

September 6, 2011

Environment Act Comments
Nova Scotia Environment
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COMMENTS ON NOVA SCOTIA ENVIRONMENT ACT REVIEW 2011
EAST COAST ENVIRONMENTAL LAW ASSOCIATION

East Coast Environmental Law Association (ECE LAW) thanks the Minister of Environment for the opportunity to make submissions on the review of the Nova Scotia Environment Act (NSEA) and the discussion paper prepared by the Nova Scotia Environment Department. ECE LAW is a charitable organization which responds to community inquiries, carries out legal and policy research and presents educational resources and opportunities to increase public awareness of environmental laws in Atlantic Canada.

ECE LAW's work touches on a variety of wide-ranging issues of lasting public importance including water, fisheries, mining, energy, protected places, species at risk, and environmental assessment. As such, ECE LAW believes that the Environment Act is of the utmost importance in protecting our environment, and that public awareness, participation, as well as transparency within the operation of the Act, should be a priority in any amendments to the Act.

Before responding to the substance of the Department's discussion paper, we will address some procedural issues related to the Review. Many of the proposals for amendment raised in the Department's discussion paper appear to be enhancements or improvements to the Act and are welcomed. However, some are vague and until specific language is proposed it is difficult to provide comment. ECE LAW's submission closes with some additional proposals for amendment of the Act related to strategic environmental assessment, environmental rights and access to justice.

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I Comments on Process of the Review:

Section 174 of the Act requires the Minister to appoint an advisory committee to review the NSEA every 5 years. The Department’s discussion paper, prepared prior to the committee’s appointment, includes a set of proposed changes to the Act. ECELAW is of the view that the Department’s paper contains valuable information for the advisory committee, and is likely to be given significant weight. However, the advisory committee’s scope of review is not limited to those topics which the Department feels are most important. It is the advisory committee and not the Department that has the responsibility for review.

ECELAW supports the integration of public participation into the review process. Effective participation requires adequate time for the public to both respond to the Departmental priorities and present other proposals for improvement of the NSEA.

ECELAW has commented previously on the short time frame provided for comment on the Department’s discussion paper and is appreciative of the time extension to September 6th. However, the proposed time frame, as communicated to us, is still short! The very general nature of the Department’s discussion paper demands that a draft of the proposed amendments be made available in a second stage of consultation – with adequate time for response – before going forward. From the perspective of both the content of proposed changes, and the time provided for submissions in this round of consultation, the process is otherwise not adequate for an effective review of the Act.

The Department states that the amendments to the Act are urgently needed, and proposes a quick process for moving amendments through the legislative process, However, in the majority of the proposed amendments, the real detail supporting necessary powers have yet to be worked out and will rely on regulation. There may be a

significant period of time following any changes to the enabling statute before underlying regulations can be brought in.

If the Department believes that some of its proposed amendments are needed as a matter of urgency, ECELAW proposes that they proceed as a first tranche of improvements, giving the public an opportunity to consider and raise additional proposals for inclusion in a second tranche.

ECELAW is also interested in the selection process for the advisory committee. While the Act does not restrict the Minister's ability to appoint members to this advisory committee, the goal should be to establish a well rounded group for an effective review of the Act. If, as we have been advised, the members of the advisory committee are to be self-selected from the Round Table, we request that the Minister consider carefully whether it then is representative of all interest groups, and should invite additional persons to take part if necessary.

II Comments on the Department's Proposed Amendments to the NSEA

ECELAW has detailed comments on the following proposed changes to the NSEA.

Goal #1: Matching resource use to the level of risk to the environment and human health

COMMENT: ECELAW understands the basic concept proposed by the Department that less risky activities could be expedited through a new and less complex regulatory process, such as the requirement to meet a regulatory standard; more risky activities that require more careful scrutiny will be subject to the current approvals process (See Part V of the Act and the Activities Designation Regulations).

To the extent that this proposal relieves administrative responsibilities from departmental staff and thereby makes more resources available for field audit and enforcement, ECELAW supports it.

