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Pathways for Moving Forwards

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Canadians became so accustomed to the mega constitutional game — the great Lockean project of democratically contracting together to adopt a constitution — that it is difficult for them to realize that in these quieter constitutional times since the Meech Lake and Charlottetown Accord debacles, the country's constitutional system has been changing and developing.²

~ Professor Peter Russell

The progress of environmental rights in Canada and around the world over the past three decades can be compared to the course of a river. There are twists and turns, and the current moves more quickly in some stretches and during some seasons than others. At times there may be turbulent white water, and experts will disagree over the best approach to navigation. However, it is almost certain that the water in the river will eventually reach the ocean. The explicit recognition of the right to a healthy environment as a fundamental human right appears to be an inevitable development, representing the evolution of universal human values.

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 forward is littered with legal and political obstacles. It is important to recognize that a country's constitution, understood holistically, comprises four elements:

- 1) The formal written constitution, including direct amendments;
- 2) Laws that do not alter the formal constitution but create or change major government institutions (e.g., Constitutional Amendments Act, Clarity Act);
- 3) Political practices that, over time, evolve into constitutional conventions; and
- 4) Judicial decisions interpreting the formal constitution and clarifying the principles underlying the constitutional system as a whole (e.g., *Secession Reference*).³

Thus there are three ways that Canada's Constitution could be modified to recognize the right to a healthy environment and associated environmental responsibilities. First, a direct constitutional amendment can be sought through the political process, requiring the approval of federal and provincial legislatures. The second option is litigation — seeking a court decision recognizing that the right to a healthy environment is implicit in an existing constitutional provision. The third possibility involves persuading either Ottawa or a provincial/territorial government to ask the courts whether Canada's Constitution already includes an implicit right to a healthy environment, using a special procedure called a judicial reference. The second and third options follow different legal paths but could achieve the same result — an indirect constitutional amendment. Many experts have observed that litigation can be an effective instrument for “changing the dynamics of political power and altering the status

quo of competing interests.”⁴ However, for a host of reasons — democratic legitimacy, clarity, symbolic value, legal effects and practical consequences — a direct constitutional amendment is the most powerful outcome. This paper will outline the legal and political details of these three pathways in detail.

Option 1. Direct amendment of Canada’s Constitution

The prospects for achieving substantial constitutional reform in Canada are widely perceived to be bleak. The scars inflicted by the failures of the Meech Lake and Charlottetown accords are still remarkably fresh. As Prof. Peter Russell wrote in his book *Constitutional Odyssey*, “using the ‘c’ word was a guaranteed conversational turn-off at Canadian dinner tables.”⁵ In Canada’s legal system it is significantly harder to amend the constitution than to amend ordinary legislation. Recent political and legal developments have made it even more difficult.

And yet history is replete with lessons about the danger of describing future political developments as impossible — from the fall of the Berlin Wall and the dissolution of the Soviet Union to the end of apartheid in South Africa. In the context of greening constitutions, France provides an inspiring example for Canada. In 1995, soon after becoming president, Jacques Chirac earned the ire of environmental groups by insisting that France resume nuclear testing in French Polynesia. In 2001, Chirac unexpectedly unveiled a proposal for an Environmental Charter that would provide constitutional recognition of the right to live in a healthy environment, the obligation to protect the environment, the precautionary principle and other key ecological principles.⁶ Chirac’s proposal was greeted with skepticism from the environmental community and opposition from the business community.⁷ Pundits suggested he was merely trying to secure green votes in the 2002 election.⁸ Chirac ignored his critics and enthusiastically championed his proposal:

I have called for France to have an Environmental Charter incorporated into our Constitution. The right to a quality environment will hence be protected in the same way as the rights of man and the citizen stated in the declaration of 1789 and the economic and social rights laid down in the Preamble to the 1946 Constitution.

The Charter was drafted following a major national public debate and has been submitted to Parliament. It states the place of Man in his natural environment, without which he would not be able to survive, and the detrimental consequences of excessive pressure on natural resources.

It declares everyone’s right to live in a balanced environment that is not harmful to their health. It calls on everyone, and first and foremost the State, to adopt an attitude of responsibility based on education, information, prevention, precaution and compensation for the sake of future generations. This text raises great hopes. I

am aware of the questions that such a move could raise and I understand them, but I believe that the adoption of this Charter will represent a huge step forward for France. ... A benchmark text that will inspire France's national, European and international policies for decades to come.⁹

In 2005, the French Congress (including both the National Assembly and the Senate) approved the Environmental Charter by a vote of 531-23.¹⁰ While it was anticipated that the Charter would increase the prominence of environmental issues in French law, Prof. David Marrani asserts that despite its recent vintage, "it has developed beyond all predictions."¹¹ The Environmental Charter is influencing legislation, court decisions, government policy and even the French education system.¹² In 2011, France cited the charter in becoming the first nation in the world to ban hydraulic fracturing, or fracking, the environmentally destructive method of extracting oil or natural gas from underground rock formations. The Council of State (the highest administrative court in France) has based more than a dozen decisions on the Charter on issues ranging from nuclear power to protection of mountain lakes.¹³ The French experience suggests that public pressure and political leadership can overcome constitutional inertia, even in the face of cynicism and opposition from societal elites.

The Amending Formula

Five different procedures for directly amending Canada's Constitution, including the Charter of Rights and Freedoms, are set forth in Part V of the Constitution Act, 1982:

- the general amending formula requiring a proclamation issued by the Governor General and authorized by resolutions from the House of Commons, the Senate, and the legislative assemblies of two-thirds of the provinces representing at least 50% of all Canadians (s. 38);¹⁴
- the unanimity formula requiring the consent of the House of Commons, the Senate, and the legislative assemblies of all ten provinces to change certain fundamental aspects of the Constitution, such as the amending formula itself or the composition of the Supreme Court of Canada (s. 41);¹⁵
- the bilateral amendment formula, which in the case of provisions that apply to one or more, but not all provinces, requires authorization by the House of Commons, Senate, and the legislative assembly of each province to which an amendment applies (s. 43);
- unilateral amendment of certain types of provisions by Parliament (s. 44), such as adding representation for Nunavut in the House of Commons and Senate; and
- unilateral amendment of certain types of provisions by a provincial legislature (s. 45).

The general amending formula is the only procedure capable of achieving constitutional recognition of the right to a healthy environment. It puts forward the basic rule requiring the concurrence of Parliament and the legislatures of at least two-thirds of the provinces with at least 50 per cent of the population. Two-thirds of the 10 provinces is generally agreed to mean seven provinces.¹⁶ The deadline for securing the required resolutions is three years.¹⁷ 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).¹⁸ It is important to note that the requirement of Senate approval can be overridden. If 180 days (six months) 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.¹⁹

The difficulties of achieving constitutional amendments were made potentially more daunting by a federal law passed in 1996 in response to the narrowly defeated Quebec referendum. The Constitutional Amendments Act provides that constitutional changes introduced by a federal minister of the Crown 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.²⁰ In effect, this system gives a veto to Ontario, Quebec, British Columbia and Alberta (based on current population distributions in the Prairies). Although in theory Parliament could amend or repeal the Constitutional Amendments Act, some experts believe it may acquire quasi-constitutional status over time.²¹

Alberta and British Columbia have passed legislation requiring provincial referendums before constitutional amendment resolutions are introduced in the legislative assembly.²² Alberta's legislation binds the legislative assembly to act in accordance with the wishes expressed by a majority of the citizens who voted in the provincial referendum.²³ Under British Columbia's law, the government is not legally bound to follow the outcome of the vote (although refusing to do so could create a political backlash).²⁴ Peter Russell has suggested that political pressure for a national referendum to ratify major constitutional changes would probably be irresistible.²⁵

