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PAPER #2:

The History of the Right to a Healthy Environment in Canada

EXECUTIVE SUMMARY

David R. Boyd



The History of the Right to a Healthy Environment in Canada

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 Conservative 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 became a territory in 1999.

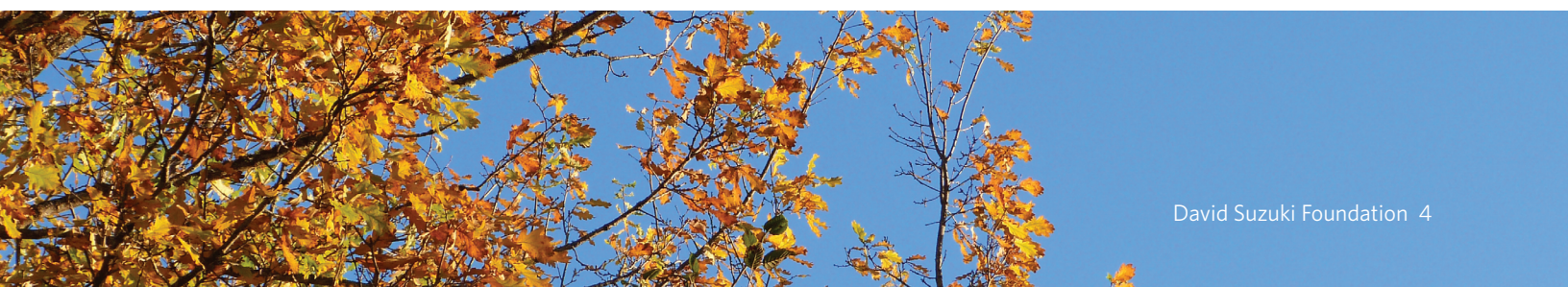
These laws focus on a narrow range of procedural rights, such as the right of access to information, the right to be notified of certain regulatory changes, and the right to request investigations. The federal Parliament recently considered a private member's bill called the Canadian Environmental Bill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





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Our present Constitution provides specific protection for the use of the French and English languages but if we succeed in destroying our environment it will matter very little whether the last “I told you so” is spoken in either French or English.

Jim Egan, 1971. Testimony before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada.¹

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 pressing in the 19th century. The earliest constitutional references in the world relevant to the environment involved protecting natural landscapes and beauty (e.g., Italy 1948, Madagascar 1959). Symbolic references to the right to a healthy environment first appeared in the constitutions of Eastern Europe’s Communist nations in the 1960s. However, these constitutions were paper tigers, used to spread propaganda rather than protect rights. It was not until the 1970s that environmental concerns began finding their way into national constitutions in democratic nations where the provisions could have real impact. Pioneers included Switzerland (1971), Portugal (1976), and Spain (1978).

This paper sets forth the history of efforts to include the right to a healthy environment and other environmental provisions in Canada’s Constitution, efforts that date back to 1969. To provide a comprehensive perspective, it also describes the history of legislative environmental bills of rights, at both the federal and provincial levels.

The Trudeau Era

Can there be a Canadian whose outlook has not been deeply marked by the stretches of seemingly infinite space—the high seas of our maritime regions, the boundless horizons of our prairies, the endless unfolding of the St. Lawrence Valley, the limitless reaches of our Great Lakes? We all feel the call of the north, a window which opens out on the infinite, on the potential, on the future.²

Pierre Elliot Trudeau, 1978

It was Pierre Trudeau—the great lightning rod for Canadian pride, affection, anger and resentment—who spurred the process of constitutional reform culminating in the repatriation of Canada’s Constitution in 1982. Trudeau is remembered for many accomplishments (and missteps), but none larger than the repatriation of Canada’s Constitution and the enactment of the Canadian Charter of Rights and Freedoms.

Trudeau knew that foreign control of the Constitution was a long-standing burr in Canada’s side. In 1926, the British government’s Balfour Declaration offered full political autonomy to the self-governing dominions of its empire. Former Prime Minister Jean Chrétien later observed, “at that time no one would have expected Canada would be the last part of the British empire to achieve complete legal independence.”³ Modest steps towards full nationhood were taken from time to time. For example, in 1931, the Statute of Westminster removed the British Parliament’s legislative authority over Canada (and other Dominions including Australia and New Zealand). The sole exception to Canada’s ability to write its own laws after 1931 involved the Constitution, which could only be amended by the U.K. Parliament.

Many prime ministers attempted to repatriate the Constitution and end Canada's quasi-colonial status. Mackenzie King (1927), Bennett (1931), St. Laurent (1950) Diefenbaker (1960) and Pearson (1964) all convened federal-provincial conferences in pursuit of constitutional reform. All failed. A major stumbling block was the inability of federal and provincial governments to agree on a formula for future constitutional amendments.

Trudeau's ambitious goal, which he first articulated in the late 1960s, was to not only repatriate the British North America Act, 1867 (to free the Constitution from British control and achieve full legal independence), but also to establish constitutional recognition of fundamental human rights and freedoms. The latter goal departed from British tradition, in that the U.K. had never created a written bill of rights or given courts the authority to review government decisions that allegedly violated human rights.

Prior to entering politics, Trudeau wrote about the urgent need to protect a broad suite of human rights. In an article titled "Economic Rights" that he wrote as a law professor at the Université de Montréal in 1962, Trudeau argued that "civil rights were only one aspect of human rights" and society could ill afford to neglect other rights. He concluded, "if this society does not evolve an entirely new set of values ... it is vain to hope that Canada will ever reach freedom from fear and freedom from want. Under such circumstances, any claim by lawyers that they have done their bit by upholding civil liberties will be dismissed as a hollow mockery."⁴

Once he became justice minister in 1967, Trudeau's views on rights began to shift. He suggested that while a constitutional guarantee of economic rights was desirable and "should be an ultimate objective of Canada," it "might take considerable time to reach agreement on the rights to be guaranteed."⁵ Trudeau also argued "that economic rights could not be constitutionally secured because they could not be judicially enforced."⁶ This lack of enforceability was one of the main rationales advanced by Trudeau's constitutional adviser, Barry Strayer, for excluding social and economic rights from the Constitution.⁷ On this basis, Trudeau concluded that it was "advisable not to attempt to include economic rights in the constitutional bill of rights at this time."⁸

In 1968, the Liberal government, under Prime Minister Lester Pearson, released a discussion paper proposing a new Charter of Rights that included only civil and political rights. In 1969, the federal government released a report that stated, "If we can indeed agree on those rights and freedoms we deem essential to all Canadians, we should be prepared to give them special legal protection. Expressed in a constitutional document they would be both a statement of common purpose for, and a limitation on, all governments within Canada."⁹

Seven first ministers' meetings on constitutional change were held between 1968 and 1971. Environmental management was a key agenda item at several of these meetings, although the concept of a right to a healthy environment was not discussed.¹⁰ The main environmental topic involved jurisdiction over the environment, and not surprisingly, there were differences of opinion. The federal government argued that Ottawa should have the jurisdiction to address interprovincial or international pollution problems when the provinces failed to solve the problem.¹¹ Some provincial premiers were supportive of Ottawa's proposal, while others suggested more time was required to gain experience in dealing with pollution, and others proposed an exclusive division of powers between federal and provincial governments. Conflicting opinions prevented the environment from being included in the consensus package of constitutional reforms called the Victoria Charter (which ultimately failed). The ongoing disagreement influenced the reluctance to address environmental jurisdiction in future constitutional talks.