ECELAW has some concern that a change from a process focused on approvals, to one relying on guidelines and standards, could shift priority from preventative measures to reactionary ones. A detailed application process ensures that a safety net is in place prior to the commencement of an activity. There is a risk that the increase in funds directed to the investigation and enforcement operations will not in fact result in greater protection of the environment because there will be more violations to deal with due to a less stringent, or non-existent, application process.

The detailed application and approval process is also in line with the goal of environmental education (Section 2(e) of the Act). It allows the Department to educate the applicant about compliance with the Act, whereas reliance on a standard expects self education.

While ECELAW believes that there could be scenarios in which the Department's proposed approach would be effective, it is not possible to provide thorough feedback without knowing when the Department plans to use this it. ECELAW would like further detail by example of the best practice models that NSE has in mind.

ECELAW also proposes that all approvals, licenses, permits, standards etc should be available to the public through on an online Environmental Registry (see more below in ECELAW's proposals).

Goal #2: Using resources more efficiently and effectively

1. Revise the definition of "adverse effect"

Current definition: "an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property."

Proposed definition: "adverse effect means an effect that impairs or damages the environment, including those aspects of human health that are or can be negatively affected by changes in the environment." This definition is based on a recommendation from the first *Act* review in 2000. It will better link with our core mandate and align more closely with the definitions used in Canadian legislation.

COMMENT: Some members of the public have expressed concern over this change. However, the change does not remove the right of action at common law for nuisance. It also does not remove the department's responsibility if there is an effect on the environment or human health. It only removes the department's responsibility over private property issues such as impairment of value or interference with economic rights (e.g. the smelly agricultural operation). These may be problematic but are not necessarily of environmental or health concern. ECELAW therefore supports this amendment.

2. Provide greater flexibility to draw on the expertise of independent experts and advisers

The NSEA permits the Minister to engage experts to report and provide recommendations on a range of matters, e.g. the Environmental Assessment Board (EAB) and Round Table. In other cases, the Minister may choose to appoint an expert or

experts to provide advice or opinion. The proposal is to consolidate into one section the powers of the Minister to appoint experts and establish advisory committees. The standing EAB will be eliminated in favour of appointing assessment panels when required.

COMMENT: Increasing the availability of expert advice is desirable; but ECELAW has some concern about changing the EA Board to an ad hoc panel. Generally, the existence of an EA Board is seen as a sign of independence and distance of the EA process from political influence. The discussion paper suggests that this change will better align Nova Scotia with other jurisdictions. ECELAW does not agree. Nova Scotia's EA process is one of the best in Canada. Maintaining the EA Board assists in developing a consistent practice and growing expertise.

Other jurisdictions in Canada also have permanent Boards.

In Québec, the Bureau can host public consultations and provide observations; but it is the Ministère de l'Environnement who makes key recommendations. The Bureau members are paid appointees of the Minister.

In Alberta, the Natural Resources Conservation Board is an independent entity that reports to and makes recommendations to the Minister of Sustainable Development. It is composed of not more than six members, appointed by the Lieutenant Governor-in-Council, for a term of not more than 5 years.

The Ontario Environmental Review Tribunal is a quasi-judicial body, and its process and decision-making proceed independently from the Ministry. The Tribunal is established by provincial legislation with members that are appointed by the Lieutenant Governor in Council and who not employees of the Ministry.

At the highest level of authority and independence are the permanent NIRB in Nunavut and the Yukon Environmental and Socio-Economic Assessment Board, composed of members appointed by different levels of government and communities. Each of these Boards may hold hearings and makes final recommendations to the Minister or relevant decision-maker.

ECELAW suggests the following possible alternatives to dismantling the EA Board:

- enhance the role of the EA Board in Nova Scotia to take on other work as per Ontario, e.g. appeals from decisions of the department or Minister.
- Ask the Board to undertake SEAs and Class EAs

3. Require reviews of the *Environment Act* every 10 years

s 174 now reads: "The Minister shall appoint an advisory committee to review this Act within five years of the coming into force of this Section and every five years thereafter."

COMMENT: ECELAW is not convinced that the review period for the NSEA should be changed. A frequent review demonstrates a commitment to environmental protection. The last review took from 2000 to 2006. If the length of time occupied by a Review is the concern, then there could be some limits put in place such as requiring that the department present the results of the Review to Cabinet or the House within a 12 month period.

