The Right to a Healthy Environment

Revitalizing Canada's Constitution

David R. Boyd

Praise for The Right To A Healthy Environment

"David Boyd helped Vancouver develop our bold plan for becoming the greenest city in the world, and with this authoritative and inspiring book he identifies a prerequisite for making Canada the greenest country. We owe it to ourselves, our children, and future generations to include the right to a healthy environment in the Canadian constitution."

- Gregor Robertson, Mayor of Vancouver, co-founder of Happy Planet

"David Boyd doesn't just talk about a paradigm shift, he shows us a path to get there. This book will be important to environmentalists, legal scholars, and policy makers, and to everyone who cares about moving from rhetoric to action on climate and the environment. It is also inspiring and a very good read."

 Dr. Alex Himelfarb, Director of the Glendon School of Public and International Affairs, York University, and former Clerk of the Privy Council (2002-06)

"Boyd's scholarship in environmental human rights is unmatched by any other scholar working in the field worldwide ... This book makes a profoundly important contribution to the fields of environmental law, human rights law, and constitutional law in Canada. The subject touches a matter of universally acknowledged importance to Canadians and the world at large."

- Lynda Collins, Common Law Section, University of Ottawa

"This book highlights that Canada, despite being a wealthy and developed country, lags significantly behind the rest of the world on environmental performance. There is a critical need for Canada to do more, especially from the point of view of protecting human health and well-being. This book explains why environmental rights for Canadians would provide the much-needed impetus for Canada to do more."

- Nickie Vlavianos, Faculty of Law, University of Calgary

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This book is dedicated to Canadian citizens, activists, and political leaders who

- recognize that protection of the environment is a fundamental Canadian value
- understand that a healthy environment is essential to human well-being
- and take the actions necessary to achieve constitutional recognition of the right to live in a healthy and ecologically balanced environment.

The environment is humanity's first right.

- Ken Saro-Wiwa, 1995

We in Canada are fortunate that we can afford to have a civilization of the better rather than a civilization of the more.

- Pierre Elliott Trudeau, 1970

The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory.

- Supreme Court of Canada, 1998

If we unbalance Nature, humankind will suffer. Furthermore, as people alive today, we must consider future generations: a clean environment is a human right like any other. It is therefore part of our responsibility towards others to ensure that the world we pass on is as healthy, if not healthier, than when we found it.

- His Holiness, the Dalai Lama, 1990

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Preface

This book is a sequel to *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012). *The Environmental Rights Revolution* represents five years of exhaustive research about the effects of including environmental protection provisions in national constitutions. In recent decades, the majority of the world's nations have incorporated environmental protection requirements into their highest laws, declared the right to live in a healthy environment a fundamental human right, and thus created legal road maps for a sustainable future. Canada, sadly, is not yet among these nations. Our constitution remains silent on the subject of environmental protection. Nevertheless, I encourage readers to consult *The Environmental Rights Revolution* for the full (and inspiring!) details regarding the three-quarters of the world's nations whose constitutions include environmental rights and/or responsibilities.

Some readers may be cynical about the prospects of amending the Canadian constitution to recognize environmental rights and responsibilities. Canada's constitution is notoriously difficult to amend, as the debacles of Meech Lake and the Charlottetown Accord demonstrated. To potential cynics I offer the following plea: Think about the Canada you are passing on to your children. Can we not emulate Sweden and Norway, similar northern nations striving to pass on to the next generation countries in which the most serious environmental problems have been solved? Think about the courageous individuals in Latin America who stood up to military dictatorships and then created bold new constitutions including environmental rights and responsibilities. Think about the brave people of Eastern Europe, who defied the Soviet empire and then rewrote their constitutions to include the right to a healthy environment. Think of the citizens of Africa, who cast aside the shackles of colonialism to gain independence and wrote constitutions that aspire to achieve the right to a healthy environment. Think of people in Egypt,

Libya, Morocco, and Tunisia, where the recent Arab Spring led to the downfall of dictators and their replacement with constitutional democracies that have enshrined the right to a healthy environment or are considering doing so. Think of the citizens of Iceland, who endured a complete economic collapse and rewrote their constitution as part of their response, incorporating the right to a healthy environment and rights of Nature. If the citizens of more than 140 nations – in every region of the world – can summon the foresight, courage, and intelligence to create constitutions recognizing our dependence upon safe water, clean air, fertile soil, and healthy ecosystems, then so too can Canadians. By converting our highest ideals into constitutional rights and responsibilities, we can build the Canada we want. It may be difficult, even daunting, but surely so is almost everything that is worth doing. As Nelson Mandela wrote, "It always seems impossible, until it's done."

Acknowledgments

Countless individuals made valuable contributions to this book. I am particularly indebted to three outstanding Canadians, each of whom has extensive expertise in the fields of constitutional law and environmental protection. Dale Gibson wrote a white paper on Canada's constitution and the environment in 1970 as well as several pioneering articles on the constitutional right to a healthy environment in the 1980s. Jim MacNeill worked in the Privy Council Office in the early 1970s under Prime Minister Trudeau, publishing a comprehensive study on environmental management and its constitutional implications before going on to write the Brundtland Commission's landmark report on sustainable development, which emphasized the need to extend constitutional status to the right to a healthy environment. Barry Strayer was Pierre Trudeau's constitutional advisor for fifteen years and is a retired Federal Court judge.

