

2015

Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution

Lynda M. Collins

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Collins, Lynda M.. "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71. (2015).

DOI: <https://doi.org/10.60082/2563-8505.1322>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/20>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

Safeguarding the *Longue Durée*: Environmental Rights in the Canadian Constitution

Lynda M. Collins*

I. INTRODUCTION

Before 1982, the only environmental right that could be found in the Canadian Constitution was the right to regulate, and even that was ambiguous.¹ The absence of an explicit environmental protection power in the Constitution has created much confusion,² but Canadian courts have consistently stepped in to fill the breach. In case after case, the Supreme Court of Canada has affirmed federal,³ provincial⁴ and even municipal⁵ governments' powers to regulate for environmental protection. The question left unanswered is when (or whether) Canadian governments have an obligation to do so.⁶ Is there a right to environmental protection in the Canadian Constitution and, if so, what is its locus and content? Is a constitutional amendment necessary to bring Canada in line with the majority of modern democracies around the world, which enjoy constitutional environmental protection? This article will argue that

* Lynda Collins is a professor with the Centre for Environmental Law and Global Sustainability at the University of Ottawa, Faculty of Law.

¹ See Penny Becklumb, "Federal and Provincial Jurisdiction to Regulate Environmental Issues" (Ottawa: Library of Parliament, 2013).

² See generally Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: UBC Press, 1996); Jean Leclair, "L'étendue du pouvoir constitutionnel des provinces et de l'État central canadiens en matière d'évaluation des incidences environnementales" in Hélène Trudeau & Ejaan Mackay, *L'environnement: À quel prix?* (Éditions Thémis: Montreal, 1995).

³ See e.g., *R. v. Crown Zellerbach Canada Ltd.*, [1988] S.C.J. No. 23, [1988] 1 S.C.R. 401 (S.C.C.); *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.).

⁴ See e.g., *Ontario v. Canadian Pacific Ltd.*, [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031 (S.C.C.).

⁵ See e.g., *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42, [2001] 2 S.C.R. 241 (S.C.C.).

⁶ See generally *British Columbia v. Canadian Forest Products Ltd.*, [2004] S.C.J. No. 33, [2004] 2 S.C.R. 74, 2004 SCC 38, at para. 81 (S.C.C.).

Canada's Constitution does provide protection for the environmental rights of its citizens. There is nothing to prevent courts from recognizing environmental deprivations of the existing rights enshrined in our *Canadian Charter of Rights and Freedoms*⁷ and much authority in support of this approach. Moreover, a broader right to a healthy environment may be found in Aboriginal rights under section 35 and/or as an unwritten constitutional principle.

Part II defines environmental human rights, contrasting the "existing rights" approach with the concept of a free-standing right to environmental quality. Part III addresses the threshold question of state action in environmental rights claims. In Part IV, the article evaluates the environmental rights of Aboriginal peoples under section 35 of the Constitution, and explains that courts have already recognized the environmental content of section 35 and will continue to do so. Part V evaluates the viability of environmental claims under the Charter and discusses ongoing litigation on this question. Part VI proposes the recognition of the right to a healthy environment as an unwritten constitutional principle. The author argues that there is no value more fundamental than that of a healthy environment and if it is not mentioned in the Constitution, then this must be because the requirement of environmental protection is so fundamental as to be self-evident. Part VII outlines the argument for explicit constitutional recognition of the right to a healthy environment and Part VIII presents a brief conclusion.

II. DEFINING ENVIRONMENTAL HUMAN RIGHTS

There are two distinct approaches to environmental human rights discernible in international and domestic scholarship and practice: (i) the recognition of environmental deprivations of existing human rights, (ii) the creation of an independent human right to a healthy environment.⁸

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

⁸ See generally D. Anton & D. Shelton, *Environmental Protection and Human Rights* (Cambridge: Cambridge University Press, 2011) [hereinafter "Anton & Shelton"]; D. Shelton, ed., *Human Rights and the Environment* (Cheltenham: Edward Elgar Publishing, 2011); Lynda M. Collins, "Are we There Yet? The Right to Environment in International and European Law" (2007) 3(2) McGill Int'l J. Sustainable Development L. & Pol'y 119 [hereinafter "Collins, 'Right to Environment'"]; John Lee, "The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law" (2000) 25 Colum. J. Envtl. L. 283 [hereinafter "Lee"].

The existing rights approach grounds environmental entitlements within recognized human rights such as the rights to life, liberty, security of the person, equality, privacy and family life, culture, and health (among others).⁹ Judges in countries with constitutions similar to our own have had no difficulty in recognizing environmental deprivations of existing rights. In one environmental claim, for example, the Supreme Court of Pakistan held that “[a]ny action taken which may create hazards of life will be encroaching upon the person rights of a citizen to enjoy the life according to law”.¹⁰ The Indian Supreme Court has gone further, holding that “[t]he right to life...includes the right of enjoyment of pollution-free water and air for full enjoyment of life”.¹¹ Nigeria’s Federal High Court has similarly declared that the right to life enshrined in that country’s constitution “inevitably” includes the right to a “clean, poison-free, healthy environment”.¹² Although some judges and commentators suggest the recognition of new environmental content within existing rights,¹³ substantive modifications to existing rights may be unnecessary. What is required is an ecologically literate approach to the various threats to human rights, such as the right to life, in their current formulations:

An ecologically literate reading of laws designed to protect people is one that recognizes that in many cases, the protection of people will require the protection of the environment. In the realm of human rights, it may be as simple as recognizing that an individual who is killed by a state-permitted air emission is equally dead as one who is shot by state police. Both should be protected from the deprivation of life, even though the former death is mediated by environmental forces while the latter is not.¹⁴

⁹ See Anton & Shelton, *id.*; Collins, “Right to Environment”, *id.*, at 128.

¹⁰ *Zia v. WAPDA*, PLD 1994 Supreme Court 693.

¹¹ *Subhash Kumar v. State of Bihar et al.*, WP (Civil) No. 381 of 1988, D/-9-1-91 (Supreme Court of India); see also *M.C. Mehta v. India*, WP (Civil) No 12739 of 1985 (Supreme Court of India); *Indian Council for Enviro-Legal Action v. Union of India*, [1996] 5 *Supreme Court Cases* 281, *per* Kuldeep Singh J.; Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh* (The Hague, Kluwer Law International, 2004), at 87 *et seq.*

¹² *Gbemre v. Shell Petroleum Development Co. Nigeria Ltd.*, Order of the Federal High Court of Nigeria in the Benin Judicial Division Holden at Court Benin City, November 14, 2005. See Kaniye S.A. Ebeku, “Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v. Shell* Revisited” (2008) Vol. 16:3 *RECIEL* 312.