The general amending formula requires a high degree of national consensus, which may be challenging in today's regionally fractured political landscape. Yet it is inconceivable that a constitution enshrined in 1982 will be treated as though written in stone and immune to revisions required to reflect social, scientific and cultural advances. In fact, amending Canada's Constitution is by no means an impossible proposition. The Constitution has been amended at least 11 times since 1982, including two direct changes to the Charter. The general amending formula was used in 1983 to amend section 25 of the Charter, establishing additional guarantees and commitments relating to Aboriginal peoples.²⁶ Section 16(2) of the Charter

was amended in 1993 to enhance the equality of English- and French-speaking communities in New Brunswick. Remarkably, despite the heightened tensions between Ottawa and the separatist Parti Québécois government, these two parties successfully negotiated a bilateral constitutional amendment relating to education and denominational schools.²⁷ The some-but-not-all-provinces procedure (section 43) has been used seven times (four amendments involving Newfoundland, one involving P.E.I., one involving New Brunswick and one involving Quebec). In 2011, the constitutional rules governing the allocation of seats in the House of Commons were amended.²⁸ As Warren J. Newman notes, “By any reasonable standard, these are not insignificant accomplishments.”²⁹

On the other hand, dozens of other efforts to amend the Constitution on specific issues have failed since 1982.³⁰ The federal Progressive Conservatives proposed a property rights amendment in 1983 that was defeated in the House of Commons. Similar property rights amendments were the subject of legislative resolutions in British Columbia, New Brunswick and Ontario. Prime Minister Brian Mulroney made an effort in 1984-85 to limit the powers of the Senate. The proposed amendment was supported by the majority of provinces but opposed by the Quebec and Manitoba governments. After the Liberals replaced the Conservatives in a provincial election in Ontario, Ontario sided with Quebec and Manitoba. As a result, the amendment died. A proposal by the federal Progressive Conservatives to recognize the rights of unborn children was defeated in the House of Commons in 1987. NDP MP Svend Robinson proposed removing the reference to God from the preamble of the Charter in 1999, but his proposal went nowhere. The right to a healthy environment enjoys much greater public consensus than any of the unsuccessful subjects of constitutional reform.

Moving Forward on Option 1

There are several options for amending Canada’s constitution to recognize the right to a healthy environment, ranging from simple to comprehensive. Section 7 of the Charter could be amended to explicitly clarify that “life, liberty and security of the person” includes the right to clean air, clean water and a healthy environment. A new stand-alone section setting out the right to a healthy environment could be added to the Charter, such as:

7.1 Everyone has the right to live in a healthy and ecologically balanced environment, including clean air, safe water, fertile soil, nutritious food and vibrant biodiversity.

This approach offers the advantage of fitting within the current style of the Charter, which is concise and focused exclusively on individual rights. Government’s duty to protect the environment is implicit, and it is left to citizens, legislatures and courts to fill in the details. A third option would be to take a more comprehensive approach, comparable to the extensive

provisions of the Charter dealing with official languages (sections 16-23). A starting point for discussion is presented below:

The Canadian Charter of Environmental Rights and Responsibilities

The people of Canada understand that:

The beauty, vastness and diversity of nature are at the heart of the Canadian identity;

We are stewards of a sacred trust, safeguarding Canada's unique and magnificent natural heritage on behalf of the world;

The air we breathe, the water we drink and the food we eat make us part of, and dependent upon, the environment;

The choices we make to meet our needs must not compromise the capacity of future generations and other peoples to satisfy their own needs;

Our future health, well-being and prosperity depend on reducing our pressure on the Earth's ecosystems and living graciously within nature's limits;

Therefore, we proclaim:

- 1) Everyone has the right to live in a healthy and ecologically balanced environment, including clean air, safe water, fertile soil, nutritious food and vibrant biodiversity.
- 2) Everyone has a responsibility to protect and, where possible, restore the environment.
- 3) Everyone has the right to information about the state of the environment, the right to participate in making decisions that affect the environment and the right of access to judicial remedies in response to violations of their right to live in a healthy environment.
- 4) Governments at all levels, according to their jurisdiction under the Constitution Act, 1867, are trustees who share the responsibility for protecting and restoring the environment, for the benefit of present and future generations.
- 5) Government laws, regulations, policies and decisions shall apply the polluter pays principle, so that any individual, private enterprise or public entity that damages the environment is responsible for paying for the full costs of restoring, rehabilitating or paying compensation for damages inflicted.

- 6) Government laws, regulations, policies and decisions shall follow the precautionary principle, so that where there is evidence of potentially significant environmental harm, a lack of scientific certainty shall not be used to avoid or delay the implementation of effective and efficient measures to prevent or mitigate the harm.
- 7) Governments shall ensure that the costs of pollution and environmental damage are fairly distributed, that existing environmental injustices are alleviated and that the benefits of environmental goods and services are enjoyed equitably.
- 8) Educational programs at all levels, from pre-school to university, must contribute to the implementation of the rights and responsibilities defined by this Charter.
- 9) Governments shall respect the rights of future generations and nature when enacting laws or regulations, making decisions, developing policies and implementing programs or budgets.
- 10) Canada shall comply with the principles articulated in this Charter when engaged in negotiations or actions at the international level.

This draft charter most closely resembles France's Charter for the Environment (see Appendix A). Both set forth the rationale for constitutional change as a response to pressing national and global ecological challenges. Both articulate substantive and procedural environmental rights and responsibilities. The draft Canadian Charter of Environmental Rights and Responsibilities addresses the complex question of constitutional jurisdiction by clarifying that governments at all levels are trustees for environmental protection within their fields of responsibility. It also identifies a number of established legal principles — polluter pays, precaution, environmental justice and intergenerational equity — and elevates them to constitutional status to ensure that they guide government decision-making. Inspired by Indigenous law as well as recent constitutional changes in Bolivia, Ecuador and Iceland, it also recognizes the rights of nature. Like the French charter, it emphasizes the critical role of education. Finally, Canada would be constitutionally bound to act in an environmentally responsible manner on the international stage, reversing a recent pattern of obstructing negotiations.

A proposal to include the right to a healthy environment or other environmental provisions in the Constitution can be initiated by a resolution passed in the House of Commons, the

Senate or the legislative assembly of any province.³¹ In other words, 12 different political entities could kick-start the process of greening Canada's Constitution. As the Supreme Court of Canada has observed, this power of initiative reflects a basic democratic principle by "conferring a right to initiate constitutional change on each participant in Confederation."³² Of particular interest in the context of potential environmental provisions, the Supreme Court then stated "the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces."³³ In other words, once either Ottawa or a provincial government initiates the constitutional amendment procedure, all parties are obligated to come to the negotiating table and bargain in good faith. Once the right to a healthy environment is the subject of a single legislature's resolution, the federal and provincial governments would all be engaged and the clock would begin ticking toward the three-year deadline.

One of the largest obstacles to achieving a constitutional amendment recognizing the right to a healthy environment is the problem of linkage. Past efforts to address Quebec's constitutional concerns have triggered an unmanageable avalanche of demands from other political actors.³⁴ These demands include expanding provincial powers, reforming the Senate, recognizing social and economic rights and addressing the aspirations of Aboriginal people. The Meech Lake and Charlottetown accords foundered under the weight of comprehensive constitutional reform packages. The 11 successful amendments, in contrast, have been focused on narrow topics. The potential linkage to constitutional property rights is also raised as an argument against seeking entrenchment of the right to a healthy environment.³⁵ Several heated battles have already been fought to prevent the addition of protection for property rights to the Charter. The argument that entrenching property rights in the constitution would undermine environmental regulation played a prominent role in the debates.