Although conventional wisdom might suggest that all provinces opposed federal involvement in environmental protection, this is historically inaccurate. Six provinces—Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland—supported a significant federal role.¹² In 1970, Saskatchewan's attorney general, D.V. Heald, proposed constitutional amendments that would have strengthened the federal government's environmental jurisdiction.¹³ The four larger provinces were more resistant, yet agreed on the need for minimum national standards, stemming from a fear of unfair competition from provinces or regions that would lower the bar.¹⁴

Trudeau and The Environment

Throughout the 1960s, the federal government denied that environmental protection was a federal responsibility. Trudeau pointed to the Constitution as the source of the problem, stating, "this challenge of pollution of our rivers, and lakes, or our farmlands and forests, and of the very air we breathe, cannot be met effectively in our federal state without some constitutional reforms or clarification."¹⁵ The Progressive Conservatives and New Democrats, in opposition, argued that either the federal government had jurisdiction or it should seek constitutional amendments giving it such jurisdiction.¹⁶ For example, NDP MP Randolph Harding asserted that "it is the duty of this government, which has hidden behind the gimmick of constitutional issues in order not to accept responsibility for pollution control, to iron out constitutional problems in this field."¹⁷

As public concern about the environment surged, the Government of Canada was forced to respond. Trudeau warned in the Throne Speeches of 1969 and 1970 of "the threat to our well-being and the well-being of future generations" posed by issues such as resource depletion and the "many-headed hydra" of pollution. Speaking in Australia in 1970, Trudeau said:

If part of our heritage is our wilderness, and if the measure of Canada is the quality of life available to Canadians, then we must act should there be any threat to either. We must act to protect the freshness of our air and the purity of our water, we must act to conserve our living resources. If necessary, we must offer leadership to the world in these respects and withstand the cries of complaining vested interests.¹⁸

Trudeau initially opposed the creation of a federal environment department, based on a perception that the federal government lacked jurisdiction.¹⁹ However, in response to rapidly mounting public concerns about pollution, he changed his mind and presided over the creation of Environment Canada in 1971.

Trudeau oversaw the introduction of a raft of new laws and policies, including the Arctic Waters Pollution Prevention Act, Clean Air Act, Canada Water Act, Environmental Contaminants Act and the Environmental Assessment and Review Process Guidelines Order. These new environmental laws and policies "staked out new and untested federal jurisdiction."²⁰ Trudeau was PM when Nahanni National Park was created, and he approved the first comprehensive plan calling for national parks in all 39 of Canada's natural regions.

Trudeau had a deep-rooted affinity for Canadian nature, demonstrated by his actions in the summer of 1979 following the election loss to Joe Clark and the Conservatives. Faced with free time for the first time since becoming prime minister in 1968, Trudeau took a train to the Rocky Mountains for a holiday with his three sons, and also canoed down the Nahanni River. He paddled many great Canadian rivers, including the Ottawa,

Coppermine and Thelon. Trudeau described canoeing as a way of finding his bearings, of going “as far away as possible from everyday life, from its complications and from the artificial wants created by civilization.”²¹ He also went scuba-diving in the Atlantic, Pacific and Arctic oceans with famed oceanographer Joseph MacInnis. Trudeau was the first Canadian PM to tour the Arctic (in 1968), a journey that “strengthened the image of his intimacy with nature and the Canadian frontier.”²² He spoke passionately about the need for environmental protection and recognized the unique place of the Arctic in Canadian mythology and national identity:

Canada regards herself as responsible to all mankind for the peculiar ecological balance that now exists so precariously in the water, ice and land areas of the Arctic archipelago. We do not doubt for a moment that the rest of the world would find us at fault, and hold us liable, should we fail to ensure adequate protection of that environment from pollution or artificial deterioration.²³

Despite his passion for nature, Trudeau apparently never mentioned the notion of including environmental rights and responsibilities in the new Canadian Constitution. Conversations with several of his advisers and confidantes from that era indicate that the subject “simply never came up” and was “not on our radar screen.”²⁴ It is inaccurate to suggest that the subject never arose, given proposals dating back to 1969, but the idea of a constitutional right to a healthy environment never captured Trudeau’s imagination. James Raffan, canoeist, professor and author of *Fire in the Bones*, the best-selling biography of Canadian paddling legend Bill Mason, wrote that “at a policy level, it is difficult to make direct connections between Trudeau’s love of canoes and wilderness and his governmental decisions.”²⁵

Early Proposals For A Constitutional Right To A Healthy Environment

Proposals to include the right to a clean or healthy environment in the Canadian Constitution date back to 1969.²⁶ At a conference hosted by the Science Council of Canada, Professor Noel Lyon of McGill University’s Faculty of Law wrote:

I am disturbed by the obsessive interest of those constitutional lawyers who dominate current public discussion with traditional legal and political rights and their apparent unawareness of the need for protection of what I will call the fundamental environmental rights of man.²⁷

Sparked by Trudeau’s proposals, there was a tremendous degree of public interest in constitutional reform in the early 1970s. 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. In Vancouver, during the first week of January 1971, the Molgat-MacGuigan Committee turned hundreds of people away from an overcrowded public meeting.²⁸ Professor Lyon testified before the Molgat-MacGuigan Committee, and recommended that a new Canadian 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.²⁹

Similar submissions to the Molgat-MacGuigan Committee were made by numerous individuals including:

- Jim Egan, vice-president of the Cowichan-Malahat branch of the Society for Pollution and Environmental Conservation, (SPEC);
- Derrick Mallard, executive director of the Vancouver branch of SPEC;
- Mary Balf, Thompson Basin Pollution Probe (Kamloops, B.C.);
- Omar Paquette, speaking for another B.C.-based ENGO; and
- Claire L. McLaughlin, policy chair, Toronto and District Liberal Association.