¹³ See *e.g.*, Lee, *supra*, note 8, at 291-92.

¹⁴ Lynda M. Collins, “An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*” (2009) 26 *Windsor Review of Legal and Social Issues* 7 [hereinafter “Collins, ‘Ecologically Literate Reading of the *Canadian Charter*’”], at 8. See also Lynda M. Collins,

Indeed, to deny a constitutional remedy for environmental deprivations of recognized rights would in effect be to read in an environmental exception or exemption.

Another way of approaching existing rights in this context is to recognize environmental quality as a necessary precondition to their enjoyment. As Weeramantry J. of the International Court of Justice has explained:

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the *Universal Declaration* and other human rights instruments.¹⁵

A second school of thought conceptualizes the right to a healthy environment¹⁶ as a free-standing, independent right that encompasses but extends beyond the content of existing rights such as the right to life. While scholars have viewed the emergence of environmental rights as an expansion of human rights doctrine,¹⁷ this is scientifically backward. The biophysical reality is that all other rights, including the right to life itself, depend on a viable environment. From this perspective, the right to environment may be seen as the primary, indeed irreducible, human right.¹⁸ If this is correct then it would appear to make good sense explicitly to recognize this ancestor of all rights. In the comparative constitutional context, there is a robust body of empirical data demonstrating that the incorporation of an explicit right to environment leads to improved environmental performance, with associated benefits to human health.¹⁹

"The United Nations, Human Rights and the Environment" in Louis J. Kotzé & Anna Grear eds., *Research Handbook on Human Rights and the Environment* (London: Edward Elgar, 2015).

¹⁵ See Gabčíkovo-Nagymaros Project, 37 I.L.M. at 206.

¹⁶ Various formulations of the independent right to environment have been proposed (e.g., "ecologically balanced", "safe", "clean", etc.). The author favours the modifier "healthy" as it can apply in both anthropocentric and eco-centric ways (denoting an environment that is healthy for humans and one that is healthy in its own right). Collins, "Right to Environment", *supra*, note 8, at 127-36. See also Michael Burger, "Bi-Polar and Polycentric Approaches to Human Rights and the Environment" (2003) 28 Colum. J. Envtl. L. 371, at 376.

¹⁷ See e.g., Jennifer A. Downs, "Note: A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right" (1993) 3 Duke J. Comp. & Int'l L. 351.

¹⁸ See *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* (July 30, 1993), 33 ILM 173 [hereinafter "*Minors Oposa*"], at 187.

¹⁹ While the cause-and-effect relationships between constitutional provisions and social or environmental outcomes are ferociously complex, the leading scholarship in this area has employed sophisticated multi-tiered analysis to control for possible confounding factors (e.g., economic

If one accepts the premise that “the *raison d’être* of the modern state is to promote the interests of its citizens”,²⁰ then this evidence strongly supports recognition of an independent constitutional right to environment.

The major analytical challenge in the “independent right” approach is the question of content. If a free-standing right to environment exists, then it must presumably have some content beyond that contained in the recognized rights to life, health, security of the person, *etc.* A thorough analysis of this question is beyond the scope of this article, but a few introductory points can be made. Scholars have proposed intergenerational equity, the protection of aesthetic interests and the Precautionary Principle as unique aspects of the right to environment.²¹ The doctrine of intergenerational equity posits the present generation of humans as simultaneously beneficiaries and trustees of a global environmental trust, recognizing environmental rights for future humans.²² The right to aesthetic protection extends environmental entitlement beyond the means of life to the requirements of a life worth living; it would give legal effect to the moral duty “not to turn a beautiful landscape into a moonscape”.²³

improvement concurrent with constitutional amendment). In the result, the case for environmental benefits resulting from constitutional protection is very strong. See David Richard Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012) [hereinafter “Boyd, *The Environmental Rights Revolution*”]; David Richard Boyd, *The Right to a Healthy Environment: Revitalizing Canada’s Constitution* (Vancouver: UBC Press, 2012) [hereinafter “Boyd, *The Right to a Healthy Environment*”]; Christopher Jeffords & Lanse Minkler, 2014, “Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes”, Working papers 2014-16, University of Connecticut, Department of Economics, online: <<https://ideas.repec.org/p/uct/uconnp/2014-16.html>> (last visited April 1, 2015); James R. May, “Constituting Environmental Rights Worldwide” (2006) 23 *Pace Env’tl. L. Rev.* 113 [hereinafter “May”]; Joshua C. Gellers, “Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis” (2015) 1 *Journal of Human Rights and the Environment* 75; Tim Hayward, “Constitutional Environmental Rights: A Case for Political Analysis” (2000) 48 *Political Studies* 558 [hereinafter “Hayward”].

²⁰ The Right Honourable Beverley McLachlin, “Lord Cooke of Thorndon Lecture – Unwritten Constitutional Principles: What is Going On?” (2006) 4 *NZJPIL* 147, at 151 [hereinafter “McLachlin”].

²¹ Dinah Shelton, “Human Rights, Environmental Rights and the Right to Environment” (1991) 28 *Stan. J. Intl. L.* 103, at 133; Lee, *supra*, note 8, at 337-39; Collins, “Right to Environment”, *supra*, note 8, at 148-52; Edith Brown Weiss, “Our Rights and Obligations to Future Generations for the Environment” (1990) 84 *American J. Intl. L.* 198, at 200-202; Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo: UN University Press, 1989) [hereinafter “Weiss, *In Fairness*”].

²² Weiss, *In Fairness*, *id.*; Lynda M. Collins, “Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance” (2007) 30 *Dalhousie L.J.* 79.

²³ Klaus Bosselmann, “Human Rights and the Environment: Redefining Fundamental Principles?” in Brendan Gleeson & Nicholas Low, eds., *Governing for the Environment: Global Problems, Ethics and Democracy* (Basingstoke, Hampshire: Palgrave, 2001), at 129.

