick shall ensure opportunities for effective, informed and timely public participation in decision-making related to provincial policies, Acts, regulations and statutory instruments.

THE ENVIRONMENTAL REGISTRY

Registry

3.1(1) An environmental registry shall be established as prescribed.

Cost of registry

3.1(2) The cost of establishing and operating the registry shall not be imposed on a municipality.

Purpose of registry

3.1(3) The purpose of the registry is to provide a means of giving information about the environment to the public.

3.1(4) For the purposes of subsection (3), information about the environment includes, but is not limited to, information about:

- (a) proposals, decisions and events that could affect the environment;
- (b) actions brought under this Act; and
- (c) activities done under this Act.

MINISTERIAL STATEMENT OF ENVIRONMENTAL VALUES

Ministerial statement of environmental values

3.2(1) Within three months after the date on which this section begins to apply to a ministerial department, the minister shall prepare a draft ministerial statement of environmental values that:

- (a) explains how the purposes of this Act are to be applied when decisions that might significantly affect the environment are made in the ministerial department; and
- (b) explains how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision-making in the ministerial department.

Public participation in statement

3.2(2) After the draft ministerial statement of environmental values is prepared and not later than three months after the day on which this section begins to apply to a ministerial department, the minister shall give notice to the public that he or she is developing the ministerial department statement of environmental values and shall allow comments from the public.

PROPOSALS FOR POLICIES, ACTS, REGULATIONS AND INSTRUMENTS

Proposals for policies and Acts

3.3(1) If a minister considers that a proposal under consideration in his or her Department for a policy or Act could, if implemented, have a significant effect on the environment, and the minister considers that the public should have an opportunity to comment on the proposal before implementation, the minister shall do everything in his or her power to give notice of the proposal to the public at least thirty days before the proposal is implemented.

Proposals for regulations

3.3(2) If a minister considers that a proposal under consideration in his or her Department for a regulation under a prescribed Act could, if implemented, have a significant effect on the environment, the minister shall do everything in his or her power to give notice of the proposal to the public at least thirty days before the proposal is implemented.

Proposals for instruments

3.3(3) If a minister considers that a proposal under consideration in his or her Department for a statutory instrument could, if implemented, have a significant effect on the environment, the minister shall do everything in his or her power to give notice to the public at least thirty days before a decision is made whether or not to implement the proposal.

3.3(3)(a) A minister required to give notice of a proposal for an instrument shall consider enhancing the right of members of the public to participate in decision-making on the proposal by providing for one or more of the following:

1. Opportunities for oral representations by members of the public to the minister or a person or body designated by the minister.
2. Public meetings.
3. Mediation among persons with different views on issues arising out of the proposal.
4. Any other process that would facilitate more informed public participation in decision-making on the proposal.

PART IV
THE ENVIRONMENTAL COMMISSIONER

Environmental Commissioner

4.(1) There shall be an Environmental Commissioner who is an officer of the Legislative Assembly.

Appointment

4.(2) The Lieutenant Governor in Council shall appoint the Environmental Commissioner on the address of the Legislative Assembly.

Functions

4.(3) In addition to fulfilling his or her other duties under this Act, it is the function of the Environmental Commissioner to:

- (a) review the implementation of this Act and the compliance of ministerial departments with the requirements of this Act;
- (b) at the request of a minister, provide guidance to the department on how to comply with the requirements of this Act, including guidance on,
 - (i) how to develop a department statement of environmental values that complies with the requirements of this Act and is consistent with other department statements of environmental values, and
 - (ii) how to ensure that the department statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the department;
- (c) at the request of a minister, assist the department in providing educational programs about this Act;
- (d) provide educational programs about this Act to the public;
- (e) provide advice and assistance to members of the public who wish to participate in decision-making about a proposal as provided in this Act;
- (f) review the use of the registry;
- (g) review the exercise of discretion by ministers under this Act;
- (h) review recourse to the rights provided in this Act;
- (i) review the receipt, handling and disposition of applications for review under this Act and applications for investigation under this Act;
- (j) review department plans and priorities for conducting reviews under this Act;
- (k) review the use of the right of action set out in this Act, the use of defences set out in this Act, and reliance on this Act respecting public nuisance actions; and
- (l) review recourse to the procedure under this Act for complaints about employer reprisals and Strategic Lawsuits Against Public Participation.

Reports

4.(4) The Environmental Commissioner shall report annually to the Speaker of the Legislative Assembly who shall lay the report before the Assembly as soon as reasonably possible.

Special reports

4.(5) The Environmental Commissioner may make a special report to the Speaker of the Legislative Assembly at any time on any matter related to this Act that, in the opinion of the Commissioner, should not be deferred until the annual report, and the Speaker shall lay the report before the Legislative Assembly as soon as reasonably possible.

Special assignments

4.(6) The Environmental Commissioner shall perform special assignments as required by the Legislative Assembly, but such assignments shall not take precedence over the other duties of the Commissioner under this Act.

Examination on oath or affirmation

4.(7) The Environmental Commissioner may examine any person on oath or solemn affirmation on any matter related to the performance of the Commissioner's duties under this Act and may in the course of the examination require the production in evidence of documents or other things.

PART V APPLICATION FOR REVIEW

Application for review

5.(1) Any two persons resident in New Brunswick who believe that an existing policy, Act, regulation or instrument of New Brunswick should be amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister.

PART VI APPLICATION FOR INVESTIGATION

Application for investigation

6.(1) Any two persons resident in New Brunswick who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate minister.

PART VII RIGHT TO SUE

Right of action

7.(1) This right applies only in respect of a contravention of an Act, regulation or instrument of the Government of New Brunswick.

7.(2) Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of this Act and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of New-Brunswick, any person resident in New-Brunswick may bring an action against the said person in the court in respect of the harm and is entitled to judgment if successful.

PART VIII EMPLOYER REPRISALS

Complaint about reprisals

8.(1) Any person may file a written complaint with the Environmental Commissioner alleging that an employer has taken reprisals against an employee on a prohibited ground.

Reprisals

8.(2) For the purposes of this Part, an employer has taken reprisals against an employee if the employer has dismissed, disciplined, penalized, coerced, intimidated or harassed, or attempted to coerce, intimidate or harass, the employee.

Prohibited grounds

8.(3) For the purposes of this Part, an employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following:

- (a) Participate in decision-making about a Department statement of environmental values, a policy, an Act, a regulation or an instrument as provided in this Act.
- (b) Apply for a review under this Act.
- (c) Apply for an investigation under this Act.
- (d) Comply with or seek the enforcement of a prescribed Act, regulation or instrument.
- (e) Give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument.
- (f) Give evidence in a proceeding under this Act or under a prescribed Act.

PART IX PROTECTION AGAINST STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

9.(1) A Judge of the Court of Queen's Bench of New Brunswick may, at any time, on request or even on his or her own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned.

9.(2) The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, in particular if it restricts freedom of expression in public debate.

9.(3) If a legal person or an administrator of the property of another resorts to an improper use of procedure, the directors and officers of the legal person who took part in the decision or the administrator may be ordered personally to pay damages.

PART X CROWN LIABILITY

Crown bound

10.(1) This Act binds the Crown.

Crown not relieved of liability

10.(2) No Act of the Government of New Brunswick does relieve the Crown of liability in respect of a tort committed by any agent or servant of the Crown to which it would otherwise be subject.