Egan made an eloquent plea for recognition of the right to a healthy environment:

No priority could be more deserving or more urgent than immediate constitutional guarantees of full protection for every aspect of our environment as an irreducible primary right without which all other rights become meaningless, the right of the individual to clean air, uncontaminated water, wholesome nutritious food free of chemical residues and harmful or unproven additives. In addition we feel that if these essential rights be violated, immediate redress through the courts should be available and, further, that all levels of government be held liable in the event that they either contribute to the impairment of air or the environment, or through dereliction of duty, knowingly allowing the environment to suffer deterioration.³⁰

Balf testified that “a constitutional law which will give to all Canadians freedom from the pollution of their environment is absolutely essential and urgent.”³¹ Paquette urged “protection of the constitution for the rights of our fellow citizens to conserve our air, our water, and land,” stating that “the right to live in a healthy climate is fundamental and requires priority over all others.”³² McLaughlin suggested that a constitutionally protected “Environmental Bill of Rights would guarantee our right to clean air, clean water, a tolerable noise level and recreational opportunities. ... Such a Bill of Rights would give individual citizens and conservation groups recourse to stop the destruction of our ecology.”³³

In addition, many experts and citizens advocated before the Molgat-MacGuigan Committee that extensive federal powers to protect the environment ought to be incorporated in the new constitution.³⁴ The problems of pollution and environmental degradation were discussed by the committee on more than 50 occasions. In its final report, the committee acknowledged “widespread agreement that jurisdiction over pollution is at present complicated at best and confusing at worst,” resulting in annoyed voters and befuddled politicians.³⁵ Thus the committee recommended that constitutional amendments provide “an increase in Federal jurisdiction over air and water pollution.”³⁶ Specifically, the committee urged that control over air and water pollution be a matter of concurrent jurisdiction between the provinces and Parliament, with the federal government possessing paramount powers. Many members of the public had forcefully expressed concerns about growing environmental problems and government’s slow, inadequate response. The committee responded to the public’s “overriding feeling” by stating, “Because pollution control is so urgently needed, we feel that any confusion which exists in constitutional powers should be ended as quickly as possible.”³⁷

Throughout the 1970s, environmental lawyers in Canada added their voices to calls for constitutional changes to recognize that “every person has the right to a healthy and attractive environment.”³⁸ The Canadian Environmental Law Association played a leading role in advocating constitutional recognition of environmental

rights and responsibilities. A book published by the Canadian Environmental Law Research Foundation in 1978 argued that “like freedom of speech, freedom of religion, and other basic rights, environmental quality should be recognized by law as an inalienable right, for without an environment capable of supporting the human race, all other rights are useless.”³⁹

Despite the groundswell of public support expressed in testimony before the Molgat-MacGuigan Committee and advocacy by public interest environmental lawyers, the idea of constitutionalizing environmental protection never reached critical mass in the same way as aboriginal rights or women’s rights, which after extensive and contentious debates eventually were included in the Constitution. As noted earlier, Trudeau and his advisers argued that social and economic rights (and by extension the right to a healthy environment) would not be enforceable and therefore ought not to enjoy constitutional recognition. According to Prof. Williams, however, “many laymen appearing before the Molgat-MacGuigan Committee viewed this approach as excessively legalistic.”⁴⁰

Bill C-60, introduced in 1978, was the forerunner of the Constitution Act, 1982. In an early version of Bill C-60, a clause in the preamble set forth the aims of the Canadian federation, which 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.”⁴¹ This so-called Canada clause was eventually deleted due to a lack of consensus among provincial governments.⁴²

The Canadian Environmental Law Association (CELA) made a submission in 1978 on Bill C-60 to the Special Joint Senate/House of Commons Committee, recommending a variety of environmental provisions, including both procedural and substantive rights to environmental quality.⁴³ According to CELA, “The new Constitution is the ideal place to firmly entrench a commitment to the individual’s right to a clean environment. The right to environmental quality should be recognized as an inalienable right, for without an environment capable of supporting the human race, all other rights are meaningless.” Other recommendations advanced by CELA included government duties to create new protected areas, conduct environmental impact assessments and provide the public with various procedural rights, including access to government information.⁴⁴ Unfortunately, the report of the 1978 Special Joint Committee (co-chaired by Lamontagne and MacGuigan) contained no references to environmental protection.

Despite CELA’s efforts, there was little public discussion of the idea of environmental rights. The Globe and Mail published an article by Paul Aird, a University of Toronto forestry professor, arguing in favour of adding preservation of natural resources and maintenance of ecological stability to the constitution reform agenda. In Alternatives Magazine, Geoff Mains observed, “The constitutional debate that has embroiled Canadians over the past few years has been largely ignored by environmentalists.”⁴⁵ Mains argued persuasively that Bill C-60 “contains little more than dishwater” and called for recognition of the right to a clean environment, plus access to information, notification, standing and access to justice.⁴⁶

There was a last-minute attempt to include environmental protection in the Constitution. In 1981, Diana Davidson, president of Vancouver People’s Law School Society, urged the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (the Hays-Joyal Committee) to recognize environmental rights, stating, “no issue more fundamentally underlies the nature of a national compact.”⁴⁷ Later that year, while carrying out its clause-by-clause review, the Special Joint Committee considered including an

explicit reference to a healthy environment under Clause 31 of the proposed Constitution Act, 1980 (now s. 36 of the Constitution Act, 1982). NDP Member of Parliament Svend Robinson moved that s. 31 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.⁴⁸

Robinson argued, “Surely in these days of acid rain and threats to our environment in a number of different sectors, we should reaffirm our commitment to the concept of a clean and healthy environment.”⁴⁹

Unfortunately, Jean Chrétien, then justice minister, described Robinson’s proposed amendment as “high-sounding rhetoric” and added, “I am waiting soon for an amendment to inscribe in the constitution the apple pie and the recipe of ma tante Berthe, and I do think that we cannot put everything there.”⁵⁰ Only two MPs voted in favour of the motion (Robinson and his NDP colleague Lorne Nystrom), while all 22 Liberal and Conservatives MPs and senators opposed it.⁵¹

In parliamentary debates about the final version of the new Constitution in 1981, NDP MP Derek Blackburn expressed disappointment that it “did not guarantee to all Canadians the right to live and work in a safe and healthy environment. This challenge still lies ahead. Those of us in this chamber who have worked hard to fight against pollution and polluters, to make our lakes and rivers clean and productive, to make the air we breathe clean and pure, the workplace safe and healthy, will continue our struggle until we win. And win we will.”⁵²

Ultimately, despite Trudeau’s affinity for nature, despite the efforts of a small but dedicated band of environmentalists and despite the progressive provisions in the new constitutions of other nations, Canada’s political leaders ignored the idea of a right to a healthy environment. Indeed, the environment was completely left out of the new Canadian Constitution, including the Charter of Rights and Freedoms. John Swaigen, one of Canada’s leading environmental lawyers since the early 1970s, co-authored CELA’s constitutional submission and edited a book in the midst of the charter debates called *Environmental Rights in Canada*. Looking back, Swaigen said that the concept of a right to a healthy environment was simply “too far out” to gain traction with the political leaders of the day.⁵³

Quebec refused to formally recognize the new Constitution, although its position is symbolic and does not affect the legal applicability of the Constitution or the charter. Quebec’s dissatisfaction led to two controversial and unsuccessful attempts to make substantial changes to the Constitution, efforts that ultimately backfired and added fuel to the fire of Quebec nationalists.