I also benefited from enlightening conversations with environmental law experts who have written about the right to a healthy environment, including Will Amos, William Andrews, Lynda Collins, Stewart Elgie, Paul Muldoon, John Swaigen, Margot Venton, and Toby Vigod. I would like to thank some of the protagonists directly involved in the development and repatriation of Canada's *Constitution Act*, 1982, for sharing their reflections and insights, including Lloyd Axworthy, Tom Axworthy, Jean Chrétien, Marc Lalonde, Svend Robinson, and Roy Romanow. My research also benefited from the assistance of P.G. Forest, Ron Graham, Leah Harms, Toby Heaps, and Sarah Miller. I genuinely appreciate the support provided by Jim Boothroyd, Lisa Gue, Tony Maas, Tim Morris, Carol Newell, Devon Page, Peter Robinson, and Terre Satterfield. To David Ohnona, Ken Rempel, Paul Richardson, and Ethan Smith, thanks for listening.

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Abbreviations

CELA Canadian Environmental Law Association

CEPA Canadian Environmental Protection Act

EBR Environmental Bill of Rights, 1993 (Ontario)

EC European Community

ECHR European Court of Human Rights

ENGO environmental non-governmental organization

EU European Union GHGs greenhouse gases

IACHR Inter-American Commission on Human Rights
ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

IUCN International Union for the Conservation of Nature

MP Member of Parliament NDP New Democratic Party

NGO non-governmental organization

NOx nitrogen oxides

OECD Organisation for Economic Co-operation and Development

PCBs polychlorinated biphenyls

SARA Species at Risk Act
UK United Kingdom
UN United Nations

UNECE United Nations Economic Commission for Europe

The Right to a Healthy Environment.....

1

Canada Needs Constitutional Environmental Rights

All human beings have the fundamental right to an environment adequate for their health and well-being.

 World Commission on Environment and Development, Our Common Future

Among the myriad responses to the mounting environmental challenges of the twentieth century and in particular their damaging effects on people's health and well-being was the emergence of a new human right. The right to a healthy environment is intended to ensure that everyone has access to clean air, safe water, fertile soil, and nutritious food, as well as the conservation of biological diversity and ecosystem functions. Rachel Carson, author of *Silent Spring*, first suggested the concept in the early 1960s. Carson testified before President John F. Kennedy's Scientific Advisory Committee, urging it to consider "a much neglected problem, that of the right of the citizen to be secure in his own home against the intrusion of poisons applied by other persons. I speak not as a lawyer but as a biologist and as a human being, but I strongly feel that this is or ought to be one of the basic human rights." 1

The first formal articulation of the right to a healthy environment came in the 1972 *Stockholm Declaration*, which emerged from the inaugural global environmental conference in Sweden: "Principle 1: Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."

Human rights are intended to recognize our most cherished values and express our moral identity as a people.² A human right must possess three defining characteristics, in that it must be universal (held by all persons); moral (existing whether or not a particular nation, government, or legal Sample Material © 2012 UBC Press

system recognizes it); and essential (ensuring the dignity and quality of life of all human beings).3 The right to a healthy environment meets these three requirements. As a biological species, all humans depend on healthy ecosystems for life, health, and well-being. Tim Hayward, author of Constitutional Environmental Rights, asserts that "as a moral proposition, the claim that all human beings have the fundamental right to an environment adequate for their health and well-being is ... unimpeachable."4 Henry Shue writes that "unpolluted air, unpolluted water, [and] adequate food" are among the basic human rights. 5 According to Birnie and Boyle, constitutional acknowledgment of the right to a healthy environment "would recognize the vital character of the environment as a basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfillment of other rights."6 Only a few scholars question the legitimacy of this right. Miller claims that "clean air, like other welfare aspirations, is best understood as a goal" rather than a right. 7 Similarly, Robertson and Merrills argue that "if one wishes to see some objective achieved - a clean and healthy environment, for example - it is tempting to say that this is a right to which we are all entitled. But it is not a good idea to take wishes for reality."8

The philosophical question of whether or not the right to a healthy environment is a legitimate human right appears to have been conclusively put to rest by the widespread recognition, implementation, and enforcement of the right. Since the dawn of the modern environmental era in the 1960s, recognition of the essential connection between human rights and a healthy environment has steadily increased. As of 2012, at least 92 percent of the world's countries (177 out of 193) recognize the right to a healthy environment, through their constitutions, laws, court decisions, or international treaties and declarations (see Chapter 6).

