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## PAPER #5:

# Pathways for Moving Forwards

## EXECUTIVE SUMMARY

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## Pathways for Moving Forwards

Despite international momentum and the compelling rationale for enshrining the right to clean air, clean water and a healthy environment in Canada's Constitution, the path is marked with daunting legal and political obstacles. There are three ways that the Constitution could be modified to recognize the right to a healthy environment:

1) a direct constitutional amendment

2) public interest litigation

3) a judicial reference

A direct constitutional amendment would explicitly add environmental rights and responsibilities to Canada's Constitution. The second option would involve a lawsuit about environmental degradation, arguing that the right to a healthy environment is implicit in an existing constitutional provision (e.g., the right to life in s. 7 of the Charter). The third possibility involves persuading a government (federal, provincial or territorial) to initiate a judicial reference about whether the right to a healthy environment is implicit in an existing constitutional provision. The second and third options could result in an indirect amendment to the Constitution. This paper outlines the legal and political details of these three pathways.

## Option 1. Direct Amendment of Canada's Constitution

The general amending formula for Canada's Constitution requires resolutions from the House of Commons, the Senate and the legislative assemblies of seven provinces representing at least 50 per cent of all Canadians. As of 2013, the provincial populations are such that no single province has a veto under the constitutional amending formula (i.e., no province has 50 per cent of Canada's population). There is a three-year deadline for securing the required resolutions once one legislature commences the process. The requirement of Senate approval can be overridden. If 180 days pass after the House of Commons passes its authorizing resolution and the Senate has not concurred, then the House may adopt a second resolution, eliminating the need for Senate approval.

The difficulties of achieving constitutional amendments were exacerbated by a federal law passed in 1996 in response to the narrowly defeated Quebec referendum. The Constitutional Amendments Act provides that constitutional changes, if introduced by a federal minister, must be supported by Quebec, Ontario, British Columbia, two or more Atlantic provinces with

at least 50 per cent of the region's population and two or more Prairie provinces with at least 50 per cent of the region's population. Alberta and B.C. have passed legislation requiring provincial referendums before introducing constitutional amendment resolutions in the legislative assembly, and Alberta's law binds the government to obey the referendum's results.

Amending Canada's Constitution is challenging but not impossible. The Constitution has been amended 11 times since 1982. For example, in 1983 s. 25 of the Charter was amended to establish additional guarantees for Aboriginal peoples. Section 16(2) of the Charter was amended in 1993 to enhance the equality of English- and French-speaking communities in New Brunswick.

A proposal to include the right to a healthy environment in the Constitution can be initiated by a resolution passed in the House of Commons, the Senate or the legislative assembly of any province. Once either the federal government or a provincial government initiates the constitutional amendment procedure, all parties are under an obligation to come to the negotiating table and bargain in good faith.

The failures of the comprehensive Meech Lake and Charlottetown Accords created a widespread perception that the prospects for constitutional change in Canada are limited. However, history suggests that narrow, focused changes with strong public support — a description that fits the right to a healthy environment — have the potential to succeed.

## Option 2. Public Interest Litigation

The second option for attempting to secure constitutional recognition of the right to a healthy environment is through a lawsuit arguing that a specific environmental harm (e.g., air pollution) violates a right that is already explicitly protected by the Canadian Charter of Rights and Freedoms, such as the right to life, liberty and security of the person (s. 7). In at least 10 previous cases, litigants have attempted unsuccessfully to rely on s. 7 to challenge environmental harms. However, the Supreme Court of Canada and other courts have carefully left the door open for future cases that might produce a different result.

There are four reasons for cautious optimism if and when a compelling lawsuit asserting an implicit right to a healthy environment reaches the Supreme Court of Canada. First, the Supreme Court has a strong track record in environmental cases. Second, the Court has explicitly referred to the right to a safe environment in several decisions. Third, the Supreme Court frequently relies on international law and leading decisions from other nations. Jurisprudence from at least 20 other countries supports recognition of an implicit right to a healthy environment as part of the constitutional right to life. Fourth, the Court describes Canada's Constitution as a "living tree" and emphasizes the need to interpret the document progressively over time to meet changing circumstances.

