

# "Straight-A" Score Card

**Introduction:** This model, "Straight-A" Score Card shows the desirable case for environmental rights as of March 2009. The below provisions are a compilation of some existing provisions in Canadian jurisdictions, principles set out in the Aarhus convention, and principles and provisions set out in the draft Canadian Environmental Bill of Rights developed by Ecojustice, Friends of the Earth Canada and the Sierra Club of Canada. In our view, a truly successful environmental rights regime would start with the below fundamental measures, but would then build upon these fundamentals with further improvements and innovations to enhance public participation in environmental decision making. Note that, as in the report, the term "citizen" in the headings is broader than the legal meaning and includes all residents of the jurisdiction being reviewed. For the provinces and territories, a "resident" is someone residing in the province or territory whose environmental legislation is being reviewed; for federal legislation, a "resident" can reside anywhere in Canada.

## Public Rights to Information and Notice

- Environmental Registry is used as a notification and public participation tool; contains information about all proposals, decisions and events that could affect the environment as well as things done under environmental statutes. The Registry can be searched for free, and searches can be saved or easily updated/followed up by the user. If the following items are not covered under the Registry, there are also the following separate registries or inventories:
  - Brownfields or Contaminated Site registry available online at no charge.
  - Environmental Assessment Registry to contain all EA documents, reports and comments from members of the public (though the identity of the commenter may be withheld at their request). This Registry is online, free of charge, and easy to search (e.g. by type of project, geographical area and proponent).
  - Mineral Titles Online Registry, Forests Online Registry, Greenbelt Register and Pollution Inventories
- Ministry responsible for Registry offers workshops for those interested in learning how best to search the Registry and stay on-top of new proposals. The Ministry provides the means for Registry users to sign up to receive a weekly summary of new postings to the Registry.
- Government must ensure effective access to environmental information by making such information available on request in a reasonable, timely, understandable and affordable fashion.
- Government prepares and provides State of Environment Reports at least every three years to provide early warnings and analysis of potential problems for the environment and to allow the public to monitor progress toward achieving environmental objectives.
- Government requires operators whose activities have a significant impact on the environment to regularly inform the public of the environmental impact of their activities and products. Where appropriate, this can be done with eco-labelling or eco-auditing.

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**Guarantee of Public Participation in Decision Making**

**A**

- For Environmental Assessments, interested persons are consulted during the preparation of terms of reference and the EA. Any person is entitled to comment in writing on proposed terms of reference, the EA and the Ministry review of the EA. There are basic and enhanced public participation requirements, ranging from submitting written comments to holding public hearings, for different classes of proposals. The public can request enhanced participation for proposals of particular interest.
- Opportunities for public participation are also available in decision-making on the development and implementation of policies, plans, Acts, regulations and statutory instruments.
- In all public participation processes, there are clear, formal stages for participation and an accessible system that reaches out to the public, particularly groups that have not historically engaged in environmental decision making. Furthermore, public participation takes place early in the decision-making process such that all options are open and the public is entitled to put forward and debate options and help mould proposals before the proposals have been developed to the point where it is difficult to take other views on board.
- For people to have confidence in the result, consultations must not be organized by the private sector.
- Standard 30 day comment periods; participants are entitled to request extended comment periods where needed. Minister always considers allowing more than 30 days to permit more informed public consultation.
- Government funding available for public participation.

**Required Government Response or Feedback**

**A**

- A Minister who gives notice of a proposed policy, plan or strategy, Act, regulation or statutory instrument ensures all comments on the proposal are considered when the decision is made. The government explains how the public's comments and concerns have been addressed, considered or incorporated into the decision (i.e. what effect the comments had).
- After a decision is made on whether to implement project proposal that was subject to an EA, public notice includes an explanation of the effect that public participation had on the decision.
- An independent auditor or commissioner evaluates how public comments are considered.

**Ability to Appeal Decisions**

**A**

- Any resident of at least 18 years of age or a legal person, regardless of whether they are directly affected by the matter in respect of which relief is sought, has standing to review a government decision provided that: i) the matter arises in the context of environmental protection; ii) the applicant raises a serious issue; iii) the applicant has a genuine interest in the matter; and iv) there is no other reasonable or effective way for the matter to get before the court.
- Interested members of the public are entitled to seek out various levels of intervener status in proponent-initiated appeals.

**Citizen Initiated Investigations**

**A**

- Any resident of at least 18 years of age who believes that an activity is impairing or is likely to impair the natural environment is entitled to apply for an investigation, regardless of whether or not an offence is alleged. The Minister attempts to resolve the investigation within a maximum of 180 days. The results of the investigation are provided, in writing, to the applicant and to an independent auditor or commissioner of the environment.
- Any resident of at least 18 years of age who believes that an existing policy, Act, regulation or statutory instrument should be amended, repealed, or revoked, or that a new policy, Act, regulation or statutory instrument should be passed in order to protect the environment, is entitled to apply to the appropriate Minister for a review. The Minister acknowledges receipt of the request within 20 days, decides whether to conduct a review within 60 days of the acknowledgement, and lets the party