In practice, the right to a healthy environment includes both a substantive right to environmental quality and a suite of procedural safeguards to ensure that it is fulfilled, including the rights to information, to participate in decision making, and to seek remedies for past, present, or anticipated violations. The right establishes a corresponding obligation on governments to respect, protect, and fulfill it. Respecting the right means that governments cannot take actions that violate the right. Protecting the right requires governments to take steps to prevent third parties from violating it. Fulfilling the right involves taking positive steps to ensure that it is fulfilled, such as ensuring the provision of safe drinking water. Like all human rights, the right to a healthy environment needs to be enforceable to be effective. Also like all

human rights, it is not absolute but must be balanced with competing rights. Finally, the right to a healthy environment confounds traditional categories of human rights. It is both a negative (liberty) right, used to protect individuals from unwarranted government interference, and a positive (welfare) right, which requires the state to take action and expend resources. It is both an individual and a collective right, a substantive and a procedural right. These multiple aspects have led to some scholarly confusion about its meaning and scope, but as this book will demonstrate, citizens, legislatures, and courts in many countries have had little trouble in defining, applying, and enforcing it.

Why is it important for the right to a healthy environment to be entrenched in the constitution? A constitution is the supreme or highest law of a nation, meaning all other laws must be consistent with it. It establishes the rules that guide and constrain government powers, defines the relationships between institutions, and protects individual rights. A constitution also reflects and reinforces a society's deepest and most cherished values, acting as a mirror of a country's soul.10 The logical argument for according constitutional status to the right to a healthy environment is straightforward. 11 Fundamental human rights should enjoy the strongest legal protection available in today's society - constitutional protection - to ensure that they are respected and fulfilled. The right to live in a healthy environment meets the test for recognition as a fundamental human right (significant moral importance, universal, practicable). Therefore, it should be protected by Canada's constitution. Even more importantly, there is now empirical evidence, based on the experiences of more than a hundred nations, indicating that constitutional entrenchment of environmental rights and responsibilities contributes to stronger laws, increased enforcement, an enhanced role for citizens, and improved environmental performance.

Do Canadians have a constitutional right to live in a healthy environment? The answer, if you asked Canadians, would probably be yes. If you asked lawyers, they would probably hedge their bets, responding that though the right is not explicitly mentioned in the constitution, it may be implicit in another right, such as the right to life. What about the Canadian government's position? In 2006, a petition was filed with the federal commissioner of the environment and sustainable development, asking, "Does the Government of Canada recognize that Canadians have a right to clean water, clean air, and a healthy environment?" The response, although long, evasive, and convoluted, can be summarized in a single word: No. 13 One can search

the text of Canada's constitution, including the *Charter of Rights and Freedoms*, in vain for any reference whatsoever to the environment. In a country where Nature is an integral element of our national identity, and in an era where scientific evidence establishes our basic dependence on a healthy environment, it is striking that our constitution makes no reference to it.

Does this constitutional lacuna matter? Absolutely. This book will argue that the omission of environmental rights and responsibilities from Canada's constitution is more than a mere oversight; it is a fundamental defect that must be rectified. There are five compelling reasons why constitutional recognition of the right to a healthy environment is imperative for Canada's future well-being:

- Environmental protection has evolved into a fundamental value held by the overwhelming majority of Canadians.
- There is an urgent need to improve Canada's poor environmental performance and preserve this country's magnificent landscapes, natural wealth, and biodiversity.
- It is vital to protect Canadians' health from environmental hazards such as air pollution, contaminated food and water, and toxic chemicals.
- Uncertainty regarding the responsibility of all levels of governments for environmental protection has undermined efforts to make Canada more sustainable and therefore needs to be clarified.
- Environmental rights and responsibilities are fundamental elements of Indigenous law, and acknowledging them would mark an important step toward reconciliation with Aboriginal people.

Each of these reasons is discussed in detail in this chapter.

Respecting the Environmental Values of Canadians

All Canadians love the land.

 Citizens' Forum on Canada's Future, Report to the People and Government of Canada

Canada is blessed with an extraordinary abundance of natural wealth – vast forests, untamed wilderness, thousands of rivers and lakes, a wonderful network of parks and protected areas, and unique landscapes. As the second-largest nation on Earth, Canada is home to 20 percent of the world's fresh Sample Material © 2012 UBC Press

water, 20 percent of the remaining wilderness, 25 percent of the world's wetlands, and the longest coastline.14 Canadian woodlands represent onetenth of the world's forested area, one-quarter of its temperate rainforests, and more than one-third of its boreal (northern, conifer-dominated) forests. 15 There are more than seventy-two thousand identified species in Canada, and scientists expect that it is home to thousands of as-yet unidentified species. 16 Canada is also one of the world's last strongholds for a range of iconic wildlife including grizzly bears, whooping cranes, mountain goats, caribou, and wild salmon. Bounded by the Pacific, Arctic, and Atlantic Oceans, Canada is also a maritime nation, with a marine area even larger than our huge land mass.

