Your right to live in a healthy environment: phantom or reality?

What does it mean to have a right to a healthy environment? And is this a right that Canadians can have and enjoy?

Having a 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.[1] While the right to a healthy environment (or a similar guarantee) is now included in the constitutions of over 110 countries, Canada's Constitution contains no such express right.[2]

What we eat, drink, and breathe

It is well known that human health is negatively impacted when the integrity of the water, air, and land that surrounds us is compromised. Air pollution causes the premature deaths of thousands of Canadians each year and contributes to health problems including heart disease, asthma, and lung cancer.[3] Pesticides that can end up in our food and on our skin are linked to cancer and damage to the human reproductive, immune, and nervous systems.[4]

Poor water quality is often a source of tragedy for Canadian communities. In the year 2000, seven people died and more than 2,300 people fell ill in Walkerton, Ontario after the town's water supply became contaminated with deadly bacteria.[5] In the 1960s, two First Nations communities in Ontario were exposed to mercury poisoning when a nearby pulp mill began dumping toxins into the English-Wabigoon River.[6] Over 50 years later, the residents in those communities continue to suffer from the symptoms of mercury poisoning, including impaired vision, tremors, speech impairment, limb numbness, and birth defects.[7]

As of early 2017, approximately 150 drinking water advisories[8] existed in First Nations communities across Canada, with 71 of those advisories having been in place for longer than a year.[9] Two-thirds of all First Nations communities in the country have been issued at least one water advisory over the past ten years.[10]

Given that human survival depends on having access to safe water, clean air, and unpolluted lands, it is natural to ask whether Canada's Constitution can, and indeed, should, protect those fundamental needs.

Why does constitutional protection matter?

Examples from abroad

Other countries provide some useful examples of the kind of protection a constitutional right to a healthy environment can give. In the Netherlands, the Hague District Court ordered the Dutch government to take greater action to reduce greenhouse gas emissions.[11] One

important factor the Court considered was the government's constitutional duty to protect and improve the living environment and to maintain the country in a "habitable state."[12]

In Argentina, citizens sued the national, provincial, and local municipal governments for polluting a major river, claiming that their right to a healthy environment had been violated.[13] The Argentinian Supreme Court ordered the governments to take several specific measures to clean up the river basin and to stop further contamination.[14] The Court's decision was made in part on the basis that Argentina's Constitution expressly includes the right to a healthy environment.

Like Argentina, the people of the Philippines have the right to a healthy environment listed in their Constitution (specifically, the right to "balanced and healthful ecology"). On that basis, the Supreme Court of the Philippines ordered government agencies to clean up the heavily polluted Manila Bay in 2008.[15]

Constitutional strength

Why include a right to a healthy environment in the Constitution, specifically, rather than simply create laws to protect different aspects of the environment?

The Constitution is the supreme (or highest) law in Canada, which means that all other laws and government actions must comply with the Constitution.[16] Entrenching a right to a healthy environment in the Constitution would therefore allow people to hold the government accountable for laws and government actions that violate that right.[17]

A constitutional right to a healthy environment would also help stop a newly formed government from removing laws that a previous government created to protect the environment.[18] This is because the Constitution is harder to change (or "amend") than other laws.[19] With a constitutional right to a healthy environment, a basic, minimal level of protection for the water, air, and land is therefore better able to survive changes to the governing political party.

How can the right to a healthy environment become a constitutional guarantee?

The right to a healthy environment is not expressly listed in the *Canadian Charter of Rights and Freedoms*.[20] So how does such a right become a guarantee that all Canadians can rely upon?

The first way that the right to a healthy environment can become a recognized protection in the Constitution is for the federal government, backed by provincial support, to expressly add that right to the *Charter*.[21] This would involve a direct amendment to the *Charter*, which requires that the federal government have the support of two-thirds of the provinces representing at least 50% of Canada's population (referred to as the "general amending formula," found in section 38 of the *Constitution Act, 1982*).[22] Such an approach is difficult because of the level of consensus it requires between the federal government and a large number of provinces who often have very different priorities.[23] Over the past 35 years, the general amending formula has successfully been used to change the Constitution

only once in 1983 when a section was added to clarify the effect of the *Charter* on Aboriginal rights.[24]