Goal #3

9. Clarify the provisions relating to the appeal of orders

The proposal is to provide that an appeal of a Ministerial order is not a new hearing of the matter and that an Appeal may only determine whether the Minister's decision was legally acceptable based on the facts that were before him or her.

s.138(1) currently allows an Appeal of the Minister's decision:

"on a question of law or on a question of fact, or on a question of law and fact, to a judge of the Supreme Court..."

COMMENT: Although we have been informed that this is a minor cleaning up of the Appeal provision, we request an opportunity to review the amended language to ensure that the Court's review of Ministerial discretion role is not unduly limited.

III Proposals that appear positive

ECELAW supports in principle the following proposed changes to the Act.

Goal #2:

5. Streamline the process for issuing emergency orders

Emergency orders will not be reviewed by the Minister; instead inspectors will inform their supervisor when issuing an emergency order.

Goal #3:

1. Enhance the duty to report spills or releases

Expand reporting requirement to include persons or companies who would tend to become aware of spills or releases during the course of their work, e.g. a consultant.

2. Create an offence for failing to comply with Protected Water Areas regulations

To assist municipalities in enforcement.

4. Clarify NSE's authority to seek enforcement measures

Update the language in the 'Purpose' section of the *Act* to clarify that we have the flexibility to seek more serious enforcement measures against offenders in appropriate cases without first having to apply educational measures.

5. Update the authority to cancel or suspend approvals

Change the Environment Minister's authority to cancel or suspend an approval to allow the Minister to respond proactively to information about the likelihood of an adverse effect.

6. Update the authority to amend approvals issued before 1995

Introduce the authority to review and amend approvals issued before 1995 that have no expiry date.

7. Update the authority to enact a new set of contaminated sites regulations

To ensure the authority to implement the regulations.

8. Revise the definition of the term "substance"

The term is defined narrowly such that certain specific types of spills or releases that should be covered under the definition may not be. This has made it difficult to enforce effectively the parts of the *Act* relating to these types of spills or releases.

IV Proposals requiring further explanation

ECELAW is not able to comment on the following proposed amendments to the *Act* without further information.

Goal 2:

4. Update the timelines for processing approval applications

The current timelines in the *Environment Act* are also not aligned with those set out in the *Approvals Procedure Regulations*. The proposal is to eliminate these timelines in favour of adopting a service standard that provides stakeholders with a reliable expectation of processing times.

6. Reduce the potential for redundancy in the collection of air emissions data

To ensure that there is no need for redundant efforts by NSE and Environment Canada with respect to data collection.

Goal #3

3. Clarify inspectors' power to issue directives to require compliance

V Comments on Administrative Penalties

Although more specifics are needed on the broad proposal to add capacity to impose administrative penalties, in general this appears to be a positive step. Currently enforcement officers may be dissuaded from proceeding with recommending prosecution because of the length of time required to prove a case in court, evidentiary hurdles, etc. ECELAW therefore supports the use of administrative penalties as an addition to the current regime so as to increase compliance. They should not be used as a way to downgrade the significance of environmental offences.

The Department has provided little information regarding the preferred form for regulations dealing with administrative penalties, and no information regarding the use and effect of such administrative penalties in other jurisdictions. We look forward to further detail and time to consider the Department's suggestions.

ECELAW has only briefly examined the use of administrative penalties in other jurisdictions. The discussion paper suggests that Nova Scotia would likely follow jurisdictions in which the Department is prevented from issuing both an administrative penalty as well as prosecuting an offence for the same violation, pointing out that Ontario is the only jurisdiction which permits both remedies to be taken for the same offence. One of the recurring themes in the Department's proposals is increasing flexibility of the Act to enable officers to deal with unique situations, offering more than one approach. Therefore, while administrative penalties can offer a more cost effective method of penalizing offenders, they should not necessarily close the door to prosecution for that offence.

ECELAW supports adding a specific requirement that administrative penalties be contributed to the Nova Scotia Environmental Trust.

