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Strengthening CEPA to support a substantive right to a healthy environment

CONTEXT AND RATIONALE

The Canadian Environmental Protection Act, 1999, a cornerstone pollution-prevention law, is out of date. Government has committed to modernizing it to better protect people and the environment. **Complementing and reinforcing other important CEPA reforms, applying a human rights lens to the process for regulating toxic chemicals represents an essential paradigm shift that will modernize and strengthen Canada’s approach to environmental protection.**

Although CEPA is designed to protect the environment and human health, the act does not currently recognize the interplay between a healthy environment and the fulfilment of human rights. As the UN Human Rights Council has noted:

A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity.¹

In Canada, toxic exposures and environmental harm disproportionately affect vulnerable and marginalized populations, particularly Indigenous, racialized and low-income communities. Amending CEPA to explicitly recognize the human right to a healthy environment, require human rights impact assessments of key decisions made under the act and protect vulnerable populations would align CEPA administration with the goal of ensuring a healthy environment *for all*, that enables and promotes enjoyment of human rights.

The substantive right to a healthy environment means an environment that, in both quality and quantity, protects human health, safety, life and well-being. This principle enjoys near-universal support in Canada. Incorporating environmental rights into CEPA resonates with Canadian values and will help strengthen public support for CEPA reform and decision-making under the act.

RECOMMENDED LEGISLATIVE AMENDMENTS

1. A general statement of environmental rights and duties.

- Amend the preamble with a new paragraph recognizing the human right to a healthy environment: “Whereas all people in Canada have the right to a healthy environment.”

¹ https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/InformationNote_EN.doc

- Amend section 2(1) with a new paragraph specifying a duty to “respect, protect and fulfil human rights [or: the human right to a healthy environment]” in CEPA administration.
- 2. Mandatory requirements in Part 5 to identify potential human rights impacts from substances, with a view to avoiding adverse human rights impacts.** This would be directly analogous to the way the precautionary principle is already incorporated into CEPA, in the preamble, section 2(1) and section 76.1.
- Amend section 76.1 to ensure the assessment of substances considers potential risks to human rights: “...the Ministers shall apply a weight of evidence approach, human rights principles and the precautionary principle,” OR “...the Ministers shall apply a weight of evidence approach and the precautionary principle and address human rights impacts.”
- 3. Provisions expressly addressing vulnerable populations.**
- Amend paragraph 2(1)(a): “(a) exercise its powers in a manner that protects the environment and human health, including vulnerable populations, applies the precautionary principle...”
 - Amend section 3 to include a definition of “vulnerable populations.”
 - Amend sections of the act addressing the assessment and management of toxic substances to require consideration of vulnerable populations — including Indigenous People, workers, seniors, children and lower socio-economic status populations.

HUMAN RIGHTS IMPACT ASSESSMENT

Within the context of CEPA Part 5, “adverse human rights impact” occurs when risk assessment and management actions fail to prevent threats and/or harm to human health or the environment that remove or reduce the ability of an individual to enjoy their human rights. A human rights impact assessment may also identify positive impacts, to the extent that environmental protection measures enhance enjoyment of human rights, for example by redressing discriminatory effects.

An implementation framework for new environmental rights requirements in CEPA would need to be defined and refined over time through policy informed by a consultative process. Drawing on the framework principles for human rights and the environment developed by the UN Special Rapporteur on human rights and the environment,² the US Executive Order on Environmental Justice, as well as methodologies for human rights impact assessment in other contexts, we suggest CEPA risk assessments should systematically consider, as a starting point:

- Whether decisions (e.g., approvals, risk mitigation measures, etc.) under CEPA are discriminatory and/or would have discriminatory effects (i.e., differential effects, environmental justice) — or help redress discrimination.
- Whether decisions would result in regression of environmental standards, without established scientific basis.

² <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx>

- The completeness of exposure and effects data for marginalized and vulnerable populations, including populations with differential susceptibilities, as well as minority and low-income populations..
- The extent to which substances impact the rights of those who are most vulnerable to or at particular risk from environmental harm and the potential need for additional measures to protect these individuals' rights.
- Whether the decisions are consistent with Canada's obligations to Indigenous Peoples, including the United Nations Declaration on the Rights of Indigenous Peoples.
- Cumulative health effects of substances assessed as a group or class, to the extent that data is available. Human rights impact assessment will also be relevant as Canada moves towards broader application of cumulative risk assessments.

The human rights impact assessment cannot be carried out without meaningful consultation. To strengthen the human rights impact assessment and the public participatory mechanism, integrating a human rights impact assessment would also require an assessment of which individuals or groups may require capacity-building support to participate in consultations.

BENEFITS

Incorporating human rights considerations in decision-making under CEPA Part 5 ensures a conscious effort is made to avoid adverse human rights impacts. A rights-based approach guards against discrimination and strengthens efforts to achieve a healthy environment for all by establishing that every person in Canada is entitled to a basic standard of environmental protection.

Consideration of human rights also allows government to take necessary preventive, precautionary action to protect such rights where the activities of third parties could or would cause environmental harm that subsequently impacts enjoyment of those rights. While determining the appropriate level of environmental protection may involve balancing several factors, the right to a healthy environment establishes parameters for this balancing act. The application of human rights principles suggests a minimum standard of environmental protection to which every person in Canada is entitled.

Integrating a human rights framework in CEPA will also discourage regression in environmental standards that protect human health. Through a human rights lens, the principle of non-regression is well-established. A reversal or backtracking of environmental protection standards would be inconsistent with the duty to respect, protect and fulfil enjoyment of human rights if there is no scientific basis for the reversal.

CONCLUSION

Modern environmental laws must equip government to address unprecedented threats to the ecological systems that are the foundations of human existence. Strengthening CEPA to recognize the human right to a healthy environment will support effective federal action and position Canada as a global leader.

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