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Re: Discussion Document on the Implementation Framework for a Right to a Healthy Environment under the *Canadian Environmental Protection Act, 1999*

Thank you for the opportunity to comment on the draft Implementation Framework for a Right to a Healthy Environment under the *Canadian Environmental Protection Act, 1999* (CEPA). Given the increasingly critical state of our environment and the threat of climate change to our society, we are pleased that the federal government is moving forward with the changes introduced by Bill S-5, the *Strengthening Environmental Protection for a Healthier Canada Act*. Implementing a robust, legally enforceable right to a healthy environment (RHE) for all Canadians is of utmost importance to fulfil CEPA's mandate and contribute to sustainable development.

While the draft Implementation Framework raises many important issues, we focus on one that has great potential for ensuring that the RHE is meaningfully implemented and that Canada advances toward sustainable development in the context of the imminent threat of climate change: **how to determine “reasonable limits” on the RHE.**

Bill S-5 requires the Implementation Framework to elaborate on “the relevant factors to be taken into account in interpreting and applying [the RHE] and in determining the reasonable limits to which it is subject, including social, health, scientific and economic factors” (CEPA, s 5.1(2)(c)).

For the RHE to take root in Canadian law, defining a framework for what can be considered a reasonable limit will be vital. Too broad a framework would risk the erosion of this crucial right and would fail to uphold the guiding principles articulated by Bill S-5, including environmental justice, non-regression and intergenerational equity.

We offer the following comments on determining reasonable limits on the RHE:

- 1. Reasonable limits are open-ended, not pre-determined;**
- 2. Reasonable limits must serve pressing and substantial objectives and respect the principle of proportionality;**
- 3. Reasonable limits must be consistent with CEPA's purposes;**
- 4. Reasonable limits must be consistent with CEPA's principles;**
- 5. Reasonable limits must be consistent with CEPA's administrative duties;**

6. **Reasonable limits must not be used to excuse non-compliance with or derogation from other provisions of CEPA;**
7. **The burden to justify limits on the RHE must rest with the Government of Canada in every case; and**
8. **The imposition and justification of limits on the RHE must be open, transparent and fair.**

1. Reasonable limits are open-ended, not pre-determined

Although Bill S-5 requires the Implementation Framework to elaborate on “the relevant factors to be taken into account in ... determining the reasonable limits to which [the RHE] is subject, including social, health, scientific and economic factors,” it is impossible and undesirable to specify those factors definitively in advance. The drafters of the *Charter of Rights and Freedoms* recognized this, and so do the courts charged with interpreting it.

Section 1 of the *Charter* provides that constitutional rights are guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” These limits are justified only if the government proves that they serve a purpose that is important enough to warrant overriding a constitutionally protected right and that they do so in a way that is proportional to the interests at stake. Specifically, the government must show that:

1. The law or policy that limits the right has a pressing and substantial objective; and
2. It passes a three-part proportionality test, namely:
 - a. The law or policy is rationally connected to this objective;
 - b. The law or policy impairs the right as little as possible; and
 - c. The negative effects of the law or policy on the right in question do not outweigh the beneficial effects of the law or policy.¹

This approach recognizes that the content and limitations of rights are not frozen in time. Rights are constantly evolving, and so are the permissible limitations on those rights. It is impossible to specify in advance the social, economic, health, scientific or other factors to be taken into account when determining the limits on constitutional rights. The questions of which objectives are important enough to warrant infringing rights, and which limits are proportionate or disproportionate, cannot be answered in advance.

The same is true of the RHE. It is impossible to predict all the trade-offs that might justify infringing the RHE.

Instead of attempting to specify a list of social, health, scientific and economic factors that justify infringement of the RHE, the Implementation Framework should recognize that these factors are open-ended and focus on defining stringent parameters within which they will operate.

¹ *R v Oakes*, [1986] 1 SCR 103.

What should those parameters be? With some crucial modifications, the parameters that have been tried and tested for constitutional rights can apply to the RHE in CEPA. These modifications are made necessary by the fact that **limits on the RHE must be determined and applied within constraints created by CEPA itself. “Reasonable limits” cannot be used to loosen or escape these constraints.**

Any limits on the RHE must be consistent with CEPA’s purposes, principles and administrative duties, and must not be used to excuse non-compliance with or derogation from the other provisions of CEPA or of any regulations, orders or other instruments promulgated pursuant to CEPA. The flip-side of this point is that the RHE also operates as a limit on the administration of CEPA. The provisions of CEPA must be interpreted and applied in a manner consistent with the RHE, and any regulations, orders or other instruments promulgated pursuant to CEPA must be consistent with the RHE.