As noted earlier, the failures of Meech Lake and Charlottetown created a widespread perception that prospects for constitutional change in Canada are dim. As Warren Newman, Senior General Counsel at the Canadian Department of Justice, observed, "The trauma attendant upon the failure of that agreement [Meech Lake] to be ratified by formal constitutional amendment has had an incalculable impact on our national psyche and on the way in which our political actors approach the question of constitutional reform."³⁶ However, Ronald Watts argues persuasively that it would be an error to assume "that the only kind of significant change to the federal system is comprehensive constitutional change."³⁷ Watts suggests that a preferable approach would be to proceed by pragmatic and incremental adjustments. He refers to Australia, Germany and Switzerland as examples of federal countries where "substantial change and even transformation has been achieved ... by incremental piecemeal constitutional adjustment and even more by pragmatic political adaptation."³⁸

In conclusion, comprehensive constitutional reform is likely to be so unwieldy as to almost guarantee failure. Narrow, focused changes that enjoy high levels of public support — a description that fits the right to a healthy environment — appear to have much better prospects for success.

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 some specific form of environmental harm (e.g., air pollution) violates a right that is already explicitly protected by the Canadian Charter of Rights and Freedoms. The crux of the argument would be that an implicit constitutional right to a healthy environment exists, most likely vis-à-vis s. 7 of the Charter, which states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.³⁹

In essence, this approach is analogous to the litigation that led the Supreme Court of Canada to determine that sexual orientation was implicitly included in the Charter's section 15 equality provision and that discrimination on the basis of sexual orientation was therefore unlawful.⁴⁰

Many lawyers and scholars have suggested that the words of s. 7 referring to "life, liberty, and security of the person" are sufficiently broad to encompass the right to a healthy environment.⁴¹ For example, as early as 1983, lawyer Colin Stevenson argued, "If section 7 purports to protect rights to life, liberty, and security of the person, surely this must also be taken to include a right to a clean environment."⁴² According to Dianne Saxe, "If a healthy environment is a necessary precondition for human life and bodily integrity, then the human right to life and bodily integrity must entail a right to a healthy environment."⁴³ More recently Prof. Lynda Collins reviewed Supreme Court of Canada jurisprudence and concluded that "it is clear that s. 7 may provide redress in cases of serious state-sponsored environmental harm."⁴⁴

In theory, it could also be argued that certain kinds of pollution or environmental destruction violate freedom of religion (s. 2(a) of the Charter) or that disproportionate pollution harming a specific identifiable group violates the Charter's equality guarantee (s. 15). Prof. John Borrows wrote a clear and compelling argument for acknowledging Indigenous spiritual beliefs related to the living Earth under the auspices of section 2(a) but concluded it was unlikely to succeed in the conservative Canadian court system.⁴⁵ Because the s. 7 arguments appear to be the strongest, they will be the focus of discussion in this paper.

The appropriate scope of section 7 of the Charter is one of the most contested issues in Canadian constitutional law, as it raises "a wide array of difficult moral and ethical issues."⁴⁶

Many different types of claims have been launched based on the right to life, liberty and security of the person, including concerns about cruise missile testing, the siting of a landfill, the inadequacy of provincial welfare programs and the legality of a Quebec law prohibiting private health insurance.⁴⁷ Most of the successful challenges launched under s. 7 have been related to government actions that deprive an individual's right to life, liberty and security of the person in the context of the administration of justice, particularly criminal justice. However more recent cases, including the Chaoulli decision on private health insurance, have confirmed that s. 7 applies in a broader range of circumstances.

According to the Supreme Court of Canada, a claimant asserting a violation of s. 7 must prove two main elements,

- 1) that a deprivation of the right to life, liberty and security of the person has occurred; and
- 2) that the deprivation is not in accordance with the principles of fundamental justice.⁴⁸

The "deprivation" can relate to any or all of the three interests identified in s. 7 — life, liberty and security of the person.⁴⁹ The right to life has been described as the "right, freedom, or ability to maintain one's existence."⁵⁰ Liberty as defined by s. 7 "encompasses... those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence."⁵¹ The right to security of the person includes both physical and psychological components:

Security of the person in s.7 encompasses notions of personal autonomy (at least with respect to the right to make choices concerning one's own body), control over one's physical and psychological integrity which is free from state interference, and basic human dignity.⁵²

The Supreme Court has ruled that the right to security of the person can be violated by laws or government actions that increase risks to health (for example, where delays in obtaining abortions result in an increased probability of serious harm).⁵³

In many cases, the Supreme Court of Canada has commented on the high degree of importance ascribed to protecting the right to bodily integrity (as an element of security of the person). One line of cases involves strip searches, body cavity searches and taking blood, hair and tissue samples from criminal suspects.⁵⁴ In the words of the court, "Canadians think of their bodies as the outward manifestation of themselves. It is considered to be uniquely important and uniquely theirs. Any invasion of the body is an invasion of the particular person. Indeed, it is the ultimate invasion of personal dignity and privacy."⁵⁵ Another line of cases

interpreting the right to bodily integrity comes from the medical context, such as the right to refuse medical treatment and manufacturers' duty to disclose dangers inherent in the use of their products (as in the potential for breast implants to rupture).⁵⁶ Therefore, it seems logical that the intrusive presence of harmful levels of toxic substances (such as mercury or PCBs) in a person's body could also be considered a violation of the right to bodily integrity and therefore a potential violation of section 7.⁵⁷

A contentious issue is whether s. 7 is, or ought to be, the basis for positive state obligations, such as guaranteeing a healthy environment or adequate living standards.⁵⁸ Efforts to broaden the application of s. 7 to incorporate social, economic and environmental rights have generally not succeeded, although the Supreme Court has deliberately left the door open. On behalf of the majority in the Gosselin case about reduced welfare payments for young people in Quebec, Chief Justice McLachlin wrote:

Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar. One day s. 7 may be interpreted to include positive obligations. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not. I leave open the possibility that a positive obligation to sustain life, liberty, or security of person may be made out in special circumstances. However, this is not such a case."⁵⁹

Justices Arbour and L'Heureux-Dube, dissenting in Gosselin, argued that s. 7 established a positive obligation on the state to make provision for everyone's basic needs.⁶⁰ The decision in Chaoulli, striking down Quebec's prohibition of private health insurance, may have marked a new era in the Supreme Court's interpretation of s. 7, suggesting the Court is willing to take a broader, more flexible approach.⁶¹

The legal attributes of a potentially successful s. 7 case can be ascertained by reviewing past jurisprudence on this and other Charter rights. First, applicants must meet the test for standing — either a directly affected interest (e.g., adverse health effects) or public interest standing, which is at the court's discretion. A court's decision on public interest standing depends on whether the applicant has a genuine interest, the case presents a serious legal issue, and there are no other effective means to bring the issue before the court. Second,

there must be government action or inaction that is alleged to violate the right to life, liberty and security of the person. Government involvement could take the form of an investment, a project on Crown land or the issuance of a permit or licence authorizing some kind of activity. Third, a relatively direct causal nexus between the government action and the alleged harm must exist. In previous s. 7 cases, adverse health effects from cruise missile testing that allegedly increased the risk of war, and inadequate liability regimes for nuclear facilities that allegedly increased the risk of accidents were considered too speculative. Fourth, the deprivation of the right to life, liberty and security of the person must be contrary to the “principles of fundamental justice.” According to the Supreme Court, to constitute a principle of fundamental justice for the purposes of s. 7, a rule or principle must:

- 1) be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and
- 2) be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.⁶²

Fifth, once a claimant has established a violation of one or more Charter rights, the onus shifts to the government to justify the infringement.⁶³ Section 1 reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court has stated that “a violation of section 7 will be saved by section 1 only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.”⁶⁴ Thus it is highly unlikely that a government could justify an environmental hazard that violated a person’s right to life or security.