Our vast, beautiful, and diverse landscapes are at the heart of who we are as a people and are a source of tremendous national pride. As the Molson Canadian beer commercial says, "This land is unlike any other. We have more square feet of awesomeness per person than any other nation on Earth. It's why we flock towards lakes, mountains, forests, rivers, and streams. We know we have the best backyard in the world. And we get out there every chance we get." From polar bears, loons, and caribou on coins to the Vancouver Canucks and Toronto Maple Leafs, Canada's currency, flags, and hockey jerseys are emblazoned with images drawn from our natural heritage. Even as the country's population has grown increasingly diverse, Nature has remained constant as a unifying value, along with multiculturalism and universal health care. 17 As the Supreme Court of Canada has repeatedly observed in decisions spanning the past fifteen years, environmental protection is a fundamental value for Canadians.18

According to public opinion polls, nine out of ten Canadians worry about the impacts of environmental degradation on their health and the health of their children and grandchildren. 19 Nine out of ten are concerned or seriously concerned about climate change, the loss of biodiversity, and pollution. Nine out of ten believe that sustainability should be a national priority, and eight out of ten agree that we need stricter laws and regulations to protect the environment. Among the fifty-seven nations for whom recent data are available from the World Values Survey, Canadians rank behind only the citizens of Andorra, Norway, Argentina, and Switzerland in terms of favouring environmental protection over economic growth and job creation.²⁰

More than 95 percent of Canadians agree that access to clean water is a basic human right, and it seems likely that a similar proportion would endorse the right to live in a healthy environment.²¹ Canadians overwhelmingly say that our most valuable natural resource is water, more precious than oil and gas, forests, or minerals.²² Additional statistics show that Sample Material © 2012 UBC Press

- 98 percent of Canadians view nature as essential to human survival
- 90 percent of Canadians consider time spent in natural areas as children to be very important
- 85 percent of Canadians participate regularly in nature-related activities
- 82 percent of Canadians say that Nature has very important spiritual qualities for them personally.²³

Thus it is anomalous that Canada's constitution, the highest expression of peoples' fundamental values, is silent on the environment. Canada's constitutional vacuum stands in stark contrast to 147 nations worldwide, where the constitution either entrenches everyone's right to live in a healthy environment (94 nations) or explicitly describes government's fundamental responsibility to protect the environment (142 nations). Constitutional recognition of environmental rights and responsibilities would both reflect and reinforce an essential Canadian value, just as the *Charter of Rights and Freedoms* reflects and reinforces our commitment to equality.

Improving Canada's Environmental Record

Contrary to the myth of a pristine green country providing environmental leadership to the world, a huge pile of studies proves beyond a reasonable doubt that Canada lags behind other nations in terms of environmental performance. According to researchers at Simon Fraser University, Canada's environmental performance ranks twenty-fourth out of the twenty-five wealthiest nations in the Organisation for Economic Co-operation and Development (OECD).²⁴ The OECD has published blistering criticisms of Canada's weak laws and policies, perverse subsidies for unsustainable industries, and poor environmental performance.²⁵ The conservative Conference Board of Canada ranked Canada fifteenth out of seventeen large, wealthy industrialized nations on environmental performance.²⁶ Sweden, Finland, and Norway top the rankings. According to the Conference Board, these Scandinavian nations also outstrip Canada in terms of economic competitiveness and innovation, debunking the myth that there is a trade-off between strong environmental protection and economic prosperity. A collaborative research project involving Yale University, Columbia University, and the World Economic Forum ranked forty-five nations ahead of Canada in environmental performance.²⁷ Nine of the countries ranked in the World Economic Forum's top fifteen for environmental performance are also in the top fifteen for global competitiveness, again undermining the notion of economy-environment trade-offs.

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Published in 2009, a comprehensive comparison of nations with federal governance systems concluded that "Canadian environmental quality and environmental policy are worse than one might expect in a relatively wealthy country." A 2010 survey of over five thousand experts – from government, academia, business, non-governmental organizations, and other institutions – found that

- 60 percent rated Canada's performance in protecting Canadians from the health impacts of pollution as poor or very poor
- 65 percent rated Canada's performance in protecting fresh water as poor or very poor
- and 85 percent rated Canada's efforts to address climate change as poor or very poor.²⁹

Another measure of environmental performance is the ecological footprint. Canadians have, on an individual basis, the seventh-largest per capita ecological footprint in the world.³⁰ If all 7 billion people on Earth consumed resources and produced waste at the prodigious rate of Canadians, we would require three additional planets.

Once internationally renowned as an environmental leader, Canada "is now a laggard in both policy innovation and environmental performance, known for inaction and obstruction."31 Canada had built a strong reputation over decades by demonstrating leadership on issues such as acid rain, ozone depletion, protection of the Arctic, and rules governing the world's oceans. As recently as the early 1990s, it was the first industrialized nation to ratify the UN Convention on Biological Diversity and the UN Framework Convention on Climate Change. Yet today Canada is a notorious saboteur at international environmental forums. For years we have garnered countless "fossil of the day" and Colossal Fossil awards for blocking progress at international climate change negotiations. Under Prime Minister Stephen Harper, Canada became the only country in the world to turn its back on legal obligations under the Kyoto Protocol. Canada, along with Russia and the USA, fought against the extension of the global regime for reducing greenhouse gas emissions. In 2010, Canada earned the Dodo Award for obstructing international biodiversity negotiations.