2. Reasonable limits must serve pressing and substantial objectives and respect the principle of proportionality

The test for justified infringement of *Charter* rights provides a suitable starting point for determining the reasonableness of a proposed limit on the RHE.

As in the *Charter* context, the limit must serve a purpose that is so pressing and substantial that it warrants overriding the right that the government of Canada is duty-bound to protect (CEPA, Preamble and s 2(1)(a.2)). But as we argue in the subsequent sections, those purposes are limited by CEPA itself: they cannot be inconsistent with the purposes, principles and duties enshrined in CEPA.

Even if the purpose of the limit is consistent with the purposes, principles and duties enshrined in CEPA, the limit must still pass a demanding proportionality test, as in the *Charter* context. It must be rationally connected to the purpose it purports to serve: in other words, it must not be arbitrary, unfair or irrational, but carefully designed to achieve its purpose. It must impair the RHE as little as possible. And its negative effects on the RHE must not outweigh its beneficial effects.

3. Reasonable limits must be consistent with CEPA’s purposes

The range of pressing and substantial purposes that can justify infringement of the RHE is limited by the purposes of CEPA itself.

The overriding purpose of CEPA is to protect the environment and human health by preventing pollution. This purpose is reflected throughout the Act, including its opening lines, which declare that environmental protection is essential to Canadians’ well-being and that the “primary purpose” of CEPA is “to contribute to sustainable development through pollution prevention” (CEPA, Declaration).

Moreover, CEPA’s goal is not limited to protecting the environment and human health but includes achieving “the highest level of environmental quality” throughout Canada and for all Canadians (Preamble and s 2(1)(l)). Although this commitment to achieving the highest level of environmental quality is expressed in relation to intergovernmental cooperation, it

underlines the primacy of environmental protection throughout CEPA and suggests that the burden to justify limits on the RHE should be heavy.

A key question to ask of any purported limit on the RHE should therefore be whether it is consistent with CEPA's purpose of protecting the environment and human health through pollution prevention.

A limit that is inconsistent with the purpose of protecting the environment and human health through pollution prevention is not a reasonable limit.

A limit is consistent with CEPA's purpose if it advances this purpose, or at least does not detract from it. The more a limit advances this purpose, the more reasonable it is. On the other hand, a limit is inconsistent with CEPA's purpose if it hinders or delays the protection of the environment or human health in pursuit of some other goal such as jobs, commerce or scientific certainty.

4. Reasonable limits must be consistent with CEPA's principles

The next question to ask of any proposed limit on the RHE is whether it is consistent with the principles enshrined in CEPA. These principles guide CEPA decision-making and must guide the interpretation and application of the RHE. **A limit on the RHE that is inconsistent with CEPA principles is not a reasonable limit.**

A few of these principles apply specifically to the RHE:

- **Environmental justice**, including avoidance of adverse effects that disproportionately affect vulnerable populations;
- **Non-regression**; and
- **Intergenerational equity** (s 5.1(2)(a)).

Any limit on the RHE that results in environmental or health burdens being borne disproportionately by vulnerable populations or by any people differentiated on the basis of grounds protected by human rights laws, such as age, sex, gender, gender identity, racialization, Indigeneity, national origin, etc., would violate the principle of environmental justice and would not be a reasonable limit.

Any limit on the RHE that would allow existing levels of protection of the environment or health provided by law to be weakened would violate the principle of non-regression and would likewise be unreasonable.

Any limit on the RHE that has the effect of shifting environmental or health burdens away from members of the present generation and onto members of future generations would violate the principle of intergenerational equity.

Other principles apply generally to CEPA:

- **Sustainable development**;
- **Pollution prevention**;

- **Ecosystem approach;**
- **National leadership** in environmental standards, objectives, guidelines and codes;
- **Precautionary principle;**
- **Intergovernmental cooperation;**
- **Science-based decision-making;**
- **Reconciliation, including UNDRIP and free, prior and informed consent;**
- **Polluter pays;**
- **Openness, transparency and accountability;**
- **Public participation in environmental decision-making;** and
- **Protection of vulnerable populations.**

It is not necessary for present purposes to illustrate how purported limits on the RHE might relate to each of these principles. A few examples will suffice.