In at least 10 previous cases, litigants have attempted to rely on s. 7 to challenge environmental harms. These cases involved claims that s. 7 was violated by: cruise missile testing in northern Canada;⁶⁵

- inadequate liability limits for nuclear reactors, increasing the likelihood of nuclear proliferation and nuclear accidents;⁶⁶
- adverse health effects from a proposed municipal waste incinerator;⁶⁷
- adverse health effects from a proposed landfill;⁶⁸
- fluoridation of public water supplies;⁶⁹

- the approval and use of toxic pesticides;⁷⁰ and
- pollution from proposed oil and gas wells.⁷¹

Although none of these previous cases was successful, the Supreme Court of Canada and other courts have been careful to leave the door open for cases that might produce a different result. While the track record of failure may be discouraging, it is important to bear in mind that this reflects the evolutionary process of law. Often a series of unsuccessful cases will be brought before victory is ultimately achieved. A classic example involves segregated schooling in the U.S., which was challenged in lawsuits for decades before the U.S. Supreme Court issued its landmark judgment in *Brown v. Board of Education* in 1954.⁷²

There are four reasons for cautious optimism if and when a compelling case 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 cases. Third, the Court frequently relies on international law and the decisions of other national courts, and both of these sources of law support recognition of an implicit right to a healthy environment. Fourth, the Court describes the Constitution as a “living tree” and emphasizes the need to interpret the document progressively over time to meet changing circumstances.

In a series of cases dating back to the 1970s, the Supreme Court of Canada has repeatedly demonstrated an understanding of the need for stronger legal protection of the environment. In a 1978 case dealing with garbage dumped in a creek, the Court stated that the prevention of pollution “is a matter of great public concern.”⁷³ In the *Sparrow* case involving Aboriginal fishing rights, the Court ruled that legitimate conservation concerns must always be the overriding priority in fisheries management, even where constitutionally protected Aboriginal rights are involved.⁷⁴ In *Friends of the Oldman River*, the Supreme Court found the federal government had failed to follow its own rules governing environmental assessment, and stated, “the protection of the environment has become one of the major challenges of our time.”⁷⁵ In a case involving the prosecution of Hydro-Québec for dumping PCBs into a river, the Court upheld the constitutionality of the Canadian Environmental Protection Act and stated that protecting the environment is a matter of “super-ordinate public importance.”⁷⁶ In a lawsuit brought by chemical companies challenging the validity of a municipal pesticide bylaw in Hudson, Quebec, the Supreme Court upheld the bylaw and endorsed the precautionary principle as a key element of environmental management.⁷⁷ In *Hudson*, the Court stated, “Our common future, that of every Canadian community, depends on a healthy environment.” In a case involving Imperial Oil’s liability for cleaning up a contaminated site in Quebec, the Court strongly endorsed the polluter pays principle.⁷⁸ In a 2004 case involving damage to forests, the court repeatedly referred to the fundamental value of environmental protection and

suggested that the law must evolve to assist in realizing this value.⁷⁹ In 2008, the Supreme Court endorsed the awarding of damages in an environmental class action lawsuit based on dust and foul odours from a cement plant.⁸⁰

Second and perhaps even more importantly, in 1995 the Supreme Court of Canada made the following observation in an environmental case:

It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment... Everyone is aware that individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, *Crimes Against the Environment*,^{supra}, which concluded at p. 8 that:

...a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the *right to a safe environment*.

To some extent, this right and value appears to be new and emerging, but in part because it is an extension of existing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as *quality of life*, and *stewardship* of the natural environment. At the same time, traditional values as well have simply expanded and evolved to include the environment now as an area and interest of direct and primary concern. Among these values fundamental to the purposes and protections of criminal law are the *sanctity of life*, the *inviolability and integrity of persons*, and *the protection of human life and health*. It is increasingly understood that certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health.⁸¹

The Supreme Court reiterated this statement in a subsequent case.⁸² As well, in a Quebec case dealing with pollution, the Court commented extensively on "the fundamental right to the preservation of the quality of the environment."⁸³ Most recently, in a decision that upheld a noise bylaw in Montreal, the court endorsed the statement that "the citizens of a city, even a city the size of Montreal, have the right to a healthy environment."⁸⁴ The Supreme Court's repeated references to the right to a safe or healthy environment establish a body of precedents that bode well for future efforts to expand the scope and impact of this right in Canada.

The Federal Court of Appeal also referred positively to the individual's right to a safe environment in a case where it quashed the registration of a toxic pesticide.⁸⁵ Another leading Canadian case (decided by the Newfoundland Court of Appeal) referred to "the rights of future generations to the protection of the present integrity of the natural world," from which it surely follows that current generations must possess a similar right.⁸⁶

Third, Canadian courts are relatively open to considering principles and precedents from other jurisdictions.⁸⁷ Courts around the world are engaged in a dialogue concerning similar legal questions, a phenomenon known as trans-judicialism.⁸⁸ As described earlier, the argument that other constitutional rights should be interpreted as including an implicit right to a healthy environment has been accepted by courts in at least 20 nations.⁸⁹ These include Argentina, Bangladesh, Costa Rica, El Salvador, Estonia, Greece, Guatemala, India, Israel, Italy, Kenya, Malaysia, Nigeria, Nepal, Pakistan, Peru, Romania, Sri Lanka, Tanzania and Uruguay. On the other hand, in several cases during the 1970s, U.S. courts rejected the argument that there is an implicit constitutional right to a healthy environment.⁹⁰ Of course, the decisions of foreign courts are persuasive rather than binding on Canadian courts.

Extensive international jurisprudence also supports the argument that environmental hazards can violate the right to life, from tribunals including the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Court of Human Rights, the European Committee of Social Rights, the African Commission on Human and Peoples' Rights and the UN Human Rights Committee. A strong argument can be made that the right to a healthy environment is now a general principle of law as well as customary international law. This substantial and growing body of international law clearly supports Canadian recognition of an implicit constitutional right to a healthy environment.

Fourth, as the Supreme Court of Canada has stated, Canada's Constitution is intended to be a living tree, "drafted with an eye to the future"... and must "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."⁹¹ The Supreme Court also has repeatedly stated that the interpretation of the Charter should be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."⁹²

Moving Forward on Option 2

Any concerned citizen, environmental non-governmental organization (ENGO) or community could file a lawsuit targeting a specific government action, arguing that the implicit right to live in a healthy environment is being violated. Potential cases could challenge:

- approval of pesticides that have been banned in other nations;

- inadequate regulation of toxic substances that are found in the bodies of Canadians (the chemical body burden);
- voluntary air quality guidelines that fail to protect Canadians' health and are substantially weaker than comparable national standards in other countries;
- drinking water guidelines that are unenforceable, fail to protect health and are substantially weaker than comparable national standards in other countries;
- industrial facilities that are having demonstrable adverse health effects on local communities; or
- other situations where there is government involvement in the production or approval of an activity or product resulting in an environmental hazard that has harmed or is likely to harm human health.