The Precautionary Principle holds that scientific uncertainty should not preclude preventative action in the face of serious environmental threats.²⁴ It requires legislators and courts to be conservative in the face of environmental uncertainty and to refrain from exposing citizens to unreasonable risk.²⁵ For example, the Precautionary Principle suggests that citizens should not be exposed to poorly understood chemicals where there is a demonstrated risk of harm.²⁶

These two contrasting approaches to environmental human rights must be borne in mind in any examination of the place of environmental rights in the Canadian Constitution. Arguably, Aboriginal and treaty rights under section 35 may encompass the broader, free-standing right to environment. Indeed, a strong argument may be made that environmental preservation is an Aboriginal right enjoyed by all Aboriginal groups in Canada.²⁷ In contrast, Charter approaches will likely follow the “existing rights” model, eschewing the more comprehensive content of the independent right to environment. Thus, the recognition of an explicit, robust right to a healthy environment in Canada may require constitutional amendment. In the alternative, the Supreme Court of Canada could recognize the right to a healthy environment (or some other form of environmental right or obligation) as an unwritten constitutional principle. As a threshold question, an applicant making any of these claims will have to establish the requisite degree of state action to invoke constitutional protection.

III. STATE ACTION

In a democratic capitalist society like Canada, the majority of environmentally harmful activity is arguably conducted by private enterprise. The casual observer might reasonably ask, then, why one should seek environmental remedies in the Constitution, which only

²⁴ See generally *Bergen Ministerial Declaration on Sustainable Development in the ECE Region*, UN Doc. A/CONF. 151/PC/10 (1990), reprinted in (1990) 1 YB Int'l. Env. L. 429, 4312; Paul Harremoës *et al.*, eds., *The Precautionary Principle in the 20th Century: Late Lessons from Early Warnings* (London: Earthscan Publications, 2002).

²⁵ See Lynda M. Collins, “Security of the person, peace of mind: a precautionary approach to environmental uncertainty” (2013) 4:1 *Journal of Human Rights and the Environment* 79.

²⁶ *Id.*

²⁷ See generally Randy Kapashesit & Murray Klippenstein, “Aboriginal Group Rights and Environmental Protection” (1991) 36 McGill L.J. 925 [hereinafter “Kapashesit & Klippenstein”]; *R. v. Sappier*; *R. v. Gray*, [2006] S.C.J. No. 54, [2006] 2 S.C.R. 686, at paras. 37-38 (S.C.C.).

applies to state action.²⁸ In the environmental context, governments may create serious environmental harm in at least four ways.²⁹ First, Canadian governments operate major facilities (*e.g.*, sewage treatment facilities, power plants) that emit pollution into the natural environment.³⁰ Risks associated with such operations include long-term, chronic exposures to relatively low levels of contaminants, as well as the possibility of acute environmental disasters (such as a nuclear melt-down).

Second, governments may create environmental degradation capable of infringing constitutional rights by affirmatively permitting pollution or other forms of environmental degradation (*e.g.*, clear-cutting). Industrial polluters and resource extraction companies are subject to municipal, provincial and federal regulatory regimes requiring specific permitting of polluting activities.³¹ The regulatory issuance of a licence, permit, or certificate of approval specifically permitting a particular environmentally harmful emission or course of conduct would appear to meet the requirement of state conduct.

Third, a government may create environmental harm by setting statutory and regulatory standards that allow for the emission of harmful levels of pollution. This can occur, for example, when regulatory standards are out of date, or where regulation allows for the issuance of an unlimited number of emissions permits, without regard to the total volume of contaminants discharged in a particular area.³² Finally, governments may create environmental harm by systematically failing to enforce environmental legislation; environmental non-enforcement is a well-studied phenomenon in Canada and could potentially meet the threshold for state conduct.³³ I have

²⁸ See Charter, *supra*, note 7, ss. 32, 52.

²⁹ See Andrew Gage, "Public Health Hazards and s. 7 of the Charter" (2003), 13 J. Env'tl. L. & Prac. 1 [hereinafter "Gage"], at 20-26; Nickie Vlavianos, "Public Participation and the Disposition of Oil and Gas Rights in Alberta" (2007) 17 J. Env'tl. L. & Prac. 205 [hereinafter "Vlavianos"], at 223-31; Collins, "Ecologically Literate Reading of the Canadian Charter", *supra*, note 14, at 17-18.

³⁰ Whether the operation of such facilities is subject to Charter scrutiny appears to depend upon whether the entity in question is governmental in nature or in the particular function implicated by the claim. See *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844, at paras. 43-49 (S.C.C.) [hereinafter "Longueuil"].

³¹ See generally David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) [hereinafter "Boyd, *Unnatural Law*"].

³² Dayna Nadine Scott, "Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution" (2008) 46(2) Osgoode Hall L.J. 293 [hereinafter "Scott"]. See also David R. Boyd, *Cleaner Greener Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (Vancouver: UBC Press, 2015).

³³ *Id.*; Boyd, *Unnatural Law*, *supra*, note 31, at 237-38; see also Nathalie J. Chalifour, "Environmental Discrimination and the Charter's Equality Guarantee: the Case of Drinking Water

used the term “state-sponsored environmental harm” to refer broadly to harm falling into any of these four categories.³⁴

IV. ENVIRONMENTAL RIGHTS IN SECTION 35

Although their content and implementation remain contentious, the existence of Aboriginal environmental rights in section 35 of the Constitution is now beyond dispute. Indeed, Aboriginal and treaty rights to hunt, fish and trap,³⁵ to carry out integral spiritual and cultural practices,³⁶ and to self-govern (among others)³⁷ are meaningless without the environment that has supported them since time immemorial.³⁸ In cases such as *Tsawout Indian Band v. Saanichton Marina Ltd.*,³⁹ *Halfway River First Nation v. British Columbia (Ministry of Forests)*,⁴⁰ and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,⁴¹ Canadian courts have recognized that environmental degradation may violate

for First Nations Living on Reserves” (2013) 43 R.G.D. 183 [hereinafter “Chalifour”], at 206-207 regarding Charter liability for failure to act.

³⁴ Collins, “Ecologically Literate Reading of the *Canadian Charter*”, *supra*, note 14.

³⁵ Lynda M. Collins & Meghan Murtha, “Indigenous Environmental Rights in Canada: the Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap” (2010) 47:4 Alta. L.R. 959; Geoffrey W.G. Leane, “Indigenous Peoples Fishing for Justice: A Paradigmatic Failure in Environmental Law” (1997) 7 J. Env'tl. L. & Prac. 279; Monique M. Ross & Cheryk Y. Sharvit, “Forest Management in Alberta and Rights to Hunt, Trap, and Fish Under Treaty 8” (1998) 36 Alta. L. Rev. 645.

³⁶ John Borrows, “Living Law on a Living Earth” in *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) [hereinafter “Borrows, ‘Living Law on a Living Earth’”].

³⁷ Theresa A. McClenaghan, “Why Should Aboriginal Peoples Exercise Governance over Environmental Issues?” (2002) 51 UNBLJ 211.