One lawsuit now underway could invoke the implicit constitutional right to a healthy environment. On behalf of two members of the Aamjiwnaang First Nation in Sarnia (Canada's Chemical Valley), Ecojustice filed a lawsuit in 2010 that argues the approval of additional air pollution from a Suncor refinery violates ss. 7 and 15 (equality rights) of the Charter. The case is expected to go to trial in 2014.

## Option 3. A Judicial Reference

The third option for achieving constitutional recognition of the right to a healthy environment involves the judicial reference, a uniquely Canadian legal process through which governments seek legal advice from courts, often on controversial issues. The judicial reference procedure offers two avenues to the Supreme Court. First, the federal government may refer to the Court important questions concerning the interpretation of the Constitution. Second, provincial/territorial governments can pose similar types of questions to provincial/territorial courts of appeal, which can then be appealed to the Supreme Court (which is bound to consider the appeal).

Throughout Canada's history, reference cases have tackled many important issues, and have a strong degree of legal legitimacy and public acceptance. There have been more than 100 references to the Supreme Court since the first one in 1892, including questions about the constitutionality of legislation governing same-sex marriage in 2004 and a pending reference about Senate reform. Perhaps the most famous reference in Canadian history was the so-called *Persons Case. I*n the 1920s, five Canadian women petitioned the government to ask the Supreme Court "Does the word 'persons' in section 24 of the *British North America Act,* 1867, include female persons?" The Court held that the phrase "qualified persons" did not include women, but its decision was overruled by the U.K. Judicial Committee of the Privy Council.

The *Persons Case* offers an intriguing precedent. A campaign could be launched to pressure governments to initiate a judicial reference asking: Does section 7 of the Charter include an implicit right to live in a healthy environment as part of the right to life, liberty and security of the person? If the Supreme Court eventually issued a positive ruling, the right to a healthy environment would enjoy constitutional recognition. If the Supreme Court issued a negative ruling, it could add momentum to a campaign to secure the direct amendment of the Constitution.

## Comparison of Options

Each option has pros and cons, and they are not mutually exclusive. None offers a guaranteed outcome. Directly amending the Constitution would have the greatest impact legally, practically and symbolically, but is widely perceived, by both the public and political elites, as tantamount to impossible. While this perception is inaccurate, it is a major barrier. One government would have to be persuaded to play a leadership role by passing a resolution proposing the constitutional amendment. Then the clock would begin ticking, with a three-year deadline. The political challenge is daunting, as the support of the House of Commons and at least seven provinces must be obtained within three years.

Based on the enduring popularity of the Charter, the consistently strong environmental concerns expressed by Canadians and almost unanimous public support for the right to water, it seems likely that constitutional recognition of the right to a healthy environment would garner tremendous grassroots support. As well, a compelling case for a constitutional amendment can be made based on the experiences of other nations. These factors could make it difficult for federal, provincial or corporate leaders to actively campaign against the proposed right to a healthy environment.

Nevertheless, substantial opposition from industry and some governments can be anticipated. Their main arguments would likely emphasize the potentially adverse economic effects, the undemocratic approach of giving courts additional responsibility for deciding issues that ostensibly belong in the hands of elected legislators, the threat of a flood of litigation and the fact that Canada already has extensive measures in place to safeguard human rights and the environment.

The two legal options — public interest litigation and a reference — seek a court ruling that the right to a healthy environment is implicitly included in the constitutional right to life, liberty and security of the person. Litigation is always rife with uncertainty. Assuming a willing government could be found, the reference procedure would be faster and less expensive than starting a lawsuit.

## Conclusion

The constitution belongs to the people of Canada, not to governments. Constitutional recognition of the right to a healthy environment, and the obligation to protect the environment, is an essential step forward if Canada is to avoid becoming world renowned as a laggard rather than a leader in safeguarding the ecological health of this vast and beautiful country.

The right to a healthy environment recognizes our most common link, that we all share this beautiful country we are so fortunate to call home. This right comes with a reciprocal responsibility — to protect the environment for our children, grandchildren, future generations and other species. Entrenching environmental rights and responsibilities in the Constitution would force Canadians to make sustainability a genuine priority, resulting in changes that would make Canada a greener, cleaner, wealthier, healthier, happier nation in the long run.