Each potential case would involve difficulties with respect to both the scientific evidence and the associated legal issues. It is challenging to establish a causal link between the source of a pollutant and demonstrable adverse health effects.⁹³ An extensive time period and substantial costs would likely be involved with identifying, financing and preparing the litigation. Notwithstanding the challenges, environmental lawyer Jerry V. DeMarco analyzed the Supreme Court jurisprudence summarized above and concluded, "there is an open invitation for innovative litigation aimed at protecting the rights and interests of present and future generations in a healthy environment. Given the greater understanding of the relationships between a clean environment and human health and well-being, this evolution may also end up incorporating a role for the Charter in safeguarding today's society and our children."⁹⁴

One lawsuit underway in Ontario could invoke the implicit constitutional right to a healthy environment. On behalf of Ada Lockridge and Ron Plain, two members of the Aamjiwnaang First Nation in Sarnia (Canada's Chemical Valley), Ecojustice filed a lawsuit in 2010 asserting that chemical pollution is violating ss. 7 and 15 (equality rights) of the Charter.⁹⁵ The lawsuit against Ontario's Ministry of the Environment challenges a government decision to approve an increase in air pollution from a Suncor petroleum refinery. In a nutshell, Lockridge and Plain argue that by permitting additional releases of sulphur dioxide, nitrogen oxides, hydrogen sulfide, particulate matter and benzene in what is already the most heavily polluted area of Canada, the government has violated the right to life, liberty and security of the person.⁹⁶ There is solid medical evidence that these pollutants cause an array of adverse health effects, including cancer, cardiovascular disease, respiratory disease and damage to reproductive, neurological and developmental systems. The Aamjiwnaang people suffer from elevated rates

of cancer and asthma, a skewed birth ratio and far below average life expectancy.⁹⁷ The case is strengthened by the fact that the increased levels of pollution were negotiated and approved in secret, violating principles of fundamental justice. The lawsuit also asserts a violation of equality rights under s. 15 of the Charter, arguing that members of the Aamjiwnaang First Nation already suffer from a disproportionate burden of air pollution, which would be exacerbated by the approved increase.

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. Judicial references involve important questions of law concerning the interpretation of the constitution, the constitutionality or interpretation of any federal or provincial legislation, or any other important legal question. A key feature is that governments are able to ask courts to answer hypothetical questions in the absence of a dispute between parties. As one judge wrote, the “very reason why [judicial reference] legislation (giving governments the power to refer any matter to the court for an opinion) has been enacted is to overcome the general principle that courts will not entertain claims that are hypothetical or merely academic.”⁹⁸

References can be initiated by either the federal government or any provincial or territorial government. Federally initiated judicial references (through the Governor in Council, or Cabinet) go directly to the Supreme Court of Canada.⁹⁹ Provincially initiated references (through the Lieutenant Governor in Council, or Cabinet) go to the appropriate provincial Court of Appeal.¹⁰⁰ The Yukon follows the same process as the provinces.¹⁰¹ In the NWT and Nunavut, the reference procedure is slightly different, in that the Minister of Justice refers questions to the NWT Supreme Court and Nunavut Court of Justice, respectively.¹⁰² Decisions from provincial and territorial courts in judicial references can be appealed to the Supreme Court of Canada as of right, meaning permission for leave to appeal is not required.¹⁰³

The relevant court determines how the reference will actually proceed: what material should be presented, who should participate and how long the process will take. In all cases, interested groups and individuals can apply to the courts to participate as interveners. Where the government of any province has a special interest in a question put in a reference, the attorney general of the province must be notified so that he or she may participate.

Throughout Canada’s history, reference cases have tackled many important issues, and accordingly have a strong degree of legal legitimacy and public acceptance.¹⁰⁴ As several experts observed, “The process has been widely accepted and the reference opinions have withstood the test of time as well as any of the thousands of decisions Canadian courts have

rendered.”¹⁰⁵ In theory, reference judgments are advisory opinions only and are not legally binding, yet in practice they do establish precedents and are followed by governments.¹⁰⁶ Arguments against references are that they involve abstract legal questions better answered in the context of specific factual controversies, that interested parties may not be involved and that it is an elitist process.¹⁰⁷

More than 70 references have been made by the federal government to the Supreme Court since the first one in 1892, including questions about the constitutionality of Senate reform that are currently pending resolution. Among the most prominent in recent decades have been the Anti-Inflation Act Reference [1976], the Senate Reference [1980], the Newfoundland Continental Shelf Reference [1984], the Manitoba Language Rights Reference [1984], the Ng Extradition Reference [1991], the David Milgaard Conviction Reference [1991], the Reference re Quebec Secession, [1998], the Reference re Same-sex Marriage (2004) and the Reference re Securities Act (2011).¹⁰⁸ The Supreme Court has also heard dozens of references initiated by provincial governments. Examples include the Constitutional Patriation Reference (1981), the Quebec Veto Reference (1982), the Provincial Court Judges Reference (1997) and the Firearms Act Reference (2000).

The Persons Case

Perhaps the most famous reference in Canadian history was the so-called Persons Case.¹⁰⁹ In 1927, five Canadian women — Henrietta Muir Edwards, Nellie L. McClung, Louise C. McKinney, Emily F. Murphy and Irene Parlby — submitted a petition to the federal government requesting that the question “Does the word ‘persons’ in section 24 of the British North America Act, 1867, include female persons?” be submitted via the reference procedure to the Supreme Court of Canada. The federal Cabinet honoured their request, and the Supreme Court infamously ruled that although women were persons in a general sense, the phrase “qualified persons” in s. 24 of the British North America Act did not include them.¹¹⁰

The Supreme Court decision was appealed to the Judicial Committee of the Privy Council in England, at the time the highest court of appeal for Canada. In 1929, Lord Sankey, Lord Chancellor of the Privy Council, announced the decision that “yes, women are persons... and eligible to be summoned and may become Members of the Senate of Canada.” The Privy Council decision recognized “that the exclusion of women from all public offices is a relic of days more barbarous than ours. And to those who would ask why the word ‘persons’ should include females, the obvious answer is, why should it not?”¹¹¹ Although technically about the eligibility of women to sit in the Senate, the decision had broad implications for women’s right to equality in Canada.¹¹²

The Persons Case is also important because it established the so-called “living tree doctrine,” which says that a constitution is organic and must be read in a broad and liberal manner so as to adapt it to changing times.¹¹³ According to the Judicial Committee of the Privy Council, Canada’s Constitution is intended to be “a living tree capable of growth and expansion within its natural limits.”¹¹⁴ The Supreme Court of Canada had ruled that the word *persons* had to be interpreted in a manner consistent with the original intent of the drafters of the British North America Act in 1867. The Judicial Committee of the Privy Council rejected that approach.

Moving Forward on Option 3

The Persons Case offers a compelling precedent for the right to a healthy environment. An environmental group, First Nation, human rights organization or coalition could formally request that the federal government initiate a reference to the Supreme Court of Canada to determine whether the right to a healthy environment is implicit in the Constitution. A government must approve every reference before it can be initiated but can do so at the request of other parties. In the past, references have been commenced at the behest of NGOs, businesses and foreign governments.¹¹⁵ For example, in addition to the Persons Case, a 1946 reference about the rights of persons of Japanese descent was initiated by pressure from an NGO called the Co-operative Committee on Japanese Canadians.¹¹⁵

Seeking a reference could create considerable public attention for the concept of the right to a healthy environment. The Persons case was preceded by petitions and letters from hundreds of thousands of Canadians supporting the appointment of women to the Senate. If the federal government refused to initiate the process, provincial and territorial governments could be approached. It seems plausible that at least one provincial or territorial government would be willing to initiate a reference, assuming it could be convinced there were political benefits to be reaped. If a court (ideally the Supreme Court) issued a positive ruling, the right to a healthy environment would enjoy unprecedented constitutional recognition in Canada. If a court issued a negative ruling, it could provide additional momentum for a campaign to secure the direct amendment of the Constitution, as the court’s judgment could be portrayed as out of sync with the values of the overwhelming majority of Canadians.