³⁸ See Kapashesit & Klippenstein, *supra*, note 27; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [hereinafter “Borrows, *Canada's Indigenous Constitution*”]; Borrows, “Living Law on a Living Earth”, *supra*, note 36; John Borrows, “Living Between Water and Rocks: First Nations, Environmental Planning, and Democracy” (1997) 47 University of Toronto L.J. 417; L. Little Bear, “Relationship of Aboriginal People to the Land and the Aboriginal Perspective on Aboriginal Title” in CD-ROM: Royal Commission on Aboriginal Peoples, *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1997); James (Sakej) McClenaghan, Youngblood Henderson, *et. al.*, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000), at 410-20, 256; Patrick Macklem, “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario” in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997).

³⁹ *Tsawout Indian Band v. Saanichton Marina Ltd.*, [1989] B.C.J. No. 563, 57 D.L.R. (4th) 161 (B.C.C.A.).

⁴⁰ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] B.C.J. No. 1494, 39 B.C.L.R. (3d) 227 (B.C.S.C.) [hereinafter “*Halfway*”].

⁴¹ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 1877, 214 F.T.R. 48 (F.C.T.D.) [hereinafter “*Mikisew*”].

constitutionally protected Aboriginal resource rights. In *Tsawout*, the British Columbia Court of Appeal held that construction of a marina that would block access and cause ecological harm to shellfish habitat would violate the applicants' treaty right to fish. In *Halfway*, the British Columbia Supreme Court (affirmed by the Court of Appeal) similarly found that proposed logging in their traditional territories would violate the First Nation's treaty right to hunt, noting that:

[t]o Halfway, the Tuzdih region is one of the last unspoiled areas of wilderness where they can exercise their traditional way of life. Logging even a limited area of the Tuzdih would irrevocably change its character.⁴²

In *Mikisew*, the Federal Court-Trial Division accepted the First Nation's argument that "any impact on the environment would have a corresponding impact on Mikisew's rights to hunt and trap in the Park due to Mikisew's reliance on the stability of the wildlife and furbearer populations".⁴³

Most recently, the Federal Court of Canada granted an injunction to the Haida Nation suspending the 2015 commercial herring fishery in Haida Gwaii⁴⁴ (the lands and waters of which are subject to an Aboriginal title claim that has been characterized by the Supreme Court of Canada as a strong *prima facie* claim). The Court recognized the unique ecological values of the area, the strength of the Haida's claim of Aboriginal title and the depth of scientific uncertainty surrounding sustainable harvest levels in the fishery at issue. Taking a precautionary approach, it held that irreparable harm would ensue if the Department of Fisheries and Oceans permitted commercial fishing in the area at issue.

While Aboriginal environmental entitlements under section 35 certainly encompass the negative right to be free from state-sponsored environmental harm that impinges on specific protected activities, Aboriginal title appears to encompass a broad right to conservation of the subject lands more akin to the independent right to a healthy

⁴² *Halfway*, *supra*, note 40, at para. 106. Note that the Court of Appeal disagreed with the characterization of the *Tuzdah* as an "unspoiled" wilderness and held that "preferred means" should not be taken to refer to an area or the condition of an area, but rather to the methods of hunting. *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] B.C.J. No. 1494, 39 B.C.L.R. (3d) 227 (B.C.C.A.), at paras. 106, 140-142. However, these disagreements did not affect the appeal court's conclusion that a *prima facie* infringement had indeed been made out.

⁴³ *Mikisew*, *supra*, note 41, at para. 92.

⁴⁴ *Haida Nation v. Canada (Minister of Fisheries and Oceans)*, [2015] F.C.J. No. 281, 2015 FC 290 (F.C.).

environment. The Supreme Court of Canada has held that even the title-holders themselves must respect environmental quality in Aboriginal title lands.⁴⁵ In its most recent judgment, the Supreme Court also opined that the environmental rights of Aboriginal title-holders include an intergenerational component. In *Tsilhqot'in Nation v. British Columbia*, the Court held that “incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land”⁴⁶ and further that Aboriginal title lands cannot be put to uses that would “destroy the ability of the land to sustain future generations of Aboriginal peoples”.⁴⁷

The application of the precautionary principle in *Haida Nation v. Canada (Minister of Fisheries and Oceans)*, and of intergenerational equity in *Tsilhqot'in* suggests that section 35 may indeed encompass a relatively broad right to environmental quality.

V. ENVIRONMENTAL RIGHTS IN THE CHARTER

A number of Charter rights are vulnerable to infringement through environmental harm.⁴⁸ Borrows explains that environmental degradation in traditional territories may violate the section 2(a) religious freedoms of Aboriginal people(s): “Proponents could show that [First Nations] spiritual beliefs concerning the Earth are holistic, deeply held, linked to their self-definition and fulfillment, and foster a connection with the subject of their faith”,⁴⁹ thus meeting the definition of religious belief under section 2(a).⁵⁰ The next step in the section 2(a) analysis would be to demonstrate a substantial or non-trivial interference with the religious practice or belief in question, and this would require a contextual approach that takes into account the relevant Aboriginal legal perspective.⁵¹

A second possible Charter right that may be implicated in cases of serious environmental harm is the right to equality under section 15. Canadian environmental law regimes do not regulate total emissions into a

⁴⁵ *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257, 2014 SCC 44, at para. 121 (S.C.C.).

⁴⁶ *Id.*, at para. 86.

⁴⁷ *Id.*, at para. 121.

⁴⁸ See generally Collins “Ecologically Literate Reading of the *Canadian Charter*”, *supra*, note 14; see also Sophie Thériault & David Robitaille, “Les droits environnementaux dans la *Charte des droits et libertés de la personne* du Québec : Pistes de réflexion”, (2011) 57 *Revue de droit de McGill* 211.

⁴⁹ Borrows, *Canada's Indigenous Constitution*, *supra*, note 38, at 253.

⁵⁰ See *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551, 2004 SCC 47 (S.C.C.).