First, the principle of **sustainable development** is notoriously vague and malleable, involving as it does the harmonization and integration of potentially competing economic, social and environmental priorities. Yet it has a core of meaning that constrains any proposed limits on the RHE. If a proposed limit on the RHE would compromise the ability of future generations to meet their own needs, for example by foreclosing the options open to them to enjoy and benefit from the full range of ecosystem services, depriving them of the insurance value of robust biological diversity at all levels (genetics, species and ecosystems) or bequeathing to them an impoverished stock of natural capital, it would violate the principle of sustainable development.

Second, the principle of **national leadership** in environmental standards suggests that a limit on the RHE that renders the right less robust—whether in its procedural or substantive dimensions—than that protected by the laws of a province or territory² would not be a reasonable limit.

Third, it is possible to imagine a limit on the RHE that is consistent with the **precautionary principle**. The precautionary principle states that “lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation if there are threats of serious or irreversible damage” (s 3(1)). Precautionary action in the face of scientific uncertainty can pose risks to the environment and human health and thus infringe the RHE, if these risks are justified by the magnitude of the threatened damage. That said, to be consistent with the precautionary principle, the measures that limit the RHE must be intended to prevent environmental degradation, not to advance other purposes.

Fourth, the principle of **intergovernmental cooperation** cannot justify limits on the RHE that compromise environmental protection, because the principle is not one of cooperation *per se*, but cooperation *to advance environmental protection* and ideally to achieve the “highest level of environmental quality” for all Canadians (Preamble, s 2(1)(l)).

² See, eg, *Environmental Quality Act*, CSQ, c Q-2, s 19.1 (Quebec); *Environmental Rights Act*, SNWT 2019, c 19 (Northwest Territories); *Environmental Rights Act*, RSNWT 1988, c 83 (Supp) (Nunavut); *Environment Act*, RSY 2002, c 76, s 6 (Yukon); *Environmental Bill of Rights*, 1993, SO 1993, c 28 (Ontario); *Quebec Charter of Human Rights and Freedoms* CSQ, c C-12, s 46.1.

Fifth, it is hard to imagine the principle of **science-based decision-making** justifying limits on the RHE for two reasons. One: the right to a healthy environment is necessarily science-based. Scientific knowledge can only reinforce the right (subject of course to the precautionary principle, which enables environmental protection action in the face of scientific uncertainty). Two: the principle of science-based decision-making does not stand alone. It is part of a broader principle of knowledge-based decision-making, alongside Indigenous knowledge (Preamble and s 2(1)(i)). Scientific knowledge does not trump Indigenous knowledge. Rather, the two complement each other, and this complementarity is more likely to support than detract from the RHE.

Sixth, the principle of **reconciliation** with Indigenous peoples, which includes a commitment to implement the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)** and **free, prior and informed consent**, is an important addition to CEPA (Preamble and s 342.1(b)). In general this principle is likely to reinforce the RHE but it is possible that tensions may emerge between the two. A measure that infringes the RHE to advance reconciliation, the rights of Indigenous peoples and their right to free, prior and informed consent would be a reasonable limit on the RHE.

Finally, the principles of **openness, transparency and accountability**, and of **public participation**, can only reinforce the RHE since openness, transparency, accountability and public participation are core procedural elements of the right to a healthy environment.

5. Reasonable limits must be consistent with the Government of Canada's administrative duties under CEPA

Another question to ask of any proposed limit on the RHE is whether it is consistent with the government's administrative duties under CEPA. **A limit on the RHE that is inconsistent with the government of Canada's duties in the administration of CEPA is not a reasonable limit.**

CEPA imposes a long list of duties on the government, including to:

- Exercise its powers in a manner that **protects the environment and human health**, including the health of **vulnerable populations** (s 2(1)(a)(i));
- Exercise its powers in a manner that applies the **precautionary principle** (s 2(1)(a)(ii));
- Apply a **weight of evidence approach** and the **precautionary principle** when assessing of toxic substances (s 76.1(1));
- Exercise its powers in a manner that promotes and reinforces **enforceable pollution prevention** approaches (s 2(1)(a)(iii));
- Take **preventive and remedial measures to protect, enhance and restore the environment**, considering the human, ecological, economic and other benefits of such measures (s 2(1)(a.1), (1.1));
- In protecting the RHE, uphold principles such as principles of **environmental justice** (including the avoidance of adverse effects that disproportionately affect vulnerable populations), the principle of **non-regression** and the principle of **intergenerational equity** (s 2(1)(a.3));
- take the **necessity of protecting the environment** into account in making social and economic decisions (s 2(1)(b));