As a hypothetical example, a reference on the right to a healthy environment could ask the following types of questions:

- 1) 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?
- 2) Does the presence of mercury, PCBs or other contaminants of concern found in the blood, fat or other body tissue of Canadians violate s. 7 of the Charter?

3) Do Canadian governments have a constitutional duty to ensure clean air, clean water and other elements of a healthy environment?

It is certain that large numbers of interested groups from across the political spectrum would apply for permission to participate in such a case as interveners, thus ensuring that the Supreme Court heard submissions from a broad range of Canadians. For example, in the same-sex marriage case, the Supreme Court heard arguments from 29 individuals and groups in addition to the federal government.¹¹⁶

Comparison Of Options

To reiterate, there are three pathways to constitutional recognition of the right to a healthy environment:

- a direct amendment to Canada's Constitution;
- a lawsuit asserting that a specific environmental harm is violating the implicit right to a healthy environment in section 7 of the Charter; *or*
- a judicial reference by one or more governments asking courts to determine whether section 7 of the Charter includes an implicit right to a healthy environment.

Each option has pros and cons, which are not mutually exclusive. None offers a guaranteed outcome. Directly amending the Constitution would have the greatest impact legally, practically and symbolically, but it is widely perceived by the public and political elites as tantamount to impossible. Although 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. It would also take strategic and sustained effort to avoid the proposed right to a healthy environment from being linked to other constitutional changes. Linkage, especially related to Quebec issues, would likely complicate and delay matters to the extent that the proposal could bog down.

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, there would likely be tremendous grassroots support for constitutional recognition of the right to a healthy environment. 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 spectre of a flood of litigation and the fact that Canada already has extensive measures in place to safeguard human rights and the environment. Industry's vitriolic opposition to the proposed Canadian Environmental Bill of Rights (Bill C-469) offered a preview of the negativity and intensity that would likely characterize their opposition to a proposed constitutional amendment.¹¹⁷ Representatives from the Canadian Chamber of Commerce, the Canadian Association of Petroleum Producers and other industry associations warned that Bill C-469 would freeze capital investment in Canada and inflict economic chaos while serving the interests of a small number of special interest groups. The experiences of other countries with constitutional environmental rights and responsibilities and Canada's own experience with the Charter demonstrate that none of these arguments is persuasive.

The two legal options — litigation and a judicial reference — would seek the same result, a court ruling that the right to a healthy environment is implicitly included in the right to life, liberty and security of the person and therefore enjoys constitutional protection. At the risk of stating the obvious, litigation is always expensive, time-consuming and rife with uncertainty. On the plus side, these legal options would avoid the linkage problem, preventing other interests from piggybacking on the amendment of the Charter to push for other constitutional reforms. However, opponents — both government and industry — would be expected to mount a vigorous campaign to defeat either of these types of legal proceedings.

Lawsuits asserting a violation of the implicit right to a healthy environment face considerable factual, scientific and legal hurdles. As in almost any legal action, there are both positive and negative precedents. Past efforts to persuade Canadian courts that section 7 of the Charter ought to be broadly construed to encompass the right to a healthy environment have failed. The challenges facing the Aamjiwnaang case (and other future section 7 lawsuits) should not be underestimated. Yet this approach has been remarkably successful in many other nations and enjoys support in international law. Given the enlightened jurisprudence of the Supreme Court of Canada in environmental cases, this option has significant potential. As environmental issues continue to be a significant concern to Canadians, the question of whether the Charter includes an implicit right to a healthy environment will likely be placed squarely before the Supreme Court eventually. The Aamjiwnaang case could conceivably do so within the next five years.

Assuming that a willing government could be found, the reference procedure would be faster and less expensive than starting a lawsuit. A reference would also be less complicated

because it would avoid factual disputes and focus strictly on legal questions. NGOs campaigning for a reference could harness the popular appeal of the Persons case. If the federal government could not be persuaded to initiate the reference procedure, more time would be needed because provincial/territorial references must go to courts of appeal before proceeding to the more authoritative Supreme Court of Canada. As with the litigation option, a reference faces substantial uncertainty despite the precedents from other nations, international law and the Supreme Court's strong track record in environmental cases.

Conclusion

Canada's Constitution must not be viewed as written in stone, changes must not be viewed as taboo and progress must not be barred by those obsessed with the unsuccessful battles of the past. Constitutions, as Prof. Lorraine Weinrib describes them, are "organic instruments" that must continue to evolve in concert with societal values.¹¹⁸ 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 Constitution belongs to the people of Canada, not to governments. Political elites no longer have a monopoly on constitutional reform. Canadians have a direct interest in participating in, and contributing to, proposed changes. As Alan Cairns concluded, "The Charter has permanently and drastically altered constitutional politics in Canada."¹¹⁹ The call for recognition of the right to a healthy environment should come from the people and be for the people, instead of emerging from behind the closed doors of a first ministers' meeting. The process of enshrining environmental rights and responsibilities in the constitution should be open, transparent and democratic, including approval in a national referendum. It would be consistent with the deep affection, even reverence, that Canadians have for the natural beauty and splendour of this great country to give voice to their pride through the Constitution. To motivate governments to take action on this issue will require the committed support of Canadians of all ages, all backgrounds, all provinces and territories and all political persuasions. It will require the support of environmental groups, unions, businesses, Aboriginal people, opinion leaders, soccer moms, youths, seniors, activists, new Canadians, farmers, blue-collar workers, white-collar workers and green-collar workers. A grassroots movement could push for recognition of environmental rights at all levels — municipal, regional, provincial/territorial and federal. Five provinces and territories already recognize the right to a healthy environment. The city of Montreal passed a pioneering municipal charter that includes environmental rights and responsibilities.¹²⁰ Local victories could establish momentum toward the ultimate goal of constitutional recognition. The prime minister and the premiers must put aside philosophical differences and demonstrate genuine leadership. The

right to a healthy environment should be a unifying constitutional issue because it focuses on our common desire to protect Canada's magnificent natural heritage rather than on potentially divisive differences such as language and multiculturalism.

Would constitutional recognition of environmental rights and responsibilities really make a substantial difference in Canada? For residents of Sarnia, Ontario, who live in the midst of Canada's most notorious concentration of industrial polluters, the answer is yes. For communities with unsafe drinking water, the answer is yes. For people suffering from respiratory difficulties because of poor air quality, the answer is yes. For endangered species pushed to the brink of extinction by reckless human activities, the answer is yes. For every Canadian who believes that the environment is important and ought to be better cared for — whether to protect our health, the planet's health or the interests of future generations — the answer is yes.

The simple reality is this: Canada cannot become a sustainable nation with existing laws and institutions. Our laws must be amended to recognize the ironclad and irrevocable laws of nature. Our society needs to shift its focus toward improving our quality of life and reducing inequality rather than myopically seeking to increase the GDP. Our economy must be transformed from the linear (burning fossil fuels, consuming resources and creating waste) to the circular — using renewable energy to power a society where everything can be reused, recycled or composted. Our financial system needs to get the prices right by incorporating the full costs of goods and services. Taxes need to be shifted away from beneficial activities such as work and investment to damaging actions such as waste and pollution. The focus of our health-care system must move from treatment to prevention. Our schools need to make ecological literacy a priority on par with reading and writing. The archaic first-past-the-post electoral system needs to be replaced with a system that honours all votes and offers more representative democracy.