⁵¹ Borrows, *Canada's Indigenous Constitution*, *supra*, note 38, at 253.

given air- or watershed.⁵² Regulatory standards target specific concentrations of pollutants at a given point source (*e.g.*, a smokestack, effluent pipe, *etc.*) but do not limit the total volume of emissions. Thus, under our current regulatory framework a Ministry of Environment could issue one permit allowing for x parts per billion of a given contaminant, or 1,000 such permits, in any given area. The inevitable result of such a system is the uneven distribution of environmental harm across communities, and the creation of so-called “pollution hotspots”.⁵³ As a general rule, such hotspots do not occur in privileged communities. Although less well studied in Canada than elsewhere, the phenomenon of “environmental injustice”, or the discriminatory allocation of environmental benefits and burdens, is alive and well in this country.⁵⁴ Consider, for example, the disproportionate prevalence of boil-water advisories (and water-borne illness) in Aboriginal communities.⁵⁵ If disparities in environmental protection occur on enumerated or analogous grounds, then there may be a viable claim under section 15.⁵⁶ The purpose of section 15 is to promote “a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration”⁵⁷ and this includes providing “an equality of benefit and protection”. To paraphrase Chalifour, a safe environment:

is one of the most basic human needs for survival, and lack of access to it undermines health, dignity and standard of living, increases the cost of living, and creates physiological and psychological stress. It can impede one’s ability to care for one’s family, to have adequate personal hygiene, and otherwise to be on an equal playing field with other Canadians...⁵⁸

Arguably the most obvious home for environmental rights in the Charter is section 7, which protects Canadians from deprivations of the rights to life, liberty and security of the person that do not comport with the

⁵² See generally Boyd, *Unnatural Law*, *supra*, note 31.

⁵³ See Boyd, *The Right to a Healthy Environment*, *supra*, note 19, at 155-58.

⁵⁴ See generally Andil Gosine & Cheryl Teelucksingh, *Environmental Justice in Canada* (Toronto: Emond Montgomery, 2008); Laura Westra & Bill E. Lawson, eds., *Faces of Environmental Racism: Confronting Issues of Global Justice* (Lanham, MD: Rowan & Littlefield, 1995); Tara Ulezalka, “Race and Waste: The Quest for Environmental Justice” (2007) 26 Temp. J. Sci. Tech. & Env’tl. L. 51.

⁵⁵ See David R. Boyd, “No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada” (2011) 57(1) McGill L.J. 81; Chalifour, *supra*, note 33.

⁵⁶ See *id.*

⁵⁷ *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6 at para. 34, [1989] 1 S.C.R. 143 (S.C.J.).

⁵⁸ Chalifour, *supra*, note 33, at 211.

principles of fundamental justice.⁵⁹ The purpose of section 7 is to protect the “core of what it means to be an autonomous human being blessed with dignity and independence in matters that can properly be characterized as fundamentally or inherently personal”.⁶⁰ Since *Chaoulli*, it is clear that a substantial risk to life may infringe section 7,⁶¹ and this comports with international human rights law. In *EHP v. Canada*,⁶² a citizens’ group in Port Hope, Ontario alleged that the storage of nuclear waste in the community threatened residents’ right to life, and the United Nations Human Rights Committee stated that the claim “raise[d] serious issues, with regard to the obligation of States parties to protect human life (article 6 (1))”. The claim was dismissed for failure to exhaust domestic remedies,⁶³ the Committee noting that:

... since Canada submitted its response to the communication of the author, the *Canadian Charter of Rights and Freedoms* has come into force on 17 April 1982. ... Section 7 of the Charter states that “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 principle [*sic*] of fundamental justice.” ... If the author believes that the Government or an agency thereof, such as the Atomic Energy Control Board, is denying her the right to life in a manner contrary to the provisions of section 7, she can ask the Courts to remedy this situation. ...⁶⁴

“Security of the person encompasses ‘a notion of personal autonomy involving ... control over one’s bodily integrity free from state interference’”.⁶⁵ This right protects individuals from serious state-imposed

⁵⁹ Gage, *supra*, note 29; Vlavianos, *supra*, note 29. See also Nickie Vlavianos, “The Intersection of Human Rights Law and Environmental Law”, paper presented at the Symposium on Environmental Education for Judges and Court Practitioners, organized by CIRL and sponsored by Environment Canada (March 23-24, 2012), online: <http://cirl.ca/files/cirl/nickie_vlavianos-en.pdf> (last visited October 23, 2015).

⁶⁰ *R. v. Clay*, [2003] S.C.J. No. 80, [2003] 3 S.C.R. 735 (S.C.C.).

⁶¹ *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.) [hereinafter “*Chaoulli*”]. See also *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134, 2011 SCC 44 (S.C.C.); *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, [2013] 3 S.C.R. 1101, 2013 SCC 72 (S.C.C.).

⁶² Communication No. 67/1980, in UNITED NATIONS, 2 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL, at 20, U.N. Doc. CCPR/C/OP/2 (1990) [hereinafter “*EHP v. Canada*”].

⁶³ *Id.*, at para. 8.

⁶⁴ *Id.*, at para. 7.

⁶⁵ *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331, 2015 SCC 5, at para. 64 (S.C.C.) [hereinafter “*Carter*”] citing *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, at 587-88 (S.C.C.) [hereinafter “*Rodriguez*”].

risk to physical health⁶⁶ and also protects an individual's psychological integrity.⁶⁷ The protection is limited to deprivations that violate a principle of fundamental justice, many of which are relevant in the environmental context.⁶⁸ The liberty interest protected by section 7 includes the individual's right to make "important and fundamental life choices"⁶⁹ free from state interference, including the choice of where to live.⁷⁰

There is a paucity of case law addressing environmental harm under section 7; most cases have been dismissed on procedural or evidentiary grounds.⁷¹ However, an ongoing lawsuit in Ontario is likely to make legal history in this area within the next few years. In 2010, two members of the Aamjiwnaang First Nation in Sarnia, Ontario, filed suit in the Divisional Court alleging that the approval of additional pollution by a major local emitter violated their Charter rights to life, liberty, security of the person and equality.⁷² The application challenges in particular a decision allowing Suncor Energy Products Inc. to increase production by 24 per cent at a part of its facility known as the "sulphur recovery plant", with resulting increases in air emissions. The section 7 claim alleges that the emission of increased air emissions in their highly contaminated area gives rise to pollution levels that threaten the applicants' health and that of their families, thus violating their section 7 rights to life, liberty and security of the person. Under section 15, the

⁶⁶ See *Chaoulli*, *supra*, note 61; *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 59 (S.C.C.); *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177, at para. 47 (S.C.C.).

⁶⁷ See e.g., *Carter*, *supra*, note 65, at para. 64; *Rodriguez*, *supra*, note 65; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.); *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307 (S.C.C.) [hereinafter "*Blencoe*"].

⁶⁸ See Collins, "Ecologically Literate Reading of the *Canadian Charter*", *supra*, note 14, at 28-31.

⁶⁹ *Blencoe*, *supra*, note 67, at para. 49 (*per* Bastarache J.).