VI ECELAW Proposals on the Review of the Nova Scotia Environment Act

Enabling Strategic Environmental Assessments

ECELAW proposes that the NSEA should be amended to enable, and in certain circumstances require, strategic environmental assessments (SEAs). Currently, the definition of "undertaking" to include "a policy, plan or program" suggests that a SEA could be included under the Act's EA process. However, ECELAW proposes that the Act be amended so as to explicitly incorporate SEAs as a higher level process to guide policy

prior to the consideration of individual project undertakings . Further amendments to the Act should also allow for a diversion from a project Environmental Assessment to an SEA during or after its completion to address broader issues, cumulative impacts, etc.

Strategic Environmental Assessments can be an important tool in dealing with public concern for environmental impacts, and assist in implementation of sustainable development goals, both of which should be significant concerns of the Department. SEAs can also reduce uncertainty for project proponents. If this tool is to be used, research suggests that it is more effective, and compliance is greater, where the process is legislated.¹ Therefore, it is important that the Act be amended to enable and provide clear legal authority for SEAs.

Enhancing Environmental Rights

ECELAW commends Nova Scotia Environment for developing a number of proposals that will undoubtedly lead to improvement of performance and enforcement. However, there are other improvements that could be made to the Environment Act to recognize advances in understanding of environmental rights. These proposals would ensure that the NSEA is one of the most effective and responsive pieces of legislation dealing with environmental protection in the country. They would also improve compliance and enforcement by equipping citizens to play a more effective role in monitoring and compliance.

ECELAW proposes that this government consider embedding in its laws substantive and procedural provisions that together are often referred to as an “Environmental Bill of Rights” (EBR). Environmental rights are recognized internationally under the Stockholm Declaration of 1972. The Yukon, the Northwest Territories, Quebec and Ontario have all in some way statutorily recognized the existence of environmental rights for their citizens. While this has yet to be replicated at the federal level, in October 2009, a draft Canadian Environmental Bill of Rights (CEBR), introduced by NDP MP Linda Duncan, received first reading before Parliament. The Bill did not pass before the 40th Parliamentary session was dissolved on March 26th, 2011. Despite this progress on environmental rights in other jurisdictions, many provinces, including Nova Scotia, have yet to adopt environmental rights in a substantial way.

In 1990, Ontario’s newly elected NDP government commissioned a multi-stakeholder advisory committee that sought to investigate the implementation of an environmental bill of rights. The Task Force issued their final report in 1992 with recommendations for Ontario’s EBR. The Task Force’s Report paid particular attention to the mechanisms and

¹ Meinhard Doelle and Chris Tollefson, “Environmental Law” (Toronto: Carswell, 2009), att p. 365.

procedural rights by which citizens of the province could hold the government accountable for the protection of the environment.² After incorporating the majority of the Task Force's recommendations, the Ontario EBR was passed in 1993 and proclaimed into force in 1994.³

The main objectives of the Ontario EBR are to "*protect the natural environment; facilitate public participation in environmental decision making; increase public access to the courts; and enhance governmental accountability.*"⁴ The mechanisms by which these objectives were put in place focus on two areas: public participatory rights and government accountability mechanisms. Public participatory rights include: the right to notice and comment, the right to review an existing law, the right to request leave to appeal an approval, the right to request an investigation, the right to sue for harm to natural resources, the removal of barriers to pursuing claims of public nuisance and finally, whistle blower protection. Government accountability mechanisms focus primarily on the creation of the Environmental Commissioner and the Ministerial Statements of Environmental Values (SEVs).⁵ The Ontario Environmental Commissioner is an officer of the Legislative Assembly of the province. The Commissioner plays a large role in reviewing government performance with respect to environmental targets and the EBR, on his own initiative and at the request of citizens. The Commissioner also handles requests for investigations and leaves to appeal.

The Ontario EBR also requires an online Environmental Registry⁶ which contains "public notices" about environmental matters being proposed by all government ministries covered by the Environmental Bill of Rights. The public notices may contain information about proposed approvals, new laws, regulations, policies and programs or about proposals to change or eliminate existing ones. The Registry is searchable in a variety of ways including by community. Comments can be submitted electronically and when final decisions are made, the registry provides information on how many and what kind of comments were made, as well as the impact, if any, the comments had on the decision. There is also information provided as to whether and how you can appeal and challenge the decision.