The Right To A Healthy Environment In The Aftermath Of The New Constitution

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.⁵⁴ Prof. Dale Gibson, one of Canada’s leading constitutional law scholars, advocated the “creation of a constitutional guarantee of environmental quality.”⁵⁵ Gibson expressed his “conviction that explicit entrenchment of environmental rights in the Canadian Constitution is desirable.”⁵⁶ According to Prof. Gibson, the most likely form of entrenchment relating to the environment that could realistically be expected “would be

a vague and sweeping statement akin to constitutional declarations of freedom of speech or rights of privacy: that every citizen has the right to enjoy a reasonable standard of purity in the natural environment."⁵⁷

In the most detailed analysis of the prospective entrenchment of environmental rights in the Canadian Constitution published to date, Prof. Gibson proposed inserting three sections into the charter (see Box 2.1). The first section would establish basic rights to a beneficial environment, to its use and to its preservation, as well as defining the term environment and listing the purposes intended to be served by protecting the environment. The second section would impose an obligation on both the federal and provincial governments to make and enforce laws implementing these rights with respect to both the public and private sectors. The third section would clarify that citizens possessed the right to seek a judicial declaration as to the sufficiency of governmental compliance with this duty.

Box 2.1: Prof. Dale Gibson's Proposed Environmental Amendments To The Charter

15.1 (1) Right to Beneficial Environment

Everyone has the right to a beneficial environment, and to enjoy its use for recreational, aesthetic, historical, cultural, scientific and economic purposes, to the extent reasonably consistent with:

- (a) the equivalent rights of others;
- (b) the health and safety of others; and
- (c) the preservation of a beneficial environment in accordance with subsection (2).

(2) Everyone has a right to the preservation of a beneficial environment, so as to ensure its future enjoyment for the uses set out in subsection (1). (3) For the purposes of this section, "environment" includes land, water, air and space, and the living things that inhabit them, as well as artificial structures and spaces that are beneficial to humans or to other components of the environment.

15.2 (1) Duty to Make and Enforce Environmental Laws

The Parliament and Government of Canada, and the Legislatures and Governments of the Provinces have the duty, within their respective areas of jurisdiction, to make and enforce laws and programs for the implementation of the rights set out in section 15.1.

(2) Content of Laws

The laws and programs referred to in subsection (1) shall include, without restricting the generality thereof:

- (i) the creation and maintenance of an environmental protection agency for each jurisdiction, responsible for determining minimum standards of environmental quality and preservation appropriate for each aspect of the environment, in each area of the jurisdiction, and to vary such standards, partially or wholly, temporarily or permanently, where the agency deems such variation to be advisable;
- (ii) the creation of effective measures to enforce such minimum standards within the jurisdiction;
- (iii) the right of everyone resident within the jurisdiction to be informed by the environmental

protection agency, by means of appropriate public notice, of all pending determinations or variation of such minimum standards and allowing a reasonable time before each determination or variation is decided upon by the agency; and

(iv) the right of everyone resident within the jurisdiction to make representations of fact, law, or policy to the environmental protection agency about any determination or variation of such minimum standards.

15.3 Judicial Review

After this section and sections 15.1 and 15.2 have been in force for more than one year, everyone has the right to apply under subsection 24(1) to a court of competent jurisdiction for a declaration that the Parliament or the Government of Canada, or the Legislature or Government of a province, has failed to fulfill some or all of the duties imposed by section 15.2.

The Mulroney Era

Like Pierre Trudeau, Brian Mulroney has a mixed legacy as prime minister. While not regarded as a nature-lover or outdoorsman in the same way as Trudeau, Mulroney did have a relatively strong record on the environmental file, leading to his surprising selection as Canada's Greenest Prime Minister by a panel of environmental experts in 2003. He oversaw the creation of six new national parks, the passage of Canada's first comprehensive pollution law (the Canadian Environmental Protection Act) and the creation of an ambitious, multi-billion-dollar Green Plan that the head of the UN Environment Programme called a model for the world. Under Mulroney, Canada not only took a number of important steps to clean up its own act, but became an outspoken advocate for environmental protection at the international level. Mulroney used his charm to coax the recalcitrant American government to act on acid rain, presided over the first international conference on climate change and hosted the negotiations that led to the urgently needed and ultimately successful Montreal Protocol on Substances that Deplete the Ozone Layer. Under Mulroney's leadership, Canada was the first nation to sign the UN Convention on Biological Diversity and the UN Framework Convention on Climate Change. Despite his green bona fides, when he turned his attention to revising the Constitution on two historic occasions, Mulroney made no effort to include the right to a healthy environment or an enforceable government duty to protect the environment.

The Meech Lake Accord

In 1987, in an effort to "bring Quebec back into the constitutional family," all 10 premiers and Prime Minister Mulroney reached unanimous agreement on a package of constitutional reforms, including recognition of Quebec as a distinct society. The Meech Lake Accord focused on Quebec but proposed shifting extensive powers from the federal government to provincial governments. Some lawyers expressed their belief that a constitutional amendment recognizing environmental rights was a realistic possibility.⁵⁸ However, there was no mention of the environment in the Meech Lake Accord. In 1988, environmental lawyer William Andrews bemoaned the fact that "despite the Brundtland Commission's endorsement of environmental rights, there has been [no] noticeable pressure to amend the Charter to incorporate environmental rights." In 1989, NDP MP Jim Fulton repeated his earlier call for constitutional changes to protect Canada's environment.⁵⁹ When Manitoba and Newfoundland did not approve it within the required period of three years, the Meech Lake Accord died.⁶⁰

The Charlottetown Accord

Following the failure of Meech Lake, Prime Minister Mulroney doggedly initiated a second process aimed at constitutional reforms that would result in Quebec's approval of the Canadian Constitution. Again, efforts were made to put the environment on the agenda. In 1990, the Canadian Bar Association recommended that:

The Government of Canada should adopt a long-term strategy to entrench the right to a healthy environment in the Canadian Constitution. In the interim it should enact a statute enunciating the right of every Canadian to a healthy environment. No statute should be enacted that is inconsistent with that right.⁶¹

In part, the Canadian Bar Association's recommendation was based on the "growing acceptance in international law of environmental quality as a fundamental human right."⁶² In Parliament, NDP MP Jim Fulton called on the government to include an "environmental charter of rights" as part of the comprehensive Green Plan.⁶³ Fulton's call was repeated by the leader of the NDP, Audrey McLaughlin.⁶⁴ In 1991, Len Taylor, an NDP MP from Saskatchewan, brought a motion that "the government should establish a Bill of Environmental Rights to empower Canadians to fight polluters and guarantee all Canadians the right to live in a healthy environment."⁶⁵ Taylor urged the Mulroney government to include environmental rights in the proposed package of constitutional amendments. Taylor's speech was followed by congratulations from Liberal MP and future Prime Minister Paul Martin, who expressed full support for an environmental bill of rights with teeth to empower the public (although it is unclear whether Martin was referring to a constitutional or legislative bill of rights).⁶⁶ The response from Progressive Conservative MP Lise Bourgault, on behalf of the Mulroney government, was that an Environmental Bill of Rights was unnecessary, warning that it could "prevent the implementation of an industrial project designed to provide employment for fear that a bee will not be gathering nectar."⁶⁷ The Canadian Environmental Law Association continued to urge that "the Charter of Rights and Freedoms be amended to include a right to a healthful environment."⁶⁸