⁷⁰ *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844, at paras. 66-68 (S.C.C.).

⁷¹ See e.g., *Manicom v. Oxford (County)*, [1985] O.J. No. 2635, 52 O.R. (2d) 137 (Ont. Div. Ct.); *Energy Probe v. Canada (Attorney General)*, [1989] O.J. No. 537, 58 D.L.R. (4th) 513 (Ont. C.A.); *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*, [1993] N.S.J. No. 182, 10 C.E.L.R. (N.S.) 257 (N.S.S.C. [In Chambers]), *revd* [1993] N.S.J. No. 404, 108 D.L.R. (4th) 145 (N.S.C.A.); *Millership v. Kamloops (City)*, [2003] B.C.J. No. 109, 2003 BCSC 82 (B.C.S.C.); *Locke v. Calgary (City)*, [1993] A.J. No. 926, 15 Alta. L.R. 70 (Alta. Q.B.); *Fata v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 42 (Ont. Environmental Review Tribunal); *Mothers Against Wind Turbines Inc. v. Ontario (Ministry of the Environment and Climate Change)*, [2015] O.E.R.T.D. No. 19 (Ont. Environmental Review Tribunal).

⁷² See *Lockridge v. Ontario (Director, Ministry of the Environment)*, [2012] O.J. No. 3016, 68 C.E.L.R. (3d) 27, 350 D.L.R. (4th) 720 (Ont. Div. Ct.) [hereinafter "*Lockridge*"].

applicants contend that the disproportionate pollution of their area results in adverse effect discrimination against them based on their status as on-reserve Aboriginal persons.

The area in which the applicants live is one of the most severely polluted “hotspots” in Canadian history.⁷³ It is home to a large concentration of refineries, petrochemical facilities and other heavy industries (colloquially known as “Chemical Valley”), many of which are located within a few kilometres of the Aamjiwnaang reserve.⁷⁴ Among other things, these facilities emit significant levels of sulphur dioxide (SO₂), hydrogen sulphide (H₂S), nitrogen oxides (NO_x), fine particulate matter (PM_{2.5}), benzene and 1,3-butadiene.⁷⁵ The area has a higher volume of toxic air pollutants than any other community in Ontario;⁷⁶ indeed, the World Health Organization has found that Sarnia has the worst air quality in Canada.⁷⁷ The emission of air pollutants in Chemical Valley includes both permitted, ongoing discharges and those resulting from accidental malfunctions, including the “flaring” of acid gas at Suncor’s petroleum refinery.⁷⁸

The Application alleges that residents of Aamjiwnaang suffer high rates of asthma, birth defects, miscarriages and stillbirths, skin rashes, chronic headaches, high blood pressure and cancer. In addition, Aamjiwnaang is the only community in the world in which the female-to-male birth ratio has, at times, reached two to one.⁷⁹ The phenomenon is complex but could be related to prenatal exposure to the chemical cocktail of hormone disrupters emitted in Chemical Valley.⁸⁰ The

⁷³ See generally Scott, *supra*, note 32.

⁷⁴ *Id.*; Lockridge, *supra*, note 72.

⁷⁵ For an explanation of the health implications of these substances, see Elliot Sigal, “Systematic Literature Review of Health Outcomes Associated with Living in Proximity to Petrochemical Industries” (Toronto: Intrinsic Environmental Sciences, 2010).

⁷⁶ Christina Dhillon & Michael G. Young, “Environmental Racism and First Nations: A Call for Socially Just Public Policy Development” (2010) 1(1) *Canadian Journal of Humanities and Social Sciences* 25, at 27.

⁷⁷ Boyd, *The Right to a Healthy Environment*, *supra*, note 19, at 156. To access the World Health Organization’s raw data, see online: <http://www.who.int/phe/health_topics/outdoorair/databases/en/index.html> (last visited April 2, 2015).

⁷⁸ Environmental Law Center, “Environmental Rights: Human Rights and Pollution in Sarnia’s Chemical Valley”, online: <http://www.elc.uvic.ca/wordpress/wp-content/uploads/2015/02/C2_ChemicalValleyAssociatesBackgrounder-2011June13.pdf>, at 4 (last visited April 2, 2015).

⁷⁹ See Constanze A. MacKenzie *et al.*, “Declining Sex Ratio in a First Nation Community” (2005) 113(10) *Environmental Health Perspectives* 1295.

⁸⁰ See Dayna Nadine Scott, “‘Gender Benders’: Sex and Law in the Constitution of Polluted Bodies” (2009) 17(3) *Feminist Legal Studies* 241; Dayna Nadine Scott, “Pollution and the Body Boundary: Exploring Scale, Gender and Remedy” in Janice Richardson & Erica Rackley, eds., *Feminist Perspectives on Tort Law* (Abingdon, U.K.: Routledge, 2012).

applicants and their immediate families have health problems including poor immune function, headaches, miscarriages, digestive problems, cardiovascular problems and respiratory problems such as asthma. They allege that living in a highly polluted environment violates their security of the person, both because it exposes them to unreasonable health risks and because it infringes their right to psychological security. Given the egregious nature of the pollution at issue in *Lockridge*, coupled with sophisticated counsel and a persuasive evidentiary record, this case has the potential to result in a substantive appellate ruling on environmental deprivations of section 7 of the Charter.⁸¹

VI. THE RIGHT TO A HEALTHY ENVIRONMENTAL RIGHTS AS AN UNWRITTEN CONSTITUTIONAL PRINCIPLE

While controversial, unwritten constitutional principles (“UCPs”) are an established part of Canadian constitutional law; they are binding on both courts and government and have even been used to strike down legislation in some cases.⁸² Recognition of the right to environment, or some species of environmental right or duty,⁸³ would assist courts in interpreting environmental legislation, adjudicating environmental claims under the Charter, and determining environmental powers under sections 91 and 92. In *Quebec Secession Reference*, the Supreme Court of Canada described UCPs as follows:

Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the

⁸¹ Another very strong environmental claim under sections 7 and 15 was filed in September of 2015 on behalf of Grassy Narrows First Nation and members thereof who allege that proposed clear-cut logging on their traditional territory will worsen preexisting mercury contamination and threaten human health. See *Grassy Narrows v. Ontario*, Ontario Superior Court of Justice Court File No. 446/15, online: <<http://www.cela.ca/sites/cela.ca/files/Notice%20of%20Application-GN.pdf>> (last visited October 23, 2015).