Constitutional protection for the environment, especially the right to a healthy environment, is an integral part of this suite of systemic changes. It has the potential to transform Canada's legal system and alter our vision of the world, bringing us closer to the elusive goal of achieving sustainability. It would mark a change of course, an admission that we have not been up to the task, and a meaningful, enforceable promise to do better in the future. 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.

Appendix A: France's Charter for the Environment (2005)

The French people, considering that:

- natural resources and ecosystems have contributed to the emergence of humanity;
- the future and the very existence of humanity are intrinsically linked with its natural environment;
- the environment is the common heritage of all human beings;
- mankind has a growing influence on the conditions of life and on its own evolution;
- biological diversity, personal fulfillment and progress of human societies are affected by certain types of consumption or production and by the excessive exploitation of natural resources;
- the preservation of the environment must be achieved with the same devotion as other fundamental national interests;
- in order to ensure sustainable development, choices aiming to meet present needs must not compromise the capacity of future generations and other peoples to satisfy their own needs;

Hereby proclaim:

Article 1. Everyone has the right to live in an environment that is both well balanced and favorable to his/her health.

Article 2. Every person has the duty to take part in the preservation and the improvement of the environment.

Article 3. Every person must, in the conditions defined by law, prevent or, at a minimum, limit the harm that it is susceptible to bring on the environment.

Article 4. Every person must contribute to the reparation of damages that it causes to the environment, in the conditions defined by law.

Article 5. Upon the risk of damage, even when uncertain given current scientific knowledge, that might impact the environment in a serious and irreversible manner, public authorities will ensure, by application of the precautionary principle, the adoption of appropriate provisional measures aiming to avoid the risk of the damage and to implement evaluation procedures to measure the level of risk.

Article 6. Public policies must promote sustainable development. To this effect, they must take into account the protection and the improvement of the environment and must reconcile these objectives with economic and social development.

Article 7. Every person has the right, under limited conditions defined by law, to access information relative to the environment that is held by public authorities, and to participate in the creation of public decisions that have an impact on the environment.

Article 8. Education and information on the environment must contribute to the implementation of the rights and responsibilities defined by this charter.

Article 9. Research and innovation must bring their participation to the preservation and improvement of the environment.

Article 10. This charter inspires France into action within the European Union and international community.

Endnotes

¹ Russell, P.H. 2004. *Constitutional Odyssey: Can Canadians become a sovereign people?* Toronto: University of Toronto Press, p. vii.

² Russell, P.H. 2004. *Constitutional Odyssey: Can Canadians become a sovereign people?* Toronto: University of Toronto Press.

³ Manfredi, C.P. 2002. "Strategic Behaviour and the Canadian Charter of Rights and Freedoms." In *The Myth of the Sacred: The Charter, the Courts and the Politics of the Constitution in Canada*, ed. P. James, D. Abelson, and M. Lusztig, 147-67. Montreal and Kingston: McGill-Queen's University Press.

⁴ Russell, P.H. 2004. *Constitutional Odyssey: Can Canadians become a sovereign people?* Toronto: University of Toronto Press, p. 228.

⁵ Ollivier, C. 2001. "French President Issues Strong Call to Protect the Environment," Associated Press, May 3, 2001.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Chirac, J. 2004. "Statement." Delivered at the Opening Ceremony of the Founding Congress of the World Organization for Cities and Local Government, Paris, 2 May.

⁹ Case, D. 2005. "Liberte, Egalite, Environment: The French Constitution gets a Dash of Green," *The Daily Grist*, July 14, 2005.

¹⁰ Marrani, D. 2008. "The second anniversary of the constitutionalisation of the French charter for the environment: Constitutional and environmental implications," *Environmental Law Review* 10(1): 9-27 at 25; Marrani, D. 2009. "Human Rights and Environmental Protection: The Pressure of the Charter for the Environment on French Administrative Courts," *Sustainable Development Law and Policy* 10(1): 52.

¹¹ Prieur, M. 2008. "La Chart de l'environnement: Droit Dur ou Gadget Politique?" *Pouvoirs* No. 127, 2008(4): 49-65; Marrani, D. 2008. "The second anniversary of the constitutionalisation of the French charter for the environment: Constitutional and environmental implications," *Environmental Law Review* 10(1): 9-27.

¹² *l'Association France Nature Environnement*, Conseil d'État, N° 306242. *Commune d'Annecy*, Conseil d'État, N° 297931.

¹³ 38(1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

- (a) resolutions of the Senate and House of Commons; and
- (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty percent of the population of all the provinces.

¹⁴ The unanimity formula is required for constitutional amendments that affect

- the office of the Queen, the Governor General and the Lieutenant Governor of a province;
- the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
 - the use of the English or French language
 - the composition of the Supreme Court of Canada; or
 - the constitutional amendment procedures. Constitution Act, 1982, s. 41.

To date, no constitutional amendment has been made pursuant to this provision.

¹⁵ P.W. Hogg. *The Constitution of Canada* DATE? TITLE?

¹⁶ Constitution Act, 1982, s. 39(2).

¹⁷ Statistics Canada. 2013. "Population by year, by province and territory."

¹⁸ Constitution Act, 1982, s. 47.

¹⁹ *Act Respecting Constitutional Amendments*, S.C. 1996, c. 1.

²⁰ Swartz, T., and A. Heard. 1997. "The Regional Veto Formula and Its Effects on Canada's Constitutional Amending Process." *Canadian Journal of Political Science* 30, 2: 339-56; Cameron, D.R., and J.D. Krikorian. 2008. "Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process." *University of Toronto Law Journal* 58, 4: 389-420.

²¹ Constitutional Referendum Act, R.S.A. 2000, c. C-25. *Constitutional Amendment Approval Act*, R.S.B.C. 1996, c. 67.

²² Constitutional Referendum Act, R.S.A. 2000, c. C-25, ss. 2 and 4.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Holding referendums

1 The Lieutenant Governor in Council may order that a referendum be held on any question relating to the Constitution of Canada or relating to or arising out of a possible change to the Constitution of Canada.

Referendum to precede constitutional change

2(1) The Lieutenant Governor in Council shall order the holding of a referendum before a resolution authorizing an amendment to the Constitution of Canada is voted on by the Legislative Assembly.

(2) The motion for the resolution may be introduced in the Legislative Assembly before the referendum is held.

Question to be asked

3 The question or questions to be put to the electors at a referendum shall be determined by a resolution of the Legislative Assembly on the motion of a member of the Executive Council.

When referendum binding

4(1) If a majority of the ballots validly cast at a referendum vote the same way on a question stated, the result is binding, within the meaning of subsection (2), on the government that initiated the referendum.

(2) If the results of a referendum are binding, the government that initiated the referendum shall, as soon as practicable, take any steps within the competence of the Government of Alberta that it considers necessary or advisable to implement the results of the referendum.

²³ *Constitutional Amendment Approval Act*, R.S.B.C. 1996, c. 67.