Canada is the only industrialized nation that exports asbestos and promotes its use, despite the World Health Organization's call for the end of all uses of asbestos.³² Along with countries such as Kazakhstan, Kyrgyzstan, and Zimbabwe, Canada has repeatedly blocked proposals to add asbestos to the Sample Material © 2012 UBC Press

Rotterdam Convention, an international agreement that limits trade in hazardous substances. In 2006, Canada rejected a UN agreement to limit the destructive fishing practice of bottom trawling. In 2010, it sided with Japan to block the protection of Atlantic bluefin tuna under the Convention on International Trade in Endangered Species, despite population declines of more than 80 percent.

Global leaders, including Ban Ki-moon (UN secretary-general), José Manuel Barroso (president of the European Commission), and Rajendra Pachauri (head of the Intergovernmental Panel on Climate Change), have been unusually frank in criticizing Canada's failure to live up to expectations in protecting the environment.³³ In 2012, one of the world's leading scientific journals, *Nature*, published an unprecedented critique of the federal government's policy of muzzling environmental scientists, stating that "Canada's generally positive foreign reputation as a progressive, scientific nation masks some startlingly poor behaviour."³⁴

In the past, many Canadians subscribed to the illusion that "Canada's environmental record is among the best in the world." Today even Canada's political leaders, who usually defend the country come hell or high water, admit that it is an environmental laggard. During a year-end interview in 2006, Prime Minister Harper acknowledged that "Canada's environmental performance is, by most measures, the worst in the developed world. We've got big problems." 36

Constitutional recognition of the right to a healthy environment can have a positive effect on environmental performance and people's quality of life, as nations with environmental provisions in their constitutions

- have smaller per capita ecological footprints
- rank higher on comprehensive indices of environmental performance
- are more likely to have ratified international environmental agreements
- have been more successful in reducing greenhouse gas emissions
- and have achieved deeper cuts in emissions of nitrogen oxides and sulphur dioxide.³⁷

Gus Speth, former dean of the Yale School of Forestry, stated "I am very excited about the move to rights-based environmentalism. Lord knows we need some stronger approaches." In light of the experiences of other countries, it is highly likely that amending Canada's constitution to recognize environmental rights and responsibilities would spur significant improvements in Canada's environmental performance.

Canada's environmental performance.
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Protecting Canadians' Health from Environmental Hazards

Canada has surprisingly weak rules governing air pollution, drinking water safety, contaminants in our food, and toxic substances used in and produced by our economy.³⁹ Despite well-established evidence of deaths and illnesses caused by air pollution, Canada has no legally binding national air quality standards – unlike the USA, Australia, and Europe.⁴⁰ On a per capita basis, we pump out more air pollution – volatile organic compounds, nitrogen oxides, sulphur dioxide, and carbon monoxide – than any other nation in the OECD.⁴¹ Contradicting the perception that air quality is improving, Environment Canada reports that average levels of smog are up 13 percent since 1990.⁴² Canadian industries in the heavily populated Great Lakes region discharge twice as much cancer-causing pollution per facility as their American competitors.⁴³

Unlike the USA and Europe, Canada has no national standards for ensuring the safety of drinking water, choosing instead to rely on unenforceable guidelines that are enshrined in law by some provinces but not others. ⁴⁴ The national patchwork of drinking water laws and regulations puts people's health in jeopardy, particularly in smaller communities, rural areas, and reserves. ⁴⁵ Thousands of Aboriginal people living on reserves in Alberta, Manitoba, Ontario, and Quebec lack access to running water, resulting in elevated levels of waterborne illnesses. ⁴⁶

Canada also lags behind other wealthy nations in rules governing food safety. Hundreds of pesticides sold in Canada – formulated with active ingredients including atrazine, carbaryl, paraquat, and trifluralin – are banned in other nations because of concerns about their impact on human health and ecosystems. ⁴⁷ Permissible levels of pesticide residues on food in Canada are, in some cases, hundreds of times higher than in comparable European rules. ⁴⁸ As well, Canada allows the use of antibiotics and hormones to make livestock grow faster, practices that are banned in Europe because of adverse effects on human health and the environment.

Canada's weak rules and poor environmental performance have substantial negative effects on human health. According to the World Health Organization, exposure to environmental hazards (such as air pollution, contaminants in water and food, and toxic substances in consumer products) contributes to thirty-six thousand premature deaths in Canada annually and approximately 13 percent of all illnesses and injuries. Another study estimated that for just four categories of illness – cardiovascular disease, respiratory illness, cancer, and congenital afflictions (birth defects) – environmental hazards contributed to as many as twenty-five thousand deaths and 1.5 million

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days in hospital annually. 50 The Conference Board of Canada, a respected think-tank not known for alarmist prognostications, warns that life expectancy for today's Canadian children will be shorter than for their parents.⁵¹ Unlike Australia, the USA, and all nations in the European Union, Canada has no national environmental health strategy to systematically address these problems.52

The potential health benefits of strong environmental laws and policies are best illustrated by Sweden, whose constitution mandates the government to pursue a healthy environment for the benefit of present and future generations. Renowned as a global leader in environmental protection, Sweden has experienced the slowest rise in health care costs among industrialized nations, a pattern attributed, in part, to its pioneering efforts to reduce pollution and prevent people from being exposed to toxic substances.⁵³

