PAPER #2:

The History of the Right to a Healthy Environment in Canada

EXECUTIVE SUMMARY

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The omission of environmental provisions from Canada's original Constitution, the British North America Act, 1867, should come as no surprise, since ecological concerns were far less urgent in the 19th century. The earliest constitutional references to the environment involved protecting natural landscapes and beauty (e.g., Italy 1948, Madagascar 1959). In the 1970s, environmental concerns began entering national constitutions with greater frequency. Pioneers included Switzerland (1971), Portugal (1976), and Spain (1978).

Proposals to include the right to a healthy environment in the Canadian Constitution date back to 1969. Sparked by Pierre Trudeau's proposals for constitutional reform, a Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (known as the Molgat-MacGuigan Committee) held hearings across Canada. Many experts and citizens urged the committee to recommend that environmental rights and extensive federal powers to protect the environment be incorporated in the new constitution. Law professor Noel Lyon of McGill University recommended that a new Constitution recognize environmental rights:

> The critical condition of many parts of our environment, and the growing pressures on it resulting from rapid growth of population and technology indicate a need for early recognition in our fundamental law of environmental rights. ... We must somehow ensure that we establish a priority for [environmental] rights that is equal to that of the political and legal rights set out in the proposed Charter of Human Rights. Otherwise the environment will simply lose by default.

In its final report, the committee recommended that constitutional amendments provide "an increase in Federal jurisdiction over air and water pollution" but did not address the right to a healthy environment.

Throughout the 1970s, leading environmental lawyers in Canada called for constitutional changes to recognize that "every person has the right to a healthy and attractive environment." However the idea of constitutionalizing environmental protection never reached critical mass in the same way as aboriginal rights or women's rights.

Bill C-60, introduced in 1978, was the forerunner of the Constitution Act, 1982. An early version of Bill C-60 included a clause in the preamble that identified "the commitment of all Canadians to the balanced development of the land of their common inheritance and to the preservation of its richness and beauty in trust for themselves and generations to come." Although it was weak, this so-called "Canada clause" was deleted due to a lack of consensus among the provincial governments.

A pivotal moment occurred in 1981, when the Special Joint Committee studying the draft Constitution considered including an explicit reference to a healthy environment. NDP MP Svend Robinson moved that s. 31 of the proposed Constitution Act be amended to include the following commitment:

(d) fully implementing the International Covenant on Economic, Social, and Cultural Rights and the goals of a clean and healthy environment and safe and healthy working conditions.

Unfortunately, Jean Chrétien, then justice minister, described Robinson's proposed amendment as "high-sounding rhetoric" and "apple pie." Only two NDP MPs voted in favour of the motion, while 22 Liberal and Conservatives MPs and senators opposed it. As a result, Canada's Constitution was repatriated without any environmental provisions.

Ironically, after the general absence of attention to the environment in the years culminating with the repatriation of the Constitution and the enactment of the Charter, there was a subsequent surge in interest in constitutional recognition for environmental rights. For example, in 1983, NDP MP Jim Fulton argued in the House of Commons that Canada needed constitutional changes to enable stronger environmental protection.

In 1987, in an effort to "bring Quebec back into the constitutional family," all 10 premiers and Prime Minister Brian Mulroney reached unanimous agreement on the Meech Lake Accord, a package of constitutional reforms that had no environmental references. Meech was ultimately not successful. Mulroney persevered, negotiating the Charlottetown Accord, which included modest environmental provisions. These provisions did not include the right to a healthy environment, and fell far short of the recommendations advanced by the Canadian Bar Association and Canadian Environmental Law Association. The Charlottetown Accord was also unsuccessful.

Following the failures of Meech Lake and Charlottetown, advocates, scholars and politicians shifted their attention to legislative or statutory environmental rights. Although the difference may not be immediately apparent, constitutional and legislative environmental rights are like lions and housecats—related, but with dramatically different degrees of strength. A constitution is the supreme law of nation, meaning that all other laws and regulations must be consistent with it or face being struck down. Ordinary legislation, in contrast, does not override other laws. As well, constitutions are better known to citizens, as they express a society's most cherished values. Thus a constitutional right to a healthy environment will have far greater legal, symbolic and practical importance than a legislated right.

In Ontario, Quebec, the Yukon, the Northwest Territories and Nunavut, citizens enjoy limited environmental rights set forth in legislation:

- Quebec included the right in its Environmental Quality Act in 1978, and more recently in its provincial Charter of Human Rights and Freedoms (2006).
- The NWT passed its Environmental Rights Act in 1988.
- The Yukon included the right in the Environment Act in 1991.
- Ontario passed the Environmental Bill of Rights in 1993.
- Nunavut adopted all of the NWT's legislation, including the Environmental Rights Act, when it be came a territory in 1999.

These laws focus on a narrow range of procedural rights, such as the right of access to information, the right to be notified of certain regulatory changes, and the right to request investigations. The federal Parliament recently considered a private member's bill called the Canadian Environmental Bill of Rights, which included

explicit recognition of the right to a healthy environment. The Canadian Environmental Bill of Rights passed second reading in 2010 but died on the order paper when the 2011 election was called.

The constitutional right to a healthy environment has never been the subject of a concerted campaign by Canadian environmental groups, nor has it ever become a prominent subject of public debate. As of today, neither the Canadian Constitution nor any federal legislation, regulation, policy or program explicitly recognizes the fundamental human right to live in a healthy environment. Numerous proposals, both constitutional and legislative, have failed since the early 1970s. Prime ministers Trudeau and Mulroney passed up the opportunity to include substantive environmental provisions in their constitutional reforms, despite broad public support.

The consequence is that Canada is a patchwork quilt where Quebec is the only province that recognizes the right to a healthy environment in its human rights legislation. Ontario, Quebec and the three territories recognize the right in environmental legislation. Citizens of the other seven provinces—British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador—have no legally recognized right to live in a healthy environment.

Today there are two national political parties—the New Democrats and the Greens—that support amending the Canadian constitution to recognize environmental rights. The Liberals and Bloc Quebecois have not taken a position on constitutional reform, although both supported the Canadian Environmental Bill of Rights. The Conservatives opposed the Canadian Environmental Bill of Rights. There is broad public support across Canada for constitutional recognition of the right to a healthy environment but reform continues to be perceived as a long shot.