Preamble

WHEREAS Canadians are involved in reassessing the Constitution of Canada;
AND WHEREAS the Constitution of Canada is the Supreme Law of Canada;
AND WHEREAS constitutional amendment has an impact on all British Columbians;
AND WHEREAS it is essential that the Constitution of Canada reflect the values of British Columbians and that British Columbians have an opportunity to indicate their views on any proposed constitutional amendment;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Referendum to precede resolution for constitutional change

1 The government must not introduce a motion for a resolution of the Legislative Assembly authorizing an amendment to the Constitution of Canada unless a referendum has first been conducted under the *Referendum Act* with respect to the subject matter of that resolution.

²⁴ Russell, P.H. 2004. *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Toronto: University of Toronto Press. P. 239.

²⁵ *Constitution Amendment Proclamation* (1983).

²⁶ Section 93A was added to the *Constitution Act, 1867*, so that sections 93(1) to (4) no longer apply to Quebec.

²⁷ *An Act to Amend the Constitution Act, 1867, the Electoral Boundaries Readjustment Act and the Canada Elections Act* (2011).

²⁸ Newman, W.J. 2007. "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada." In *A Living Tree: The Legacy of 1982 in Canada's Political Evolution*, ed. G. Mitchell, Z. Peach, D.E. Smith, and J.D. Whyte, 747-80. Markham: LexisNexis Canada and Saskatchewan Institute of Public Policy. See p. 749.

²⁹ Hurley, J.R. 1996. *Amending Canada's Constitution*. Ottawa: Minister of Supply and Services, 99-136.

³⁰ *Constitution Act, 1982*, s. 46.

³¹ Reference re Secession of Quebec, para 69.

³² Reference re Secession of Quebec, para 69.

³³ Cameron and Krikorian (2008, 394).

³⁴ Mulvihill, P. 1988. "Would Constitutional Property Rights Inhibit Environmental Protection?" *Alternatives* 15, 2: 5-8.

³⁵ Newman, W.J. 2007. "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada." In *A Living Tree: The Legacy of 1982 in Canada's Political Evolution*, ed. G. Mitchell, Z. Peach, D.E. Smith, and J.D. Whyte, 747-80. See pg. 771.

³⁶ Watts, R. 1996. *Comparing Federal Systems in the 1990s*. Kingston: Queen's University Institute of Intergovernmental Relations. See pp. xiv, 114).

³⁷ *Ibid.*, 114.

³⁸ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, s. 7.

³⁹ *Egan v. Canada*, [1995]; *Vriend v. Alberta*, [1998].

⁴⁰ Collins, L.M. 2009. "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms," *Windsor Review of Legal and Social Issues* 26:7; Demarco, J.V. 2007. "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could be Next in Canadian Environmental Law?" *17 Journal of Environmental Law & Practice*, 159; DeMarco, J. V. 2004. "Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law." *Journal of Environmental Law & Practice*, 27; Gage, A. 2003. "Public Health Hazards and S. 7 of the Charter." *Journal of Environmental Law and Practice* 13, 1: 1-34; Hatherly, M. 1987. "Constitutional Amendment," in D. Tingley, ed. *Environmental Protection and the Canadian Constitution*. Edmonton: Environmental Law Centre, p. 130. C. Stevenson. 1983.

⁴¹ Stevenson, C.P. 1983. "A New Perspective on Environmental Rights after the Charter." *Osgoode Hall Law Journal* 21, 3: 390-421. See p. 413.

⁴² Saxe, D. 1990. *Environmental Offences: Corporate Responsibility and Executive Liability*. Aurora, ON: Canada Law Book. See p. 9.

⁴³ Collins, L.M. 2009. "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms." *Windsor Review of Legal and Social Issues* 26:7 at 21.

⁴⁴ Borrows, J. 2010. *Canada's Indigenous Constitution*. Toronto: University of Toronto Press.

⁴⁵ Sharpe, R., and K. Roach. 2009. *The Charter of Rights and Freedoms*. Toronto: Irwin Law. See p. 232). Young, M. 2005. "Section 7 and the Politics of Social Justice," *UBC Law Review* 38(2): 539-560.

⁴⁶ *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441.

⁴⁷ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, at para. 205. Steps originally delineated by La Forest J. in *R. v. Beare*, [1988] 2 S.C.R. 387, at p.401.

⁴⁸ *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 204-5. See also Reference *Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486.

⁴⁹ *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; Reference *Re Ng Extradition*, [1991] 2 S.C.R. 858; *United States v. Burns*, [2001] 1 S.C.R. 283.

- ⁵⁰ *Godbout v. Longueuil (Ville)*, [1997] 3 S.C.R. 844 at para 66.
- ⁵¹ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.
- ⁵² *R. v. Morgenthaler*, [1998] 1 S.C.R. 30.
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- ⁶⁰ *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791.
- ⁶¹ *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 SCR 571. See also *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para. 8.
- ⁶² *R. v. Oakes*, [1986] 1 S.C.R. 103.
- ⁶³ *R. v. D.B.*, [2008] 2 S.C.R. 3, para. 89. *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3. para 78
- ⁶⁴ *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441.
- ⁶⁵ *Energy Probe v. A.G. Canada* (1994), 17 O.R. (3d) 717 (Ont. Gen. Div.); *Energy Probe v. Canada (Attorney General)* (1989), 58 D.L.R. (4th) 513 (Ont. C.A.).
- ⁶⁶ *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority* 10 C.E.L.R. (N.S.) 257 (N.S.S.C.), reversed 108 D.L.R. (4th) 145 (N.S.C.A.).

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- ⁶⁸ *Locke v. Calgary*, [1993] A.J. No. 926 (Q.B.). *Millership et al. v. British Columbia et al.* 2003 BCSC 82.
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¹⁰⁷ *Reference re Quebec Secession*, [1998] 2 S.C.R. 217.

¹⁰⁸ *Reference re British North America Act 1867 (UK) Section 24* [1928] S.C.R. 276.

¹⁰⁹ It is often erroneously suggested that the Supreme Court of Canada held women are not persons. For example, see. L'Heureux-Dub, C. 2002. "It Takes a Vision: The Constitutionalization of Equality in Canada," *Yale Journal of Law and Feminism* 14(2): 363 at 364. In fact the Court very clearly stated "There can be no doubt that the word "persons" when standing alone prima facie includes women." However, the Court held that women were not qualified persons and thus ineligible to be appointed to the Senate.

¹¹⁰ *Edwards v. Canada (Attorney General)* [1930] A.C. 124 (J.C.P.C.).

¹¹¹ Mahoney, K. 1982. "The Constitutional Law of Equality in Canada." *Maine Law Review* 44, 2: 229-60, at 234.

¹¹² L'Heureux-Dube, C. 2000. "The Legacy of the 'Persons Case': Cultivating the Living Tree's Equality Leaves," *Saskatchewan Law Review* 63: 389.

¹¹³ *Edwards v. Canada (Attorney General)* [1930] A.C. 124 at 136 (J.C.P.C.).

¹¹⁴ *Reference re Persons of the Japanese Race* 1946 SCR, *Reference re Tariff Board of Commerce* 1934 SCR 538, *Reference re Employment of Aliens* 1921 63 SCR 293; Huffman, J.L. and Saathoff, M. 1990. "Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction," *Minnesota Law Review* 74: 1251.

¹¹⁵ *Co-operative Committee on Japanese Canadians v. Attorney General* [1947] A.C. 87 (J.C.P.C.)

¹¹⁶ *Reference re Same-sex Marriage* [2004] 3 S.C.R. 698.

¹¹⁷ Canadian Association of Petroleum Producers and Canadian Chamber of Commerce. 2010. Testimony before the House of Commons Standing Committee on Environment and Sustainable Development. November 2010.

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