Clarifying the Responsibility of All Governments to Protect the Environment

Canada's constitution divides jurisdiction over various matters between the federal government and the provinces. Because the environment is not mentioned in the constitution, there is extensive uncertainty about the allocation of responsibility in this field. This uncertainty sabotages both federal and provincial governments' willingness and ability to enact and enforce environmental laws and regulations. Constitutional ambiguity also results in a lack of transparency and accountability.54

Ottawa justifies its environmental laws, policies, and programs based on its constitutional authority related to criminal law, trade and commerce, fisheries, navigation and shipping, agriculture, federal lands, interprovincial works, the peace, order, and good government of Canada, works or undertakings for the general advantage of Canada, taxation and spending, and the negotiation and signing of treaties. Provincial governments defend their environmental policies based on ownership of natural resources, property and civil rights, civil law, agriculture, and matters of local concern. The constitutional changes made in 1982 clarified that provinces are primarily responsible for managing forests, electricity generation, and non-renewable resources.

For at least a hundred years, it has been understood that Canada's constitutional arrangement is inadequate for tackling environmental problems.⁵⁵ In 1912, a paper on water pollution published by Prime Minister Laurier's Commission of Conservation identified the problems associated with jurisdictional uncertainty. 56 In 1961, a workshop attended by Canada's leading Sample Material © 2012 UBC Press

constitutional lawyers, civil servants, and academics held as part of the Resources for Tomorrow conference warned that jurisdictional problems were likely to become more critical in the future.⁵⁷ In 1969, Prime Minister Pierre Trudeau said, "This challenge of pollution of our rivers and lakes, of our farmlands and forests, and of the very air we breathe, cannot be met effectively in our federal state without some constitutional reforms or clarification."58 In 1970, Dale Gibson, one of Canada's leading constitutional law experts, concluded that amendments were required to dispel doubts about the environmental powers of both levels of government and to provide for improved environmental management.59

Passing the buck for environmental responsibility between federal and provincial governments was decried as early as 1971. A witness testifying before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada observed, "Everyone says 'Oh dear it is a pity. But perhaps some other level will look after it.' Meanwhile things get grubbier and grubbier."60 In 1978, the Canadian Environmental Law Association concluded that the constitution's silence "led to jurisdictional buck-passing between the federal and provincial governments, failure to pass needed laws, erratic and haphazard enforcement of existing legislation, and pollution havens."61 In 1984, J.P.S. MacLaren argued that "the spectre of constitutional challenge" prevented Ottawa from effectively implementing or enforcing environmental laws. 62 In 1991, lawyer Paul Muldoon asserted that the federal government's constitutional powers were inadequate to support a strong role in environmental protection. 63 In 1992, the Supreme Court ruled that the environment "is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty."64 In 1996, Kathryn Harrison criticized Ottawa's tendency to defer to the provinces on environmental policy. 65 In 2007, Stewart Elgie concluded that the ongoing uncertainty about the scope of jurisdiction sabotaged the federal government's ability to address modern environmental challenges, such as climate change.66

Another major problem caused by constitutional uncertainty is that corporations often challenge Canadian environmental laws - both provincial and federal – as being beyond the jurisdiction of the government that passed them. For example, the Supreme Court of Canada struck down a Manitoba law that imposed liability upon industrial polluters whose mercury discharges harmed fisheries.⁶⁷ Provisions of the federal Fisheries Act have been struck down in cases involving environmental damage inflicted by logging companies. 68 The federal *Clean Air Act* was challenged by the Canadian Metal Sample Material © 2012 UBC Press

Company in 1982 but upheld by a Manitoba court. ⁶⁹ The *Ocean Dumping Control Act* was attacked by logging company Crown Zellerbach and narrowly upheld by the Supreme Court in 1988. ⁷⁰ In a case involving the Oldman Dam, the constitutionality of the federal environmental assessment process was challenged by the Government of Alberta but upheld by the Supreme Court. ⁷¹ The ability of municipal governments to protect the environment was also the subject of a constitutional challenge. When the town of Hudson (Quebec) banned the use of pesticides for cosmetic or non-essential purposes, lawn-care companies sued, arguing that municipalities had no jurisdiction to regulate pesticides. The Supreme Court ruled that all levels of government have a part to play in environmental protection, although it did not clarify the boundaries between those roles. ⁷²

In the 1990s, Ottawa came within a hair's breadth of losing its ability to regulate toxic pollution because of a constitutional challenge. The case arose when Hydro-Québec was charged with dumping PCBs into the St. Maurice River, in violation of the *Canadian Environmental Protection Act (CEPA)*. *CEPA* is Canada's primary pollution law, regulating industrial air pollution, vehicle emissions, and the manufacture, import, sale, use, and release of thousands of toxic chemicals.