² Task Force on the Ontario Environmental Bill of Rights, *Report of the Task Force on the Ontario Environmental Bill of Rights*, <<http://www.archive.org/details/reportoftaskforc00taskuoft>> at VI.

³ *Environmental Bill of Rights*, RSO 1993, c. 28 at <http://www.e-laws.gov.on.ca/Download?dID=49391>

⁴ Richard D. Lindgren, "Statutory Environmental Rights: Lessons Learned From Ontario's Experience" (Lecture, delivered at the Renewing Environmental Law Conference, Vancouver, February 3 2011, <http://envlawforum.ca/pdfs/lindgren.pdf> at 5.

⁵ Paul R. Muldoon, Alastair Lucas, Robert Gibson & Peter Pickfield, *An Introduction to Environmental Law and Policy in Canada*, (Toronto: Emond Montgomery, 2009).

⁶ <http://www.ebr.gov.on.ca/ERS-WEB-External/>

The Ontario EBR is a comprehensive package with significant cost implications, such as the creation of the role of Environmental Commissioner. The Ontario EBR also governs the activity of a number of government departments, not just the provincial Ministry of the Environment. Keeping in mind the current fiscal constraints, ECELAW proposes that Nova Scotia could adopt an incremental approach to environmental rights by introducing a range of measures that would not have significant budgetary impact and which all could be integrated into the Environment Act, rather than requiring a new legislative vehicle.

ECELAW has selected the following proposed amendments to the Environment Act with this approach in mind:

1. Provide a Substantive Right to a Healthy Environment and Right of Action for its Breach

The NSEA provides a long list of laudable goals for the Act including Section 2(b)(iv) which recognizes:

the principle of shared responsibility of all Nova Scotians to sustain the environment and the economy, both locally and globally, through individual and government actions.

However, the NSEA does not grant a substantive right to a healthy environment, nor provide a corresponding enforcement mechanism. Recent research by environmental scholar David Boyd for his new book "The Environmental Rights Revolution" lists 86 countries having constitutions that give an individual right to a healthy environment. (David Boyd, 2009 at <http://envlawforum.ca/pdfs/boyd.pdf>)

Sample provision:

Every resident of Nova Scotia has a right to a healthy and ecologically balanced environment.

2. Creation of an obligation on Government to protect the environment

A corresponding mechanism to enhance environmental protection is to place a duty on government to protect the environment. Boyd's research reveals that 132 countries have constitutions that place a duty on government to protect the environment. (David Boyd, 2009 at <http://envlawforum.ca/pdfs/boyd.pdf>)

Sample provision:

The Government of Nova Scotia has an obligation, within its jurisdiction, to protect the right of every resident of Canada to a healthy and ecologically balanced environment

The combination of the substantive right and the obligation supports the more detailed procedural proposals outlined below. They also create a basis for legal action by citizens where there is a breach of the obligation.

3. Improvements to the Environmental Registry

Section 2(h) of the NSEA states that one of the goals of the Act is:

providing access to information and facilitating effective public participation in the formulation of decisions affecting the environment, including opportunities to participate in the review of legislation, regulations and policies and the provision of access to information affecting the environment.

ECELAW proposes that this goal be translated into a positive responsibility.

Sample provision:

The government of Nova Scotia shall ensure effective access to environmental information by rendering it available on request to the public in a reasonable, timely, and affordable fashion.

NSEA s.10 requires the Minister to establish an environmental registry and to ensure public access to the information and documents contained in the environmental registry during business hours of the Department. The Act does not require that the Registry be online. Thus, the current Registry includes an online portion and a much larger paper Registry. To be accessible, more information should be required to be available online.

Sample provision:

NSEA s.10 (1) The Minister shall establish an environmental registry consisting of an Internet site and related files. The Internet site shall contain:....

Currently, the Registry includes approvals, orders, policies, programs etc. once made. Updating the Nova Scotia Registry is essential to ensure that the public are being informed of environmentally significant decisions and that they are able to provide input into the making of those decisions.