⁸² See generally David J. Mullan, “Unwritten Constitutional Principles: The Legacy of Justice Rand”, Ivan C. Rand Memorial Lecture, University of New Brunswick, 2002 (unpublished); David Dyzenhaus, “The Deep Structure of *Roncarelli v. Duplessis*” (2004) 53 *University of New Brunswick* 111; Jamie Cameron, “The Written Word and the Constitution’s Vital Unstated Assumptions”, in Pierre Thibault, Benoit Pelletier & Louis Perret, eds., *Les mélanges Gérald-A. Beaudoin / Essays in Honour of Gérald A. Beaudoin* (Cowansville: Les Éditions Yvon Blais Inc., 2002); Mark D. Walters, “The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001) 51 *U.T.L.J.* 91; Dale Gibson, “Constitutional Vibes: Reflections on the *Secession Reference* and the Unwritten Constitution” (1999) 11 *N.J.C.L.* 49.

⁸³ See Vlavianos, *supra*, note 29.

constitutional text: they are the vital unstated assumptions upon which the text is based. ... These defining principles function in symbiosis.

.....

Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to ... it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a “living tree”...⁸⁴

Writing extra-judicially, McLachlin C.J.C. elaborates: “[U]nwritten constitutional principles refer to unwritten norms that are essential to a nation’s history, identity, values and legal system.”⁸⁵

Whether framed as the “right to a healthy environment” or in more general terms such as “respect for the environment” or “environmental protection”, some concept of environmental obligation and/or entitlement undoubtedly meets all of these criteria.⁸⁶ Environmental stewardship has an ages-old place in the lineage of Canadian law. Indeed as far back as 1217, the *Charter of the Forest* guaranteed to British subjects rights of access to vital natural resources, which reinforced the civil and political rights contained in its companion document, the *Magna Carta*.⁸⁷ Environmental protection is judicially and socially recognized as fundamental to Canadian society, and it is obviously essential to the evolution — indeed the survival — of our Constitution as a living tree.

⁸⁴ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at paras. 49-52 (S.C.C.). Note the recurrence of biological language in this passage (“symbiosis”, “lifeblood”, “living tree”). There seems implicit in this an acknowledgment that all our human structures depend on our biological survival. In this sense there is no principle more fundamental than that of a healthy environment.

⁸⁵ McLachlin, *supra*, note 20, at 149.

⁸⁶ See also Shalin M. Sugunasiri, “Public Accountability and Legal Pedagogy: Studies in Constitutional Law” (2008) 2 J.P.P.L. 93 for an excellent analytical framework for assessing new UCPs. The right to a healthy environment seems to comport with Sugunasiri’s criteria.

⁸⁷ See Sir William Blackstone, *The Great Charter and Charter of the Forest* (Oxford: Clarendon Press, 1759).

Environmental protection is thus an “unwritten principles without which the law would become contradictory and self-defeating”.⁸⁸

Importantly, respect for the environment is also a defining feature of “[i]ndigenous legal traditions [which] are among Canada’s unwritten normative principles and, with common and civil law, can be said to ‘form the very foundation of the Constitution of Canada’”.⁸⁹ Recognition of an environmental UCP would reflect Indigenous law, thus simultaneously advancing the goals of reconciliation and sustainability.⁹⁰ As Borrows points out, “[t]he Constitution, though a legal document, serves as a framework for life and for political action....”⁹¹ It is trite (ecological) law that a framework for life must ensure the protection of the biophysical environment on which life depends.

Although it has not yet recognized an unwritten constitutional principle relating to the environment, the Supreme Court of Canada has described environmental protection in terms that are commensurate with constitutional protection.⁹² The Court summarized its own holdings on this point in *British Columbia v. Canadian Forest Products Ltd.*:⁹³

...As the Court observed in *R. v. Hydro-Québec*..., legal measures to protect the environment ‘relate to a public purpose of *superordinate importance*’.... In *Ontario v. Canadian Pacific Ltd.* ... ‘stewardship of the natural environment’ was described as a *fundamental value* ... Still more recently, in 114957 *Canada Ltée (Spray-Tech, Société d’arrosage) v. Hudson (Town)*... the Court reiterated, at para. 1:

...Our common future, that of every Canadian community, depends on a healthy environment...This Court has recognized that ‘(e)veryone is aware that individually and collectively, we are responsible for preserving the natural environment ... environmental protection [has] emerged as a *fundamental value* in Canadian society’⁹⁴

⁸⁸ McLachlin, *supra*, note 20, at 163.

⁸⁹ Borrows, *Canada’s Indigenous Constitution*, *supra*, note 38, at 108.

⁹⁰ Boyd, *The Right to a Healthy Environment*, *supra*, note 19.

⁹¹ Borrows, *Canada’s Indigenous Constitution*, note 38, at 200.

⁹² See generally Jerry V. DeMarco, “The Supreme Court of Canada’s Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?” (2007) 17(3) J. Envtl. L. & Prac. 159.

⁹³ [2004] S.C.J. No. 33, [2004] 2 S.C.R. 74 (S.C.C.).

⁹⁴ *Id.*, at para. 7 (emphasis added, citations omitted). See also *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154, at para. 234 (“Regulatory legislation is essential to the functioning of our society and to the protection of the public. It responds to the compelling need to protect the health and safety of the members of our society and to preserve our fragile environment.”).

In *Ontario v. Canadian Pacific Ltd.*,⁹⁵ the majority of the Supreme Court specifically recognized environmental rights, adopting the following passage from the Law Reform Commission of Canada's report, *Crimes Against the Environment*:

... 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.^{96, 97}

Taken as a whole, this robust body of *dicta* from the Supreme Court of Canada suggests that environmental protection is indeed a higher-order legal value deserving of constitutional protection.

This makes sense when one considers that the only truly non-derogable laws in human existence are the biophysical ground-rules of life on Earth. Chief Justice McLachlin suggests that UCPs derive from natural law,⁹⁸ which must surely include these laws of nature. The Supreme Court of the Philippines eloquently captured this idea in its celebrated decision in *Minors Oposa*, a case concerning the environmental rights of future generations:

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the

⁹⁵ [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031 (S.C.C.).

⁹⁶ *Id.*, at para. 55 (emphasis in original).

⁹⁷ This passage was quoted again in *R. v. Hydro-Québec*, [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.), in which the Court upheld the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 as a valid exercise of federal power.