The federal government's tepid response was to suggest enshrining constitutional recognition of Canadians' environmental values in the proposed Canada clause:

The Government of Canada proposes ... a Canada clause that acknowledges ... a commitment to the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve and protect the environment for future generations.⁶⁹

Extensive public consultation including the Citizen's Forum on National Unity (known as the Spicer Commission), another Special Joint Committee of the House of Commons and the Senate, and the inclusion of First Nations resulted in the 1992 Charlottetown Accord. The report of the Citizen's Forum noted, "Canada's unspoiled natural beauty is a matter of great importance [and] is threatened by inadequate attention to protecting our environment."⁷⁰ The Charlottetown Accord included a recommendation that a section be added to the Constitution outlining the commitment of the governments, Parliament and the legislatures to the preservation and development of Canada's social and economic union. This new provision would include a series of policy objectives related to the social union, including "protecting, preserving and sustaining the integrity of the environment for present and future generations." With respect to the economic union, one of the policy objectives was "ensuring sustainable and equitable development." These policy objectives were

intended to be non-justiciable, meaning that citizens would be unable to hold governments accountable for perceived violations through recourse to the courts. Another new section of the Constitution, outlining fundamental Canadian values, made no reference to the environment. Overall, the environmental provisions in the Charlottetown Accord were very weak, and fell far short of the recommendations advanced by the Canadian Bar Association and Canadian Environmental Law Association.

In referendums held in October 1992 (one national and one in Quebec), the Charlottetown Accord was rejected. Quebec nationalists portrayed the results as a slap in the face to Quebec. In the controversial referendum held in 1995, Quebecers narrowly rejected a proposal to separate from Canada. Since that time, the notion of comprehensive constitutional reform has been widely considered anathema by both the public and politicians.

In an interesting twist, while both the Meech Lake and Charlottetown accords failed to include recognition of the right to a healthy environment, Prime Minister Mulroney was advocating for the adoption of this right at the international level.⁷¹ With Mulroney at the helm, Canada signed the 1989 Hague Declaration on the Environment following an international environmental conference. The Hague Declaration emphasized “the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the environment.”⁷² However, the Hague Declaration was not legally binding and was signed by only 23 other nations.⁷³ Mulroney persevered, seeking a global and legally binding agreement that included the right to live in a healthy environment. During preparations for the 1992 Earth Summit in Rio de Janeiro, Canada lobbied for the incorporation of the following environmental rights provision in the draft text that later became the Rio Declaration:

All persons have the right to live in an environment capable of assuring his [sic] health and well-being.⁷⁴

Mulroney said in a speech at Rio, “What remains is for governments to provide the leadership the world so desperately needs. Let us find that will and marshal that leadership to the task at hand on behalf of the five billion people we represent. Our children, the Rio generation, will be our judges and our beneficiaries.”⁷⁵ Despite Mulroney’s best efforts, nations only agreed on the non-binding Rio Declaration, which laid out 27 principles, not including an explicit right to a healthy environment. Mulroney continued to urge the international community to adopt a true Earth Charter of environmental rights and responsibilities with 1995, the 50th anniversary of the founding of the United Nations, as the target completion date.⁷⁶ Those international efforts were unsuccessful.

Constitutional Reform Today

Two national political parties—the New Democrats and the Greens—currently support amending the Canadian constitution to recognize environmental rights. The NDP support “Protecting the environment as a common good by creating a legal framework to ensure that people have the right to live in a healthy environment with access to natural spaces.”⁷⁷ Lawyer John Swaigen, in response to a request from NDP MP Nathan Cullen, provided a draft constitutional amendment on the right to a healthy environment.⁷⁸ In 2005, the Green Party of Canada proposed an amendment to Canada’s Charter of Rights and Freedoms to enshrine basic environmental rights, including the right to clean air, soil and water. The pledge was incorporated into the party’s election

platform in 2006: “The Green Party believes that clean air, soil and water is a basic right for all Canadians. ... [and will] amend the Charter of Rights and Freedoms to enshrine the right of future Canadians to an ecological heritage that includes breathable air and drinkable water.”⁷⁹ In 2010, the Green Party promised to “Protect the fundamental right to water for all Canadians today and in future generations by amending the Canadian Charter of Rights and Freedoms to enshrine the right of future Canadians to an ecological heritage that includes breathable air and drinkable water.”⁸⁰

However, recognizing the right to a healthy environment through constitutional reform continues to be perceived as a long shot. A 1999 law review article on substantive environmental rights in Canada failed to mention constitutional environmental rights, either in the Canadian context or in light of the rapid evolution of constitutions around the world, focusing exclusively on legislative environmental rights.⁸¹ According to William Andrews, a prominent Canadian environmental lawyer, writing in 2000, “Canadians suffer from constitutional amendment fatigue.”⁸² Canada’s former environment minister, Stéphane Dion, believes that constitutional amendments in the near to medium term are highly unlikely.⁸³ Retired judge Barry Strayer, who served as Pierre Trudeau’s legal adviser for 15 years during the era of constitutional reform, also sees constitutional recognition of environmental rights or responsibilities as unlikely.⁸⁴ Strayer’s rationale includes opposition from provincial governments, concerns about transferring environmental policy decisions from elected legislators to unelected judges, the difficult choices that judges could face in environmental cases and constitutional fatigue. Other political pundits and constitutional experts are less pessimistic. See Paper #5 for details.

Legislating The Right To A Healthy Environment

What the Canadian people want is an environmental bill of rights, a bill of rights which will recognize the right of Canadians to a clean and safe environment, and one which will have sufficient teeth.⁸⁵

Jim Manly, MP, 1988

Following the failures of the Meech Lake and Charlottetown accords, advocates, scholars and politicians shifted their attention to legislative or statutory environmental rights. While the efforts to gain constitutional recognition of the right to a healthy environment in Canada have been unsuccessful thus far, there have been modest successes in securing legislative recognition of this right. 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. In contrast, the dreary details of legislation are unknown to most people. Thus a constitutional right to a healthy environment is likely to have far greater legal, symbolic and practical importance than a legislated right. Nevertheless, some experts contend that a legislated bill of environmental rights could “promote the fulfillment of environmental obligations, and to help maintain and strengthen our regime of environmental protection in Canada.”⁸⁶ Legislated environmental rights and responsibilities could serve as a stepping stone to future constitutional change and could also flesh out the details of the constitutional right.