Using the Ontario Registry⁷ as a best practice model, ECELAW proposes that the scope of the online Registry should be broadened to be prospective and include:

- all applications for approvals under the NSEA by third parties.

⁷ <http://www.ebr.gov.on.ca/ERS-WEB-External/>

- all proposals for new or amended environmentally significant policies, acts, regulations or instruments, including any deletions.

Note that the Ontario EBR provides for classification of applications for approval into 3 classes based on whether the approval decision could have a significant effect on the environment and the level of public review already provided by an existing instrument. Class II proposals require public notice beyond the environmental registry and consideration of enhanced public participation, e.g. oral representation, meetings or mediation.

Sample provision concerning applications for approvals:

The Internet site shall contain:

- (i) *Applications for an approval or amendment to an approval*
- (ii) *Notices of an amendment, addition or deletion to an approval*
- (iii) *Applications to transfer, sell, lease, assign or otherwise dispose of an approval*
- (iv) *Applications for a certificate of variance to vary a term or condition of the approval or a requirement of the regulations*
- (v) *Ministerial Orders*
- (vi) *Emergency Orders*

Sample provision concerning new policies, acts, etc. as per Ontario EBR, section 14-16:

If a minister considers that a proposal under consideration in his or her ministry for a policy, Act or regulation 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.

In determining whether a proposal for a policy, Act or regulation could, if implemented, have a significant effect on the environment, a minister shall consider the following factors:

1. *The extent and nature of the measures that might be required to mitigate or prevent any harm to the environment that could result from a decision whether or not to implement the proposal.*
2. *The geographic extent, whether local, regional or provincial, of any harm to the environment that could result from a decision whether or not to implement the proposal.*
3. *The nature of the private and public interests, including governmental interests, involved in the decision whether or not to implement the proposal.*
4. *Any other matter that the minister considers relevant.*

(vii) Public Participation and Standing

The NSEA already provides a right to request an investigation and a right to Appeal where government has failed to adhere to the required law or procedure. However, the right to Appeal (s. 137 and 138) is not available unless the person exercising it is "aggrieved", i.e. has a special interest or has suffered harm. A concerned individual, or a non-profit organization, may therefore have difficulty in proceeding. The Courts have provided interpretation of who is an "aggrieved". In the Supreme Court of Canada decision of *Re British Columbia Development Corporation et al. v. Friedmann (Ombudsman) et al.*⁸, Mr. Justice Dickson, defined "aggrieved person" as follows:

I would hold that a party is aggrieved or may be aggrieved whenever he genuinely suffers, or is seriously threatened with, any form of harm prejudicial to his interests, whether or not a legal right is called into question.

This interpretation has been a barrier to non profit organizations, for example, pursuing an Appeal that is in the public interest. In recognition that all residents of Nova Scotia have an interest in environmental protection, it is proposed that there be clarity that a right of Appeal is provided to anyone with genuine interest in the matter" including "legal entities".

Sample provision:

No person shall be denied standing to participate in environmental decision-making or to appear before the courts in environmental matters solely because they lack a private or special legal interest in the matter.

(viii) Interim relief/Stay during an Appeal

As noted above, the right to appeal extends to any aggrieved person who objects to a decision. This can include the applicant for an approval, or a company that is subject to a ministerial Order. It can also include a member of the public who objects to a decision or approval on the basis that it would be likely to cause an adverse affect that is unacceptable. In such a case, the Appellant may wish to ask the Minister or the Court for a delay in the decision or approval pending the hearing of the case. This is known as a request for a stay or an interim injunction. The requirements that Courts impose before granting such an order for a stay are onerous and can prevent legitimate challenges to Ministerial and administrative decisions. For example, a Court will normally require proof of irreparable harm before an interim injunction or stay is granted. A court will usually require that the Appellant provide an undertaking to pay

⁸ [1984 CanLII 121 \(S.C.C.\)](#), (1984), 14 D.L.R. (4th) 129

damages caused by delay if they are ultimately unsuccessful in the case. It is proposed that the NSEA have specific provisions that address requests for a stay.