<p>requesting the review know of the intended course of action. The Minister must report to the applicant on the progress of the review every 90 days. At the end of the review, the Minister communicates results of the review in writing to the applicant and to an independent auditor or commissioner of the environment.</p>	
<p><b>Citizen Initiated Prosecution of Statutory Offences</b></p> <ul style="list-style-type: none"> <li>• Any resident of at least 18 years of age can prosecute an offence where they believe that an offence has been committed under any of the environmental protection statutes in the jurisdiction in which they reside. Where that resident conducts the prosecution, the court has authority to order that a portion of the fine imposed be paid to the resident to reimburse them for costs and expenses incurred.</li> </ul>	<p><b>A</b></p>
<p><b>Ability of Citizens to Sue to Protect the Environment</b></p> <ul style="list-style-type: none"> <li>• Every resident of at least 18 years of age is entitled to seek recourse in the courts to protect the environment by: <ol style="list-style-type: none"> <li>1. Bringing a civil action against the government for failing to fulfill its duties as trustee of the environment;</li> <li>2. Bringing a civil action against the government for violating the right to a healthy and ecologically balanced environment; and, or</li> <li>3. Bringing a civil action where a person has contravened, or is likely to contravene an Act, regulation or statutory instrument, and where the offence has resulted or will likely result in significant environmental harm.</li> </ol> </li> <li>• The above actions are subject to a civil standard of proof and are adjudicated on the basis of a balance of probabilities. For the third type of action, once the plaintiff has demonstrated a <i>prima facie</i> case of environmental harm, the burden of proof is then on the defendant to prove that their actions will not result in harm to the environment.</li> <li>• It is <u>not</u> a defence to the first and second type of action that the appropriate Minister has the power to authorize an act which may result in significant environmental harm. It is <u>not</u> a defence to the third type of court action that: <ul style="list-style-type: none"> <li>○ The activity causing environmental harm or impairment is authorized or licensed;</li> <li>○ The activity causing environmental harm or impairment is confined to the polluter's property; or</li> <li>○ There was no reasonable and prudent alternative to the activity causing environmental harm or impairment.</li> </ul> </li> <li>• Remedies available in the above court actions are broad and directly aimed at restoring environmental quality.</li> <li>• A resident bringing one of the above civil actions is entitled to make a motion to the court for an injunction to protect the subject matter of their action where, in the court's opinion, serious environmental harm may occur before the action can be heard.</li> <li>• A resident bringing one of the above civil actions may only be ordered by a court to pay costs if the action is found to be frivolous, vexatious or harassing. The resident bringing the action is entitled to counsel fees, regardless of whether or not they were represented by counsel, and/or if the court hearing the matter deems that it is in the public interest, the court has the power to give the resident an advance award to cover the resident's costs in bringing the civil action. In exercising its discretion with respect to costs, the court is entitled to consider any special circumstances, including whether the action is a test case or raises a novel point of law.</li> </ul>	<p><b>A</b></p>
<p><b>Whistleblower Protections</b></p> <ul style="list-style-type: none"> <li>• By law, no employer shall dismiss, discipline, penalize, coerce, intimidate or harass, or attempt to coerce, intimidate or harass an employee because the employee did or may do any of the following, in good faith, for the purpose of protecting the environment: <ul style="list-style-type: none"> <li>○ Participates in environmental decision-making;</li> <li>○ Applies for a review of an Act, regulation, statutory instrument or policy;</li> <li>○ Applies for an investigation;</li> </ul> </li> </ul>	<p><b>A</b></p>

<ul style="list-style-type: none"> <li>○ Seeks the enforcement of any Act, regulation or instrument that seeks to protect the environment;</li> <li>○ Provides information to an appropriate authority for the purposes of an investigation, review or hearing;</li> <li>○ Gives evidence in a proceeding;</li> <li>○ Refuses or states an intention of refusing to do anything that constitutes an offence under environmental protection legislation, if acting in good faith and on the basis of reasonable belief;</li> <li>• Where the above prohibition has been violated by an employer, the authority responsible for administering the legislation investigates the offence. In addition, the employee is entitled to file a written complaint with the labour relations board. In an inquiry by the labour relations board, the burden of proof lies upon the employer to establish that they did not contravene the prohibition set out above. An employer who is found to have violated the above provision is guilty of an offence and is liable to a fine or to imprisonment or both. In addition to any other penalty imposed, the court has authority to order the employer to reinstate the employee to their former position or equivalent position or to pay the employee wages and benefits lost due to the offence.</li> </ul>	
<p><b>Strategic Lawsuits Against Public Participation (“SLAPP”) Protections</b></p> <ul style="list-style-type: none"> <li>• A <i>Public Participation Protection Act</i> or other similar law exists to encourage and protect public participation by providing: <ul style="list-style-type: none"> <li>○ An opportunity for defendants in SLAPP suits to allege that the proceeding or claim is being brought for an improper purpose (e.g. to dissuade residents or legal persons from engaging in public participation; to divert the resources of participants from the public participation into defending the court action; and/or to penalize the defendant from engaging in public participation);</li> <li>○ A means to summarily dismiss a claim that is brought for an improper purpose;</li> <li>○ A means by which a court can order that residents or legal persons who are subjected to a proceeding or claim that is brought for an improper purpose may be reimbursed for all reasonable costs and expenses they incurred as a result of the proceeding or claim;</li> <li>○ A means by which a court can impose punitive damages against those who brought a claim or proceeding for an improper purpose; and</li> <li>○ Protection from liability for defamation if the communication or conduct that the SLAPP plaintiff claims to be defamatory constitutes public participation.</li> </ul> </li> <li>• The Act provides a fund to help victims stop SLAPP suits quickly and put them on equal footing with corporations that have deep pockets.</li> </ul>	<b>A</b>
<p><b>Independent Environmental Auditor or Commissioner</b></p> <ul style="list-style-type: none"> <li>• An independent Environmental Commissioner or Environmental Auditor monitors the implementation of, and adherence to, the above provisions and reports deficiencies to the Legislature. The Environmental Commissioner or Auditor is present to hold the government accountable. The Commissioner or Auditor has the authority, under law, to facilitate public participation in environmental decision making by informing and otherwise assisting members of the public to make use of their environmental rights.</li> </ul>	<b>A</b>
<b>Final Grade</b>	<b>A</b>