As early as the 1970s, academics and activists advanced proposals for federal and provincial legislation recognizing the environmental rights of citizens. For example, proposals for laws on the right to a healthy

environment were included in the first two editions of a book called *Environment on Trial*. The book, considered a pioneer in the field of Canadian environmental law, outlines the essential components of an environmental bill of rights, including the right to a healthy environment and a host of other procedural and administrative features such as access to information, public participation in standard-setting, the right to bring a class action, the right to judicially review administrative decisions, and the appointment of an environmental ombudsman.⁸⁷ It is interesting to note that most of the procedural proposals set forth in *Environment on Trial* have been incorporated into Canadian law in one way or another. The substantive right to a healthy environment remains the missing link. Similarly, in a 1974 law review article, Profs. Franson and Burns recommended, "Legislation should be enacted, by the provincial and federal governments, recognizing the right of Canadians to a clean, healthful, and aesthetically pleasing environment."⁸⁸

In 1981, Liberal MP Charles Caccia, who later became the environment minister, brought a private member's motion for a federal environmental bill of rights.⁸⁹ Members of all parties expressed support for the motion, including then Environment Minister John Roberts (Lib.) and future Environment Minister Tom McMillan (PC). Nevertheless, Caccia's motion went nowhere, like most efforts advanced by backbenchers in Canada's parliamentary system. Tom McMillan expressed regrets that the Liberal government did not include environmental rights in its constitutional reform package.⁹⁰ Also in 1981, McMillan introduced a motion calling on Environment Minister Roberts to "explain fully to the House why the government's bill of rights, while addressing almost every other subject under the sun, contains not a single reference to environmental rights."⁹¹

Despite serving as Canada's environment minister in 1983-84, Charles Caccia failed to introduce the environmental bill of rights that he had called for as a backbencher. In 1985, as an opposition MP, Caccia promised to introduce a private member's bill that would declare the right to a healthy environment as a constitutional right of every Canadian.⁹² No such bill was ever introduced.

In 1986, Prime Minister Mulroney's Progressive Conservatives promised to enact a new law called the Canadian Environmental Protection Act. Environment Minister Tom McMillan promised it would be the toughest pollution legislation in the Western world and pledged, "The Act will provide a clear statement of citizens' rights to a healthy environment."⁹³ In 1987, the Progressive Conservatives introduced Bill C-74, the Canadian Environmental Protection Act (CEPA). Bill C-74 failed to mention rights. At least a dozen opposition MPs decried this omission, and expressed support for including an environmental bill of rights in the new CEPA.⁹⁴ According to the opposition, the environment minister "promised an environmental bill of rights and instead delivered some elegant prose in the preamble which really has no legal status at all."⁹⁵ According to NDP MP Nelson Riis, the overwhelming majority of Canadians wanted an environmental bill of rights. Riis said, "We all agree that Canadians have the right to a healthy environment. If there is any country in the world that is in a position to provide that, it must be Canada."⁹⁶

However, calls to include an environmental bill of rights in the new law were rejected by Environment Minister Tom McMillan, who warned that it would be unwise to endorse "the principle of an environmental bill of rights that simply takes a whole area of public policy, puts it in the laps of the courts, and tells the judiciary to sort it out."⁹⁷ When the Canadian Environmental Protection Act was eventually enacted in 1988, it included no right to a healthy environment but only very limited procedural rights to request investigations and initiate lawsuits. In an interesting twist, the federal Department of Justice apparently advised Minister McMillan that environmental rights "would be ineffective without constitutional status."⁹⁸

McMillan's flip-flop on the desirability of environmental rights was dramatic. In 1981, he had stated in response to Charles Caccia's environmental rights motion, "I think we do indeed need a bill of environmental rights which, among other things, would state clearly and explicitly that the citizen has the right to a healthy environment, that government has an obligation to protect the environment ... and that government's first priority in accepting or rejecting any proposal must be the protection of the public interest as far as environmental matters are concerned."⁹⁹ McMillan outlined a detailed vision of an environmental bill of rights, including:

- application to both federal and provincial levels of government;
- the right to a healthy environment would be paramount over other legislation;
- reduced discretion in environmental laws (requiring, rather than permitting the government to act);
- standing for citizens to defend the environment before tribunals and courts;
- mandatory environmental impact assessments, including public hearings;
- full access to environmental information;
- public participation in setting environmental standards;
- right to pursue class actions for environmental damage;
- an environmental ombudsperson; and
- placing the burden of proof on polluters and manufacturers to demonstrate that their actions or products do not harm the environment.¹⁰⁰

None of these provisions was included in CEPA when McMillan introduced it and presided over its enactment.

As Liberal MP Charles Caccia stated in 1988, referring to the evolution of CEPA, "this legislation has a history of retreats, contradictions, and flip-flops."¹⁰¹ Tom McMillan was an outspoken advocate of an environmental bill of rights, and then an opponent. Caccia himself was guilty of some degree of hypocrisy. As Lynn McDonald, an NDP MP, pointed out after listening to a long speech by Caccia on the flaws of Bill C-74, he could have done something about the need for an environmental bill of rights when he was minister of the environment.¹⁰²

Despite the failure to include an environmental bill of rights in CEPA, the concept continued to have champions. While in opposition in the early 1990s, the federal Liberal Party promised to introduce an Environmental Bill of Rights that would guarantee citizens the right to a healthy environment, the opportunity to participate in decision-making and the power to use the courts to ensure that federal environmental laws are obeyed and enforced.¹⁰³ In a document authored by future Prime Minister Paul Martin, the Liberal Party stated:

As we reform the economy from an environmental perspective, so must we do for the legal system. At present, the legal system in Canada discourages citizens from bringing lawsuits in the public interest against polluters to make them accountable for the damages they cause. This can be remedied by legislating an Environmental Bill of Rights that entitles Canadians to a healthy environment by guaranteeing:

- the right to use courts to ensure that federal environmental laws are properly obeyed and enforced; and
- the right to participate fully in the federal government's environmental decision-making.¹⁰⁴

In 1993, Liberal MP Ethel Blondin put forward a motion urging the government to “develop a comprehensive environmental charter of rights.”¹⁰⁵ In its policy platform for the federal election later in 1993, *Creating Opportunity: The Liberal Plan for Canada*, the Liberal party recognized “Individual Canadians are far ahead of their governments in their desire for environmental protection... A new Liberal government will build on this public awareness and give individuals new tools to protect the environment and to participate in environmental decision-making.”¹⁰⁶ The document also endorsed the proposal for a legal right to sue those breaking environmental laws.

The Liberal promises regarding substantive and procedural environmental rights were never fulfilled and were not reiterated in subsequent Liberal election platforms. CEPA underwent a mandatory review process beginning in 1993 and lasting until 1999. The revised Canadian Environmental Protection Act, 1999, maintains several largely ineffective procedural rights (involving requests for investigations and prosecutions) but is otherwise silent on environmental rights. Environmental laws subsequently enacted or amended by the Liberals failed to address the inability of Canadian citizens to ensure that environmental laws are effectively enforced.¹⁰⁷

Parliament recently considered enacting a Canadian Environmental Bill of Rights, which would have included explicit recognition of the right to a healthy environment.¹⁰⁸ The Canadian Environmental Bill of Rights was drafted by lawyers from Ecojustice on behalf of Friends of the Earth and the Sierra Club of Canada in 2008 and shared with all of the national political parties. It was introduced by NDP MP Linda Duncan as a private member’s bill in 2009 (Bill C-469), passed first and second reading and, with the support of all opposition parties overriding the minority Conservative government, was referred to the House of Commons Standing Committee on the Environment and Sustainable Development for review.¹⁰⁹ The Committee heard from many expert witnesses and made minor changes to Bill C-469 before sending it back to the House of Commons for third reading. Unfortunately it died on the order paper when Parliament was dissolved for the election in May 2011.