Sample provisions:

- *An appellant may make a motion for an interim order for a stay to suspend the operation of any decision appealed from, pending the disposition of the appeal, where serious environmental harm may occur before the action can be heard.*
- *Where an application for stay is made, relief will not be withheld solely on the grounds that the appellant is unable to provide an undertaking to pay damages.*
- *Where an application for stay is granted, the amount of an undertaking for damages shall be limited to [INSERT REASONABLE SUM] or such amount as the Court shall determine to be reasonable taking into account the means of the appellant, the public interest and the risk of serious harm to the environment*

This would ameliorate the current situation under NS Civil Procedure Rule 41.06 (1) which states:

A party who makes a motion for an interim or interlocutory injunction, ...must file, with the *ex parte* motion or notice of motion, an undertaking to do all of the following:

- indemnify another party for losses caused by the interim or interlocutory injunction ...if a judge who finally determines the claim is satisfied that the injunction... is not justified in light of the findings on final determination;
- move without delay for an interlocutory injunction ..., if the party successfully makes a motion for an interim injunction...;
- bring the party's claim to a final determination without delay.

(ix) Costs

It is proposed that the NSEA specifically allow for leniency in costs where the Appellant is acting in the public interest. Nova Scotia Civil Procedure Rules provide a Judge with discretion in ordering costs and their amount (i.e. either less or more than the usual "Tariff" of costs). However, it is proposed that when a person brings an appeal in the public interest, the Court may make an advance cost award that reduces the potential burden on the Appellant.

Sample provision:

An appellant may be entitled to an advance cost award upon application to the court if, in the opinion of the Court, it is in the public interest. In exercising its discretion with respect to costs, the Court could consider any special circumstances, including whether the action is a test case or raises a novel point of law.

(x) Participant funding: EA

Amendments to the Act should make funding available for participants in the EA process, for which individuals or organizations can apply once there has been a requirement for an EA Report. The funding may be required to be paid by the proponent of an undertaking.

Sample provision:

Where the Minister decides that an environmental assessment report is required, an administrator shall advise the public that participant funding will be made available. The administrator shall make a determination of the amount of funding available and include this information in the proposed Terms of Reference along with the proposed mechanism for its distribution. Individuals, Aboriginal groups and incorporated not-for-profit organizations may apply for participant funding.

(xi) Anti-SLAPP protection

Anti-SLAPP suits, or Strategic Lawsuits Against Public Participation, have been identified as a threat to accessing justice for individuals or citizen's groups in defending their environmental by burdening them with the cost of a legal defence so that they abandon their criticism of, or opposition to, a certain project or undertaking. Quebec is the only province to currently have anti-SLAPP legislation.⁹ British Columbia had passed anti-SLAPP legislation in the form of the *Protection of Public Participation Act* of 2001, however, this Act was subsequently repealed following the election of the Liberal Government.¹⁰ In Ontario in 2008, Bill 138 the Protection of Public Participation Act was proposed as a private member's bill by NDP Member and now Ontario NDP Leader Andrea Horwath.¹¹ While Bill 138 hasn't moved forward, an advisory panel on how to deal with SLAPPs commissioned by the Ontario Attorney General recommended that the province enact anti-SLAPP legislation in their final report issued on October 28th, 2010.¹² The incorporation of analogous provisions into the NSEA based on of Ontario's *Protection of Public Participation Act* would address this issue in addition to the previously mentioned access to justice issues already mentioned. It could form the basis for a broader piece of legislation that ultimately would affect non-environmental matters as well.

⁹ *An Act to Amend the Code of Civil Procedure to Prevent Improper Use of the Courts and Promote Freedom of Expression and Citizen Participation in Public Debate*, RSQ 2009 C-12.

¹⁰ *Supra* note 52 at 60.

¹¹ Bill 138, *Protection of Public Participation Act*, 1st Sess, 39th Leg, Ontario 2008 (first reading 9 December 2008).

¹² Ontario Anti-SLAPP Advisory Panel, *Report to the Attorney General*, online: <http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.pdf> at VI.

(xii) Regulatory review on a regular basis

ECELAW proposes that the NSEA should require a regular review of Regulations as well as a Review of the Act, with opportunity for appropriate public consultation.

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