Hydro-Québec's defence to the charge of dumping PCBs was that *CEPA* was unconstitutional – that the federal government lacked the requisite authority to regulate toxic substances. According to Hydro-Québec, pollution was a local matter falling within the provincial government's exclusive jurisdiction. Although most Canadians would reject such a defence as nonsense, Hydro-Québec was successful before the Quebec trial court, which struck down the impugned sections of *CEPA*. Ottawa appealed to the Quebec Superior Court and the Quebec Court of Appeal but lost both appeals. All three Quebec courts sided with the polluter, striking down key provisions of the *Canadian Environmental Protection Act*. The last hope for *CEPA*'s salvation lay with Canada's highest court, the Supreme Court.

Faced with the absence of a clear constitutional mandate for federal environmental law, lawyers defending *CEPA* were left to do the best they could with a handful of sub-optimal options:

- the trade and commerce power of the federal government
- its criminal law power
- and Parliament's residual jurisdiction under the vague "peace, order, and good government" power to legislate respecting matters of national

concern, as provided for in the introductory paragraph of section 91 of the *Constitution Act*, 1867.

By the narrowest possible margin (five to four), the Supreme Court upheld the constitutionality of Canada's most important environmental law. The four dissenting judges, led by the chief justice, agreed with Hydro-Québec and the Quebec courts that *CEPA*'s provisions prohibiting the release of toxic substances into the environment were unconstitutional. According to these judges, a substance that affected groundhogs but that had no impact on people could be labelled "toxic" and made subject to wholesale federal regulation, thus undermining the constitution's carefully balanced division of powers.⁷³ Had one more judge joined their opinion, it would have blown an immense hole in Canadian environmental law.

Fortunately, five Supreme Court judges upheld *CEPA*'s constitutionality. To do so, however, required some judicial creativity, as they relied on the federal government's criminal law power. Because of the constitution's silence regarding environmental protection, the courts and Ottawa are forced to perform jurisdictional gymnastics to validate its role in protecting the environment. The notion that, today, in the twenty-first century, Canada's Parliament must justify environmental legislation on the basis of its power to enact criminal laws or its residual peace, order, and good government power is, frankly, absurd. In an article called "Polluting the Law to Protect the Environment," David Beatty described the Supreme Court's *Hydro-Québec* judgment as "the jurisprudential equivalent of a serious spill of toxic waste" because its logic deviated so widely from previous court decisions.⁷⁴

Canada's constitutional gap is also used to delay, block, or water down proposed environmental legislation and regulations. A classic example is federal endangered species legislation. The USA passed a strong *Endangered Species Act* in the early 1970s, yet three decades of prolonged effort from environmentalists and scientists were required in Canada before the weak *Species at Risk Act (SARA)* was passed in 2002. Whereas the American law applies to endangered species wherever they may live, Canada's law is limited to protecting species on federal lands and waters, thus excluding huge swaths of provincial and private land. Experts describe *SARA* as "subsidized voluntary stewardship," in contrast to the stronger regulatory model relied upon in the USA. ⁷⁵ In part by playing the constitutional card, provinces and industries opposed to *SARA* delayed the law and eventually secured "federal legislation that would help to cement a more decentralized vision of Canadian environ-

mental responsibilities."⁷⁶ Another example was the Nuclear Control and Administration Act, introduced in 1977 to replace a badly outdated law governing the use of nuclear energy. Provinces objected that the proposed legislation invaded their jurisdiction and delayed its passage for twenty years.⁷⁷ In 2012, it became clear that the Conservative government led by Prime Minister Stephen Harper was exploiting a very narrow perspective of constitutional jurisdiction in order to emasculate the federal role in protecting Canada's environment.

The USA, once regarded as an environmental leader, is similarly hampered by constitutional silence on this issue. As Oliver Houck points out, the USA "still clings to the constitutional notion that environmental laws are justified as protecting interstate commerce, causing considerable confusion when the objects, such as endangered species or isolated wetlands, are not in commerce at all." The studies cited earlier to demonstrate Canada's poor environmental record also prove that the USA is a laggard.

The European Union (formerly known as the European Community) was originally in a similar position, as its founding document, the quasiconstitutional Treaty of Rome (*Treaty Establishing the European Economic Community*), was enacted in 1957 without any mention of the environment. ⁸⁰ Most early EC environmental laws were weak directives that set goals but left states to develop programs and monitor progress (similar to today's Canadian air and water quality guidelines). EC laws required the unanimous consent of national governments, meaning that any recalcitrant country held a veto. Environmental laws were justified on the basis of preventing economic disparities (by harmonizing national environmental rules). In other words, European Community environmental laws were ostensibly based on achieving economic, rather than ecological, objectives.

In order to overcome the uncertainty caused by the EC's inability to pass legislation with environmental objectives, the Europeans "did a straightforward thing" and "dropped the fiction." The Single European Act passed in 1987 is a quasi-constitutional law that explicitly authorizes legislation to protect the environment. No more games, no linguistic gymnastics requiring legislatures and courts to tie themselves in knots to create convoluted rationales for environmental laws. And the outcome for Europe? Ascendance to global environmental leadership, both in words, and more importantly, in actions. Europe has dramatically reduced air and water pollution, eliminated the use of dozens of pesticides and other hazardous chemicals, made progress in shifting to clean energy and reducing greenhouse gas emissions,

and slashed both water and electricity use through aggressive conservation measures and full-cost pricing.⁸³

Canada's constitution, rather than requiring governments to protect the environment by imposing a responsibility upon them, constrains their action. Constitutional recognition of the right to a healthy environment would clarify the situation by imposing a duty upon all levels of government to respect, protect, and fulfill this right.

