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**PAPER #3:**

**Constitutional Recognition of the Right to a Healthy Environment:  
Making a Difference in Canada**

**EXECUTIVE SUMMARY**

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## Constitutional Recognition of the Right to a Healthy Environment: Making a Difference in Canada

How would constitutional recognition of the right to a healthy environment and the accompanying responsibility to protect the environment make a tangible difference in Canada? Based on the experiences of other nations, this paper will discuss cross-cutting changes or systematic improvements that include stronger laws, less possibility of environmental rollbacks, improved enforcement of existing laws and a greater emphasis on ecological tax shifting. The paper also discusses concrete examples of how constitutional recognition of environmental rights and responsibilities could improve air quality, the cleanup of toxic hotspots, drinking water safety, Canada's record on climate change and protection of biodiversity.

### Stronger environmental laws

Constitutional recognition of the right to a healthy environment provides a powerful impetus for governments to strengthen environmental laws. In 80 of 98 nations where this right enjoys constitutional status, environmental laws were subsequently revised to require improved protection. In some cases—Argentina, Portugal, the Philippines and South Africa—the entire environmental governance paradigm shifted from minimizing damage to proactively securing the right to a healthy environment.

### Prevent environmental law rollbacks

In a number of nations where the constitutional right to a healthy environment is recognized (e.g., Belgium, France, Hungary), legislatures are not allowed to weaken levels of environmental protection. Thus undemocratic actions such as the weakening of the Canadian Environmental Assessment Act, Fisheries Act, Navigable Waters Protection Act and many provincial environmental laws and regulations could be prevented if Canada recognized the constitutional right to a healthy environment.

### Environmental enforcement

The experience of other nations shows that incorporating environmental rights and responsibilities into the constitution results in improved implementation and enforcement of environmental laws and policies. More resources are allocated, citizens are more involved and the level of prosecutions increases. A leading example is Brazil, where constitutional amendments in 1988 led to a dramatic increase in environmental enforcement. If environmental rights and responsibilities had constitutional status in Canada, it is likely that environmental enforcement would improve substantially.

### Ecological tax shifting

In countries where the constitution recognizes the right to a healthy environment and government's duty to protect the environment, ecological tax shifting enjoys enhanced support. The support may be explicit, as in Portugal where the constitution requires the government to ensure "that tax policy renders development compatible with the protection of the environment and the quality of life." In other nations, the right to a healthy environment has been used to defend environmental taxes from attacks claiming that such taxes violate property rights or are beyond a particular government's powers.

### Addressing air pollution

Wealthy industrialized nations with constitutional environmental rights and/or responsibilities have been more effective in improving air quality. For example, emissions of nitrogen oxides fell 10 times faster in these countries than in countries without similar constitutional provisions. It is common for constitutional changes to spur enactment or strengthening of air quality laws and regulations. Constitutional recognition of the right to a healthy environment could contribute to strong, legally enforceable air quality standards in Canada, improving human and environmental health.

### Tackling industrial pollution hotspots

Recognition of the constitutional right to a healthy environment could improve the quality of life of Canadians who are subjected to disproportionate quantities of pollution. Canada has many toxic hotspots, such as Sarnia (Canada's Chemical Valley), the Sydney tar ponds, Fort Chipewyan, Hamilton, Uranium Lake, and Boat Harbour. Citizens in a diverse range of nations—Costa Rica, Spain, Italy, India, the Philippines, Colombia, Brazil, Thailand and Russia—have been able to force governments and industry to clean up pollution hotspots by wielding the constitutional right to a healthy environment to achieve stronger laws, stricter standards and more effective enforcement.

### Cleanup and restoration of the Great Lakes

There have been almost 40 years of on-again, off-again efforts to clean up and restore the Great Lakes, and huge challenges remain. Recent developments in Argentina and the Philippines, nations that are far less wealthy than Canada, demonstrate the power of the constitutional right to a healthy environment to produce dramatic progress in cleaning up polluted ecosystems. In Argentina and the Philippines, citizens empowered by their constitutional right to live in a healthy environment succeeded in holding governments accountable. In both countries, the Supreme Court ordered various levels of government to develop and implement extensive cleanup, restoration and pollution-prevention activities. For example, the World Bank already approved US\$2 billion in financing for Argentina's Riachuelo Basin Sustainable Development Project, which the Bank acknowledges is intended to contribute to compliance with the Supreme Court's order.

### Ensuring access to safe drinking water for all Canadians

The right to a healthy environment includes access to safe drinking water. In South Africa, constitutional recognition of the right to water had a significant effect on water laws and policies, contributed to major investments in infrastructure and spurred the extension of potable water to 10-million South Africans (predominantly black and poor) in 10 years. Nelson Mandela describes increased access to safe drinking water for millions of South Africans as "amongst the most important achievements of democracy in our country."

As of 2013, more than 100 First Nations in Canada face ongoing boil-water advisories. Worse yet, thousands of people in First Nations communities live in homes that lack running water and indoor toilets. Constitutional recognition of the right to a healthy environment could serve as an impetus for Canadian governments to treat the lack of safe drinking water in aboriginal communities as the urgent crisis that it is, requiring an investment in infrastructure, training for system operators and legal standards that no longer treat aboriginal people as second-class citizens. All Canadians could benefit from the enactment of binding national standards for drinking water quality.

### Greenhouse gas emissions

The wealthy industrialized nations whose constitutions include environmental rights and responsibilities have a significantly better record in controlling greenhouse gas emissions. Countries that have articulated the goal of eventually becoming zero-carbon and begun moving in that direction (e.g., Norway, Costa Rica and Sweden) all enjoy constitutional environmental provisions.

### Offshore drilling

There is a booming oil and gas industry on Canada's East Coast, and ongoing development in the Arctic. Nations that recognize the constitutional right to a healthy environment take a stricter approach to offshore oil and gas exploration. For example, based on environmental concerns, Costa Rica's Constitutional Court struck down a large oil company's approvals for offshore oil and gas exploration. In Brazil and Norway, offshore oil and gas development faces more stringent rules than in Canada or the U.S.

### Conserving biodiversity

In Canada, when economic considerations clash with concerns about biodiversity, the former usually emerge victorious. In nations where the constitution includes the right to a healthy environment, a better balance may be achieved. Countries from Costa Rica to Spain have passed strong laws to protect endangered ecosystems and species from harmful human activities, recognizing the inherent value of nature. In Europe, courts have played a substantial role in using the right to a healthy environment to protect biodiversity. Examples include protecting lakes from development, striking down efforts to privatize forests, protecting the habitat of an endangered species of salamander, protecting different species of birds and their habitat, and rejecting major water-diversion projects. Based on the experiences of other nations, recognition of the constitutional right to a healthy environment in Canada would likely improve the odds for the survival and recovery of many endangered species, from sea turtles to woodland caribou.

### Conclusion

The constitutional right to a healthy environment is not a silver bullet that will address all of Canada's environmental challenges. However, the examples in this paper, drawing on the experiences of other countries, demonstrate that it is a powerful tool that could be harnessed to close the gap between the actions and rhetoric of Canadians.

