A Constitutionalized Right to a Healthy Environment: Problems and Prospects

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INTRODUCTION[1]

Born from the civil rights movement, scientific hypothesis, and the highly publicized environmental disasters of the 1960s, environmental law is now a functional—and unavoidable—feature of the Canadian legal landscape. It takes many forms including, *inter alia*: 1) the application of private law principles to situations of environmental harm or toxicity; 2) the development and operationalization of complex statutory/regulatory regimes that seek to limit, mitigate, and prevent environmental harms; 3) the judicial review of administrative decisions taken by a broad array of executive decision-makers; and 4) the development and implementation of international environmental law. Constitutional law and litigation under the *Canadian Charter of Rights and Freedoms* is conspicuously absent from this list.[2] This doesn't mean, however, that environmental law never engages constitutional issues. To the contrary, there is considerable jurisprudence engaging the constitutionality of various environmental laws. These decisions traditionally engage jurisdictional issues and interpretation of sections 91 and 92 of the *Constitution Act, 1867*.[3] Many of these issues have been resolved, and our highest court is clear that: 1) environmental protection is a "fundamental value in Canadian society";[4] and 2) the 'environment'—the sum of our surroundings, natural or otherwise—is an area of shared jurisdiction.[5]

Thanks in large part to the product of scientific investigation, we continue to learn more and more about the rate and scale at which collective human activity is affecting the environment—locally, regionally, and internationally. By and large, the findings are clear (and dire): humans are a dominant global force capable of overwhelming natural systems to our collective detriment.[6] And, despite the presence of functional environmental law, Canadian society struggles to adequately safeguard our natural resources, make decisions geared towards ensuring the sustainability of our society, or to ensure that marginalized and socio-economically disadvantaged Canadians are not disproportionately exposed to environmental conditions that are unsafe or inadequate. Canada is not alone in this struggle; however, compared to similarly situated countries, we rank near the bottom in terms of effectiveness of our environmental laws.

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[1] Portions of this article were prepared for the Centre for Constitutional Studies for the purposes of an educational article on constitutional issues. The original version of the article is available **here**.

[2] Part I of the *Constitution Act*, 1982, being Schedule B to *the Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

[3] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

[4] *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at 1075-1076, Gonthier J [*Canadian Pacific Ltd*].

[5] *R v Hydro-Québec*, [1997] 3 SCR 213, La Forest J.

[6] Will Steffen et al, "Planetary boundaries: Guiding human development on a changing planet" (2015) 347 *Science* 736.

Canadian environmental law continues to evolve. Subject to political manipulation, regulatory capture, and practical limitations including resource scarcity and financial constraint, its progression tends to occur in fits and starts rather than in an organized or coherent manner. Perhaps it is this form of evolution that has led many scholars, practitioners, and legislators to ask the sort of larger normative questions that challenge the status quo. When it comes to the future of environmental law, should we continue down the path we are currently on and hope that incremental improvement to existing laws (statutory or otherwise) will yield better results, or is it time to eschew this approach in favour of something less familiar (at least to us) but with the prospect of greater success? Seeking recognition of a constitutionalized right to a healthy environment qualifies as one such alternative and the analysis that follows introduces you to what such a right might entail and the impact it could have.

DO YOU, AS A CANADIAN, HAVE THE RIGHT TO LIVE IN A HEALTHY ENVIRONMENT?

What does the 'right to a healthy environment' entail? And, is this a right that Canadians hold and enjoy? In short, the right to a healthy environment means that the government guarantees its people access to clean air, safe water, and uncontaminated lands on which to live.[7] While the right to a healthy environment (or some analogous guarantee) is enshrined in the constitutions of over 110 countries, Canada's Constitution is absent of such a right.[8]

Locating the Right in the Food We Eat, the Water We Drink, and the Air We Breathe

Human health is negatively impacted when the quality of the water, air, and land upon which we depend is compromised. Air pollution is responsible for the premature death of thousands of Canadians each year and contributes to a wide range of health problems including heart disease,

[7] David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution*, (Vancouver: UBC Press, 2012) at 1-3 [Boyd, *Revitalizing Canada's Constitution*]; David R Boyd, "The Constitutional Right to a Healthy Environment" *Environment* (July-August 2012), online: <www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>.

[8] Ecojustice, "The Right to a Healthy Environment: Canada's Time to Act", *Ecojustice Cases*, online: <www.ecojustice.ca/case/right-to-a-healthy-environment/>; Cameron Jeffries, "If it's Easy Being Green, How Come Our Charter Isn't?" (Centre for Constitutional Studies' Downtown Charter Series, 22 March 2017), online: <ualawccsprod.srv.ualberta.ca/index.php/downtown-charter-series>.