- Implement an **ecosystem approach** (s 2(1)(c));
- endeavour to act in **cooperation with governments to protect the environment** (s 2(1)(d));
- encourage the **participation** of the people of Canada in the making of decisions that affect the environment (s 2(1)(e));
- facilitate the **protection of the environment by the people of Canada** (s 2(1)(f));
- establish **nationally consistent standards of environmental quality** (s 2(1)(g));
- provide **information** to the people of Canada on the state of the Canadian environment (s 2(1)(h));
- apply **knowledge**, including **traditional aboriginal knowledge, science and technology**, to identify and resolve environmental problems (s 2(1)(i));
- **protect the environment**, including its biological diversity, **and human health, from the risk of any adverse effects of the use and release of toxic substances**, pollutants and wastes (s 2(1)(j));
- **protect the environment**, including its biological diversity, **and human health, by ensuring the safe and effective use of biotechnology** (s 2(1)(j.1));
- endeavour to **act expeditiously and diligently** to assess whether existing substances or those new to Canada are toxic or capable of becoming toxic and assess the risk that such substances pose to the environment and human life and health (s 2(1)(k));
- endeavour to act with regard to the intent of intergovernmental agreements and arrangements entered into for the purpose of **achieving the highest level of environmental quality** throughout Canada (s 2(1)(l));
- ensure, to the extent that is reasonably possible, that all areas of federal regulation for the protection of the environment and human health are addressed in a complementary manner in order to avoid duplication and to provide **effective and comprehensive protection** (s 2(1)(m));
- endeavour to exercise its powers to require the provision of information in a coordinated manner (s 2(1)(n)); and
- apply and enforce this Act in a **fair, predictable and consistent** manner (s 2(1)(o)).

There is a statutory qualification on these duties, but it operates only in favour of protecting the environment or human health, not against it: “Nothing in this section shall be construed so as to prevent the taking of any action **to protect the environment or human health** for the purposes of this Act” (s 2(2)).

Once again a few illustrations of how these duties might constrain the government’s ability to justify limits on the RHE will have to suffice.

First, when discharging its duty to take **preventive and remedial measures to protect, enhance and restore the environment**, the government is explicitly required to consider the benefits of such measures, but it is not authorized to consider their costs (s 2(1)(a.1), (1.1)). If the government proposed to limit the RHE in the name of the economic or

other costs of preventive or remedial measures, this would not be a reasonable limit because it would conflict with the government's statutory duty.

Second, the duty to take the **necessity of protecting the environment** into account in making social and economic decisions (s 2(1)(b)) means that the government cannot simply treat environmental protection as a discretionary option that can be sacrificed on the altar of social or economic decision-making. To limit the RHE in the name of social or economic priorities would be inconsistent with this duty to recognize the necessity of environmental protection.

Third, the duty to **protect the environment and human health from the harmful effects of toxic substances and biotechnology** (s 2(1)(j), (j.1)) implies that any limit on the RHE that has the effect of increasing environmental or human exposure to such effects would not be a reasonable limit.

Finally, any purported limit on the RHE that allows a delay or relaxation of the assessment of potentially toxic substances would be inconsistent with the duty to **act expeditiously and diligently to assess the toxicity** of existing or new substances (s 2(1)(k)).

In short, the administrative duties imposed on the government by CEPA limit the government's ability to justify limits on the RHE.

6. Reasonable limits must not be used to excuse non-compliance with or derogation from other provisions of CEPA

Aside from being consistent with the purposes, principles and duties of CEPA, limits on the RHE must be consistent with the legal requirements of CEPA and of any regulations, orders or other instruments promulgated pursuant to CEPA. **Limits on the RHE cannot be used to excuse non-compliance with or other derogation from these mandatory provisions.**

7. The burden to justify limits on the RHE must rest with the Government of Canada in every case

The burden to justify limits on the RHE must always rest with the government. This principle may seem self-evident, but it is important to emphasize that it must always be applied on a case-by-case basis that is sensitive to variations in the circumstances of different rights holders and variations in the nature and severity of threats to the right to a healthy environment. Blanket, one-size-fits-all limits on the right cannot be articulated in advance.