Recognizing Indigenous Law

Indigenous, English, and French legal systems existed for centuries in Canada prior to the passage of the Constitution Act, 1867, and continue to operate today.84 Indigenous law can be defined as "those procedures and substantive values, principles, practices, and teachings that reflect, create, respect, enhance, and protect the world and our relationships within it."85 Although great strides have been made in integrating common law and civil law, far less progress has been made in terms of finding an appropriate place for Indigenous law, leaving Canada's legal system incomplete.86 And yet, as the Supreme Court has acknowledged, the ongoing project of reconciliation with the Aboriginal peoples of Canada requires the integration of Indigenous legal concepts into Canadian law. For example, the court wrote that "aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights."87 As well, the UN Declaration on the Rights of Indigenous Peoples, which Canada endorsed in 2010, refers repeatedly to the importance of recognizing and respecting Indigenous laws and legal institutions.88

One of the bedrock elements of Indigenous law common to many Aboriginal societies is the idea of a living Earth, with a set of rights and responsibilities governing the relationships between humans and the natural world. As John Borrows has written, "The land's sentience is a fundamental principle of Anishinabek law," and it contributes to "a multiplicity of citizenship rights and responsibilities for Anishinabek people and the Earth." Similarly, Mi'kmaq law is rooted in ecological relationships, extending legal personality to animals, plants, insects, and rocks, and imposing legal obligations on Mi'kmaq persons. 100

Borrows concludes that "only through a pluralistic, multi-juridical framework can we fully respect the place of Indigenous legal thinking" in the shaping of Canadian legal traditions. ⁹¹ Because of their central importance in First Nations' culture and law, incorporating environmental rights and

responsibilities into Canada's constitution would mark a significant step toward the integration of Indigenous and Canadian law. This could "expand and improve Canada's legal system and benefit Aboriginal peoples along with our society as a whole." ⁹²

Overview of the Book

Chapter 2 explores, from a Canadian perspective, the arguments for and against entrenching the right to a healthy environment in the constitution. Chapter 3 reviews the history of proposals, dating back to 1969, to include environmental rights and responsibilities in Canada's constitution. It also examines legislative environmental bills of rights, which have been passed by a handful of provinces and territories and debated but not enacted at the federal level. Ultimately, the validity of the arguments made by proponents and opponents of constitutional environmental rights should be evaluated by assessing the practical effects of recognizing these rights. Therefore, Chapters 4 and 5 identify the countries that have incorporated environmental rights and responsibilities into their constitutions and examine the extent to which these provisions have influenced environmental laws, court decisions, and most importantly, environmental performance. Chapter 6 traces the evolution of the right to a healthy environment in international law and identifies the implications for Canada. Extrapolating from the experiences of other nations, Chapter 7 describes the specific types of tangible impacts that constitutional recognition of environmental rights and responsibilities would have in Canada. Chapter 8 explores the political and legal avenues for achieving constitutional recognition of the right to a healthy environment, including the daunting process of direct amendment and the alternatives involving judicial interpretation of existing constitutional provisions. Chapter 9 offers a draft Canadian Charter of Environmental Rights and Responsibilities and assesses the prospects for incorporating such a document into Canada's constitutional framework.

Conclusion

We live in an era of unprecedented environmental damage at the hands of human beings. As medical doctors Eric Chivian and Aaron Bernstein concluded in their book *Sustaining Life: How Human Health Depends on Biodiversity*, "Our behavior is the result of a basic failure to recognize that human beings are an inseparable part of Nature and that we cannot damage it severely without severely damaging ourselves." Canadians love this country's beauty,

immense landscapes, and diverse wildlife. We express deep concerns about environmental problems and their effect on human health and ecological integrity. Yet our environmental performance, compared to other wealthy industrialized nations, is an international embarrassment. Our dismal record contradicts our fundamental values, jeopardizing our health, our magnificent natural heritage, and our legacy for future generations.

A similar gap used to exist with respect to social values. Prior to 1982, Canadians thought of themselves as tolerant, compassionate, and egalitarian. To some extent this was true, but the perception outstripped reality. Since 1982, the new constitution and the *Canadian Charter of Rights and Freedoms* have contributed to significant advances in women's, gay, and Aboriginal rights, and have enhanced the protection of civil and political rights for all Canadians. As Matthew Mendelsohn wrote, "The values in the *Charter* may not have reflected who we were as a country then, but it is those values which have created who we are as a country today." Today, the *Charter* is cherished by an overwhelming majority (88 percent) of Canadians. Style Canada's constitution fails to reflect the strong environmental values held by most Canadians. We live in the twenty-first century with a constitution that is built for the twentieth century. Greening Canada's constitution could force us to live up to our ideals.



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