Bill C-469 recognized that Canadians have the right to live in a healthy environment, amends the legislative Canadian Bill of Rights to include this right and provides a suite of procedural rights. The Canadian Environmental Bill of Rights set out five primary purposes in s. 6:

- Safeguarding the right of present and future generations of Canadians to a healthy and ecologically balanced environment
- Confirming that the federal government has a public trust duty to protect the environment
- Ensuring all Canadians have access to environmental information, effective mechanisms for participating in environmental decision-making, and access to justice
- Providing legal protection for environmental whistleblowers (employees who act to protect the environment and may be subject to reprisals by their employer)
- Enhancing public confidence in the implementation of environmental law

At the heart of the Canadian Environmental Bill of Rights was recognition of the right to live in a healthy and ecologically balanced environment. Most of the bill consisted of procedural tools designed to ensure the fulfillment of this right. These procedural tools reflected the three key pillars—access to information, participation in decision-making and access to justice—of an international agreement called the Aarhus Convention.¹¹⁰ Although Canada participated in Aarhus negotiations, it never signed the agreement. To

achieve the purposes related to information and public participation, the Canadian Environmental Bill of Rights mandated the federal government to make environmental information available in a reasonable, timely and affordable fashion (s. 10); and ensure opportunities for effective, timely and informed public participation in decision-making related to laws, regulations and policies (ss. 11-12).

Bill C-469 contained a suite of provisions designed to increase the enforcement of Canadian environmental laws by authorizing concerned citizens, NGOs and communities to:

- apply to the Commissioner of Environment and Sustainable Development asking the responsible Minister to conduct a review of existing or proposed laws, regulations, and policies in order to protect the environment (s. 13);
- request investigations into potential violations of environmental law (ss. 14-15);
- file environmental protection lawsuits against the federal government for violating the right to a healthy environment, failing to enforce an environmental law, or failing to protect the public trust (ss. 16-21); and
- file a civil lawsuit against anyone (individual, business or government) who violates a federal environmental law or regulation (s. 23).

Bill C-469 also required the auditor general to examine all proposed laws and regulations to determine whether they were consistent with the provisions of the Canadian Environmental Bill of Rights and provided protection for environmental whistleblowers. Finally, the Canadian Environmental Bill of Rights would have amended the Canadian Bill of Rights to include the right to a healthy and ecologically balanced environment. The Canadian Bill of Rights is a law passed by the Diefenbaker government in 1960 and is not to be confused with the Charter of Rights and Freedoms, which has constitutional status. The Canadian Bill of Rights is widely regarded as having had little influence on the fulfillment of human rights in Canada, although a case can be made that it elevated the public profile of human rights and served as a stepping stone to the eventual enactment of the charter.

The greatest attributes of the Canadian Environmental Bill of Rights were its recognition of the right to a healthy environment, democracy-enhancing procedural rights—giving citizens a greater role in the environmental decisions that affect their lives—and its potential to improve environmental enforcement.¹¹¹ It represented a potentially important step toward accountability and making the environmental laws passed by Parliament meaningful rather than symbolic. However, a legislative Canadian environmental bill of rights would have been weaker—both legally and in terms of reflecting Canadian values—than a constitutionally entrenched environmental bill of rights. Unlike a constitutional right to a healthy environment, the Canadian Environmental Bill of Rights would not override other legislation, nor would it apply to provincial, territorial, municipal or aboriginal governments. One of the key limitations of the Canadian Environmental Bill of Rights was that it applied primarily to federal decisions, federally regulated projects and federal lands and waters. However, Bill C-469 represented a possible milepost on the road to constitutional recognition of the right to a healthy environment and could have spurred the enactment of similar laws at the provincial level.

The Right To A Healthy Environment At The Provincial/Territorial Level

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 became a territory in 1999.

The first point to note is that none of these laws deals with substantive rights to clean air, clean water or a healthy environment. All of 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.

Unsuccessful attempts to legislate environmental rights have occurred in British Columbia, Alberta and Saskatchewan. The New Democratic Party introduced the earliest proposal for a provincial bill of environmental rights in the B.C. legislature in 1971.¹¹² It was never enacted, nor was a similar proposal introduced by the B.C. Social Credit party in 1973, or a more comprehensive version introduced by the NDP in 1994.¹¹³ The 1994 Environmental Bill of Rights proposed by B.C.'s NDP government included the following provisions:

- 30(1). Every resident of British Columbia has the right to a healthy environment and a right to protect the environment and the public trust from any adverse effects by any legal means.
- (2). The Government of British Columbia has a duty, as trustee, to conserve and protect the environment of British Columbia.

The Environmental Bill of Rights was dropped because B.C.'s then-powerful union representing loggers claimed it would be of "no value to most citizens" but "would be a huge benefit to overzealous green groups who would undoubtedly use it to tie up all kinds of economic activity on the basis of vague and wooly accusations."¹¹⁴ Alberta (1979) and Saskatchewan (1982, 1992) also proposed environmental bills of rights but failed to convert these proposals into law.¹¹⁵

Quebec

Quebec, in 1978, was the first province to legislate environmental rights. The specific provision, found in Quebec's Environmental Quality Act, states:

- 19.1 Every person has the right to healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this act and the regulations, orders, approvals, and authorizations issued under any section of this act.¹¹⁶

Because of the restrictive wording of s. 19.1, it is generally regarded as having modest influence.¹¹⁷ However, it has led to increased public access to the judicial system by eliminating the requirement for a traditional legal interest to gain standing, and at least three dozen cases decided by Quebec courts have mentioned it.¹¹⁸

In 2006, Quebec amended its provincial Charter of Human Rights and Freedoms to include the right to a healthy environment:

46.1 Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law.¹¹⁹

This amendment resulted in a significant expansion of the scope of environmental rights for Quebec's citizens. The Charter of Human Rights and Freedoms requires that all legislation passed by the provincial government be consistent with its provisions. The explicit reference to biodiversity makes it the most eco-centric of the provincial/territorial environmental rights legislation. The law authorizes civil actions for damages and injunctive relief (interim or permanent) for violations of enumerated rights. There have already been a substantial number of cases in which Quebec courts have cited this right to a healthy environment.¹²⁰ Sophie Thériault and David Robitaille assert that Quebec's Charter of Human Rights and Freedoms requires the provincial government to establish a strong legislative and policy framework for fulfilling this right.¹²¹ However, as provincial legislation it does not have full-fledged constitutional status, unlike the Canadian Charter of Rights and Freedoms.