The second route to creating a right to a healthy environment is for a court to find that the right is implicitly included within the existing *Charter* rights. For example, a court can conclude that section 7 of the *Charter*, which guarantees the right to life, liberty, and security of the person, includes a right to have access to things like safe drinking water, air above a specific quality standard, and/or uncontaminated lands on which to live.[25]There are two paths available that can lead to such a court finding:

1. **A judicial reference**. The federal or provincial governments can ask the courts whether a specific section of the *Charter,* such as section 7, includes an implied right to live in a healthy environment.[26] This process of the government asking for advice from the courts is called a judicial reference, and has been used frequently through Canada's history.[27]
2. **Private litigation against the government**. Individuals living in Canada can claim that a government action or law that causes a specific harm to the environment (like water contamination or air pollution) violates their right to life, liberty, and security of the person in section 7 of the *Charter*.[28] Notably, it could be argued that certain types or locations of environmental degradation could violate section 2(a) religious freedoms or section 15 equality rights, but section 7 is recognized as the right most likely to include an implied guarantee to a healthy environment.[29] If a court finds that a government action or law that causes harm to the environment violates section 7, then a right to a healthy environment (or a right to something simpler such as access to safe drinking water) would be recognized as being guaranteed by the *Charter*.

Finding the right to a healthy environment in section 7

Section 7 of the *Charter* guarantees everyone in Canada "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

In certain circumstances, a court could find that a person is deprived of their life, liberty, and/or security interests by government actions or laws that damage the environment. For example, a law or government action may deprive an individual of their right to life if it leads to increased air, water, or soil contamination that causes premature death.[30] Similarly, Canadians may be deprived of their right to security of the person when a government decision results in an environmental catastrophe that causes people "physical

or serious psychological suffering."[31]

Liberty interests may be engaged where a government gives its approval for new polluting activities that cause members of a community to suffer from cancer, birth defects, and fear of venturing outside of their homes.[32] Such a decision made by the government can restrict an individual's ability to make fundamental personal choices regarding where they live and how they can meet their basic needs.[33]

Of note is that no Canadian court has yet found that government *inaction* can violate section 7 of the *Charter*.[34] This is especially relevant when considering the right to a healthy environment because a government's inaction, such as failing to monitor water quality, not limiting greenhouse gas emissions, or refusing to clean up a contaminated ecosystem will impact the health of the environment.

Up to the current time, courts have found only that laws and government *actions* are required to comply with the *Charter*.[35] As stated by the Supreme Court of Canada in *Chaoulli v Quebec (AG)*, this means, for example, that the *Charter* does not place a positive obligation on the government to actively provide Canadians with a service such as health care.[36] The requirement is that if the government decides to provide health care, it must do so in a way that complies with *Charter* rights.[37] However, the Supreme Court has also said that in the future, it is possible that "a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances."[38]

While the Supreme Court has not recognized the existence of a right to a healthy environment in the *Charter*, the Court has called environmental protection "a fundamental value in Canadian society."[39] The Supreme Court has also expressed that "our common future, that of every Canadian community, depends on a healthy environment."[40]

Are we moving toward a right to a healthy environment?

Despite interest in including a right to a healthy environment in the Constitution leading up to, and after the creation of the *Charter*, that right never became an express constitutional guarantee.[41] Since 2009, Linda Duncan – Member of Parliament for Edmonton-Strathcona – has proposed several times that Parliament pass a *Canadian Environmental Bill of Rights*.[42] Most recently, Duncan re-tabled her private member's bill, Bill C-202, in December 2015, and it currently remains in the early stages of consideration. Although the *Bill* would lack constitutional status and only restrict federal laws and the actions of the federal government, it would mark a significant step towards recognizing a right to a healthy environment.[43]

In 2010, members of the Aamjiwnaang First Nation filed a lawsuit against Ontario's provincial government, claiming that their section 7 rights had been violated.[44] The government had approved of additional industrial activity near the First Nation community, which is located in a valley already known for its high levels of air pollution. The lawsuit was withdrawn in the summer of 2016 as the Ontario government began to correct several of the problems that triggered the lawsuit.[45] As a result, no finding was made in court on the

section 7 issue.

Meanwhile, Canadians continue to face threats from a changing climate and pollution from a multitude of sources.[46] Until future court cases, a judicial reference, or a direct amendment result in turning the right to a healthy environment into a constitutional guarantee, that right remains more phantom than reality.