8. The imposition and justification of limits on the RHE must be open, transparent and fair.

Finally, if there are to be limits on the RHE, they must be devised, applied and justified in an open, transparent and fair manner that implements the right of the rights holders to effective participation at every stage of this process. Space and time constraints do not allow further elaboration of this point here.

Conclusion

The preceding recommendations regarding the determination of reasonable limits on the right to a healthy environment under CEPA can be summarized as follows:

For a limit on the RHE to be reasonable, the Government of Canada must demonstrate, in every case, that:

- 1. The limit serves a purpose that is so pressing and substantial that it warrants overriding the RHE, which the government of Canada is duty-bound to protect;**
- 2. The limit is consistent with CEPA's purposes, principles and administrative duties, including without limitation:**
 - a. Protection of the environment and human health by preventing pollution;**
 - b. The principles of:**
 - i. Sustainable development;**
 - ii. Pollution prevention;**
 - iii. Ecosystem approach;**
 - iv. National leadership in environmental standards, objectives, guidelines and codes;**
 - v. Precautionary principle;**
 - vi. Intergovernmental cooperation;**
 - vii. Science-based decision-making;**
 - viii. Reconciliation, including UNDRIP and free, prior and informed consent;**
 - ix. Polluter pays;**
 - x. Openness, transparency and accountability;**
 - xi. Public participation in environmental decision-making; and**
 - xii. Protection of vulnerable populations; and**
 - c. The Government of Canada's duties to:**
 - i. Exercise its powers in a manner that protects the environment and human health, including the health of vulnerable populations;**
 - ii. Exercise its powers in a manner that applies the precautionary principle;**
 - iii. Apply a weight of evidence approach and the precautionary principle when assessing of toxic substances;**
 - iv. Exercise its powers in a manner that promotes and reinforces enforceable pollution prevention approaches;**
 - v. Take preventive and remedial measures to protect, enhance and restore the environment, considering the human, ecological, economic and other benefits of such measures;**
 - vi. In protecting the RHE, uphold principles such as principles of environmental justice (including the avoidance of adverse effects that disproportionately affect vulnerable populations), non-regression and intergenerational equity;**
 - vii. take the necessity of protecting the environment into account in making social and economic decisions;**
 - viii. Implement an ecosystem approach;**

- ix. **endeavour to act in cooperation with governments to protect the environment;**
 - x. **encourage the participation of the people of Canada in the making of decisions that affect the environment;**
 - xi. **facilitate the protection of the environment by the people of Canada;**
 - xii. **establish nationally consistent standards of environmental quality;**
 - xiii. **provide information to the people of Canada on the state of the Canadian environment;**
 - xiv. **apply knowledge, including traditional aboriginal knowledge, science and technology, to identify and resolve environmental problems;**
 - xv. **protect the environment, including its biological diversity, and human health, from the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes;**
 - xvi. **protect the environment, including its biological diversity, and human health, by ensuring the safe and effective use of biotechnology;**
 - xvii. **endeavour to act expeditiously and diligently to assess whether existing substances or those new to Canada are toxic or capable of becoming toxic and assess the risk that such substances pose to the environment and human life and health;**
 - xviii. **endeavour to act with regard to the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada;**
 - xix. **ensure, to the extent that is reasonably possible, that all areas of federal regulation for the protection of the environment and human health are addressed in a complementary manner in order to avoid duplication and to provide effective and comprehensive protection;**
 - xx. **endeavour to exercise its powers to require the provision of information in a coordinated manner; and**
 - xxi. **apply and enforce the Act in a fair, predictable and consistent manner; and**
3. **The limit does not operate to excuse non-compliance with or derogation from any other provisions of CEPA;**
 4. **The limit is proportional, in that:**
 - a. **It is rationally connected to the purpose it purports to serve (in other words, it is not arbitrary, unfair or irrational, but carefully designed to achieve its purpose);**
 - b. **It impairs the RHE as little as possible; and**
 - c. **Its negative effects on the RHE do not outweigh its beneficial effects; and**

5. The limit is devised, applied and justified in an open, transparent and fair manner that implements the right of the rights holders to effective participation at every stage of this process.

We hope you find these comments helpful.

Sincerely,

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On behalf of the Centre for Law & the Environment