Ontario

In Ontario, the Canadian Environmental Law Association first articulated the need for legislated environmental rights in 1974.¹²² A series of provincial environmental bills of rights were introduced by both the Liberals and the NDP, primarily while those parties were in opposition, in 1979, 1980, 1981, 1982, 1987 (twice), 1989 and 1990.¹²³ Finally, in 1994, Ontario's Environmental Bill of Rights, 1993, came into force.¹²⁴ The preamble states, "The people of Ontario have a right to a healthful environment."¹²⁵ Section 2 of the Ontario Environmental Bill of Rights (EBR) states that:

- 2(1) The purposes of this Act are,
- (a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act;
 - (b) to provide sustainability of the environment by the means provided in this Act; and
 - (c) to protect the right to a healthful environment by the means provided in this Act.

The procedural provisions of Ontario's Environmental Bill of Rights have produced varying rates of engagement from citizens. Tens of thousands of Ontarians have commented on proposed government actions, standards, or policies.¹²⁶ Twenty to 30 requests are made annually for reviews of provincial laws, regulations or policies, and one in seven is acted upon, although this rate has risen in recent years.¹²⁷ Of the 10 to 15 requests made annually for investigations into alleged violations of environmental laws, one in three results in an investigation and enforcement action.¹²⁸ Of the 10 to 12 applications made each year for leave to appeal environmental or natural resource approvals, roughly 20 per cent are granted.¹²⁹ On the other hand, in 17 years there have only been two citizen suits for violations of environmental laws or damage to public resources, two public nuisance lawsuits and one use of the whistleblower provision.¹³⁰ Ontario's Environmental Review Tribunal has made decisions affirming and applying the right to a healthy environment.¹³¹

Opinions regarding the effectiveness of the Environmental Bill of Rights are polarized. Environmental lawyer Joseph Castrilli said Ontario “opted for an environmental rights regime in name only.”¹³² Other lawyers have observed that “the Ontario Environmental Bill of Rights is a peculiar and paradoxical piece of legislation. Notwithstanding its title, the EBR grants members of the public no explicit substantive environmental rights, and even the procedural rights which the Act provides are subject to very significant limitations.”¹³³

The EBR does have its defenders, with one author suggesting that it is “the most sweeping and complex collection of statutory rights and obligations with respect to government environmental decision-making in any jurisdiction in North America.”¹³⁴ There is certainly an unprecedented volume of information available through the public registry, including technical details of approvals for specific facilities. The creation of an environmental commissioner of Ontario has contributed to an elevated profile for environmental policy issues. The commissioner believes that the EBR makes Ontario a leader in public participation, citizen empowerment and government accountability.¹³⁵ More recently, it was argued that the EBR has increased transparency, enabled citizens to meaningfully engage governments and influenced the outcome of public policy decisions.¹³⁶

Despite the protection provided by the EBR, the environmental commissioner of Ontario reported in 1996 that “the ministries are making remarkable changes to environmental safeguards either behind closed doors or with minimal public participation. This is a clear and unacceptable departure from the goals and purposes of the Environmental Bill of Rights.”¹³⁷ In 2004, lawyer Richard Lindgren of the Canadian Environmental Law Association wrote a compelling indictment regarding the first decade of the law’s operation:

While occasional EBR “success” stories exist at the local level, there is little or no evidence at the provincial level that the EBR has directly led to the conservation of natural resources, protection of biological diversity, or provision of environmental sustainability. ... Indeed, the available evidence suggests that despite the existence of the EBR, Ontario is still experiencing serious environmental crises, public health concerns, and threats to our quality of life. For example, during the past decade, Ontario has suffered the Walkerton Tragedy, the Plastimet fire, numerous chemical spills, increasing smog alerts, rampant urban sprawl, leaking landfills, energy shortages, climate change impacts, endangered/threatened species of flora and fauna, and intense resource management conflicts over water-takings, forestry practices, and aggregate/mining operations. In addition, annual reports from the Commission for Environmental Cooperation have consistently placed Ontario at or near the top of North American jurisdictions with the largest volume of releases of pollutants to air, land and water.¹³⁸

Criticism of the EBR’s effectiveness continues to mount.¹³⁹ In 2011, the Canadian Environmental Law Association requested a formal review of the EBR, with the goal of strengthening the legislation. The environmental commissioner of Ontario concurred with the need to improve the EBR, noting that an array of problems, such as the failure to post major proposals on the Environmental Registry, “hinder the public’s right to exercise their rights under the EBR, and point to a lack of respect by the responsible ministries for the legislation and its users.”¹⁴⁰

Yukon

In 1991, the Yukon passed a new Environment Act providing, in section 6, that “The people of the Yukon have the right to a healthful natural environment.”¹⁴¹ Natural environment is comprehensively defined and citizens are provided with legal remedies for breaches of the law. An interesting

provision of the Yukon's Environment Act imposes public trust obligations on the territorial government, requiring it to protect the environment from impairment and authorizing citizens to file lawsuits if the government fails to fulfill its responsibilities as trustee. The act also establishes a range of procedural rights, including whistleblower protection, the ability to request an investigation, bring a private prosecution, make a complaint, access government information and request review of a regulation.¹⁴² The strengths of the act are undermined by section 9, which provides a plethora of defences, including the fact that a harmful activity was licensed by the territorial or federal government. Few cases have cited the Environment Act.¹⁴³ A 2010 audit of government performance under the Environment Act concluded that the Yukon government had ignored some portions of the act.¹⁴⁴

Northwest Territories and Nunavut

In 1991, the Legislative Assembly of the Northwest Territories adopted the Environmental Rights Act. The stated purpose of the act is to "provide environmental rights for the people of the Northwest Territories."¹⁴⁵ In its preamble, the act states, "Whereas the people of the Northwest Territories have the right to a healthy environment and a right to protect the integrity, biological diversity and productivity of ecosystems in the Northwest Territories ..." The act also allows a resident to bring an action in the Supreme Court against any person releasing any contaminant into the environment, enhances access to information, authorizes private prosecutions, enables requests for investigation and provides whistleblower protection.¹⁴⁶ When Nunavut was established in 1999, the new territory adopted the existing laws and regulations of the Northwest Territories, meaning that Nunavut has an identical Environmental Rights Act. These laws have not been used frequently in either territory.

Conclusion

The constitutional right to a healthy environment has never been the subject of a concerted campaign by environmental groups in Canada, 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 for such measures. Politicians have embraced the idea of environmental rights while in opposition, and then either sat on their hands while in power, or reversed course and actively opposed recognition of these rights.

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 and the three territories recognize the right in relatively weak environmental legislation. Citizens of 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. The Canadian Environmental Bill of Rights (Bill C-469) represented a potential legislative breakthrough but is unlikely to be enacted because of the current Conservative majorities in both the House of Commons and Senate.

More than 40 years have passed since the idea of entrenching the right to a healthy environment in the Constitution was first proposed in Canada. If Canada had endorsed the concept at the time, it would have been at the forefront globally in recognizing this newly emerging human right. Instead, Canada is an international laggard, as most nations have incorporated environmental rights and responsibilities into their constitutions.

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