⁹⁸ McLachlin, *supra*, note 20, at 149-51.

civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation[,] the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.⁹⁹

This logic seems inescapable; physical self-preservation is a fundamental imperative for all human beings, both individually and collectively. If our Constitution fails to address the protection of the biophysical environment on which all of the enumerated rights and powers delineated therein depend, it must be because the principle of environmental protection is so fundamental as to be both implicit and obvious, much like the principle of democracy — a basic, underlying structure that supports every other provision in the written Constitution. The argument for recognition of an environmental right or obligation as an unwritten constitutional principle is logically and legally compelling.

VII. THE CASE FOR A CONSTITUTIONAL AMENDMENT

Since its first appearance on the international stage in the 1972 *Stockholm Declaration*, the right to a healthy environment has achieved a stunning level of success in domestic constitutional systems around the world. The vast majority of constitutions that have been enacted or amended in the last four decades include some form of explicit constitutional recognition of the environmental rights of individuals, the environmental responsibilities of government, or both.¹⁰⁰ Around the world, more than 90 states have constitutionalized some form of environmental right, variously described as the right to a healthy, ecologically balanced, safe, or wholesome environment.¹⁰¹ If one includes nations that have constitutionalized environmental rights through interpretation of other rights (*e.g.*, the right to life) or through incorporation of international or regional human rights instruments, the number of nations that accord constitutional protection to environmental

⁹⁹ See *Minors Oposa*, *supra*, note 18, at 187, cited in Sumudu Atapattu, “The Right to Life or the Right to Die Polluted” (2002) 16 *Tul. Env'tl. L.J.* 65, at 106-107.

¹⁰⁰ See generally, Boyd, *The Environmental Rights Revolution*, *supra*, note 19.

¹⁰¹ Boyd, *The Environmental Rights Revolution*, *supra*, note 19, at 53-57; Boyd, *The Right to a Healthy Environment*, *supra*, note 19, at 74.

rights and/or obligations is 147 (out of a total of 193 U.N. members states).¹⁰²

In his ground-breaking books, *The Environmental Rights Revolution* and *The Right to a Healthy Environment*, Professor David Boyd demonstrates that the explicit constitutionalization of environmental rights produces significant and measurable improvements in environmental performance, environmental legislation and litigation outcomes. These benefits are seen across an astonishingly diverse range of political contexts — including both developing and developed countries with constitutions ranging from very new¹⁰³ to very old.¹⁰⁴ The data are compelling: compared to countries that lack such protection, nations with constitutional environmental rights rank higher on multi-indicator assessments of environmental performance, have smaller “ecological footprints” (a comprehensive measurement of environmental impact), and have been more successful in reducing dangerous air pollutants (including greenhouse gases).¹⁰⁵ These relative improvements apply whether nations are compared with all other countries around the globe or with only those in their own region (e.g., Africa, the Americas, Asia-Pacific, Europe and the Middle East/Central Asia).

Boyd’s data also show that both the content and enforcement of environmental legislation improves following constitutionalization of environmental rights.¹⁰⁶ In addition, constitutional entrenchment of environmental rights has the potential to prevent rollbacks in environmental legislation such as those that have occurred in Canada over the past decade.¹⁰⁷ Moreover, litigants around the world are successfully mobilizing their respective constitutional environmental rights to protect human health and the environment where governments have failed to do so. In some cases, constitutional environmental litigation has led to massive environmental remediation projects and

¹⁰² Boyd, *The Right to a Healthy Environment*, *supra*, note 19, at 88.

¹⁰³ See e.g., South Africa. For the full text of all domestic constitutional provisions relating to environmental rights, online: <<https://circle.ubc.ca/handle/2429/36469>> (last visited June 7, 2015).

¹⁰⁴ For example, Norway, online: <<https://circle.ubc.ca/handle/2429/36469>> (last visited June 7, 2015).

¹⁰⁵ Boyd, *The Right to a Healthy Environment*, *supra*, note 19, at 107-21. See also Christopher Jeffords & Lanse Minkler, 2014, “Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes”, Working papers 2014-16, University of Connecticut, Department of Economics, online: <<https://ideas.repec.org/p/uct/uconnp/2014-16.html>> (last visited April 1, 2015) [hereinafter “Jeffords & Minkler”].

¹⁰⁶ Boyd, *The Environmental Rights Revolution*, *supra*, note 19, at 233-37.

¹⁰⁷ See Lynda M. Collins & David R. Boyd, “Non-Regression and the *Charter* Right to a Healthy Environment” (2015) J. Env’tl. L. & Prac. (forthcoming).

major change in regulatory practice.¹⁰⁸ Boyd concludes that there is every reason to believe that constitutional environmental protection would have similarly salutary effects in Canada. In particular, he argues that the inclusion of the right to a healthy environment in the Canadian Constitution would: decrease environmentally-induced mortality and morbidity, preserve our natural heritage for future generations, reflect the centrality of the environment in Canadian national identity, clarify the environmental obligations of all levels of government, and reflect the core importance of environmental values in Indigenous legal systems in Canada, as well as aligning our Constitution with the international law of environmental human rights.¹⁰⁹ While constitutional amendment is a difficult path in Canada,¹¹⁰ these benefits arguably justify the journey.¹¹¹

VIII. CONCLUSION

If there ever was a time in modern history when an ecologically silent constitution was justifiable, that time has passed. In the *longue durée*, there is no project that merits constitutional recognition more than that of environmental protection. A constitution not grounded in a healthy, sustainable environment is a paper temple — a mere recitation of rights with no real guarantee of their survival over time. Given the high degree of ecological literacy demonstrated by the Supreme Court of Canada, it seems likely that we will soon join the international community in recognizing environmental human rights in our highest law.

¹⁰⁸ *Id.*, at 95-99.

¹⁰⁹ *Id.*, at 4-17.

¹¹⁰ See Ian Greene, "Constitutional Amendment in Canada and the United States" in Stephen L. Newman ed., *Constitutional Politics in Canada and the United States* (Albany: SUNY Press, 2012); Wil Waluchow, "Constitutions as Living Trees: An Idiot Defends" (2005) 18 Can. J.L. & Juris 207, at 232; Joel I. Colón-Ríos, "The Counter-Majoritarian Difficulty and the Road Not Taken: Democratizing Amendment Rules" (2012) 25 Can. J.L. & Juris 53.

¹¹¹ In addition to the significant benefits identified by Boyd, see Jeffords & Minkler, *supra*, note 105; May, *supra*, note 19; Hayward, *supra*, note 19. For a glimpse into the rich debate regarding the significance (or not) of constitutional rights generally see *e.g.*, Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1990); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004); Michael J. Klarman, "What's So Great About Constitutionalism?" (1998) 93 Nw. U.L. Rev. 145.