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[1] 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>.

[2] 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>.

[3] Government of Canada, "Road traffic and air pollution" (2016), online: <www.canada.ca/en/health-canada/services/air-quality/road-traffic-air-pollution.html>; Canadian Medical Association, *No breathing room: national illness costs of air pollution* (Ottawa: Canadian Medical Association, 2008) at 4-7, online: <www.healthyenvironmentforkids.ca/sites/healthyenvironmentforkids.ca/files/No_Breathing_Room.pdf; Michael Brauer, Conor Reynolds & Perry Hystad, "Traffic-related air pollution and health in Canada" (2013) 185:18 CMAJ at 1557–1558, online: <www.ncbi.nlm.nih.gov/pmc/articles/PMC3855107/>; Robert Smith & Kieran McDougal, *Costs of Pollution in Canada: Measuring the impacts on families, businesses and governments* (Winnipeg: International Institute for Sustainable Development, 2017) at 26.

[4] P Nicolopoulou-Stamati et al, "Chemical Pesticides and Human Health: The Urgent Need for a New Concept in Agriculture" (2016) 4:148 Front Public Health at 1-3; World Health Organization, "Pesticide residues in food" (2016), online: <www.who.int/features/qa/87/en/>; Canadian Cancer Society, "Pesticides" (2017), *Harmful substances and environmental risks*, online: <www.cancer.ca/en/prevention-and-screening/be-aware/harmful-substances-and-environmental-risks/pesticides/?region=on>.

[5] The Honourable Dennis R O'Connor, *Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues, Part One: A Summary* (Toronto: Ontario Ministry of the Attorney General, 2002) Summary of the Report at 3, online: <www.archives.gov.on.ca/en/e_records/walkerton/report1/pdf/WI_Summary.pdf>.

[6] Michelle McQuigge, “Two Ontario first nations still plagued by mercury poisoning: report”,

The Globe and Mail (4 June 2012), online: <www.theglobeandmail.com/news/politics/two-ontario-first-nations-still-plagued-by-mercury-poisoning-report/article4230507/>; M Harada et al, “Mercury Pollution in First Nations Groups in Ontario, Canada: 35 years of Canadian Minamata Disease” (2011) 3 Journal of Minamata Studies 3.

[7] Martha Troian, “Neurological and birth defects haunt Wabaseemoong First Nation, decades after mercury dumping”, *CBC News* (20 September 2016), online: <www.cbc.ca/news/indigenous/wabaseemoong-birth-defects-mercury-dumping-1.3764315>; McQuigge, *ibid*; Harada et al, *ibid*.

[8] Public health or regulatory authorities issue drinking water advisories to warn people of the potential health risks associated with their drinking water and inform them on how they should protect themselves from harm. See Environment and Climate Change Canada, “Drinking Water Advisories in Canada” (27 April 2016), *Environmental Indicators*, online: <www.ec.gc.ca/indicateurs-indicators/default.asp?lang=en&n=2C75C17A-1>.

[9] Kaitlyn Mitchell, “Drinking water crisis in First Nations communities violates human rights” (24 February 2017), *Ecojustice* (*blog*), online: <www.ecojustice.ca/drinking-water-crisis-first-nations-communities-violates-human-rights/>; Margo McDiarmid, “Indigenous water solutions: 2 steps forward, 1 step back”, *CBC News* (15 February 2017), online: <www.cbc.ca/news/politics/first-nations-drinking-water-advisories-1.3982999>.

[10] Joanne Levasseur & Jacques Marcoux, “Bad water: 'Third World' conditions on First Nations in Canada”, *CBC News* (15 October 2015), online: <www.cbc.ca/news/canada/manitoba/bad-water-third-world-conditions-on-first-nations-in-canada-1.3269500>.

[11] *Urgenda v The Netherlands* (2015), HA ZA 13-1396 (Netherlands) . See also Mike Corder, “Netherlands ordered to slash greenhouse gases by Dutch court”, *CBC News* (24 June 2015), online: <www.cbc.ca/news/world/netherlands-ordered-to-slash-greenhouse-gases-by-dutch-court-1.3126814>. Note that the Dutch government has appealed the Hague District Court’s decision, and no decision on that appeal had yet been reached at the time that this article was written.

[12] *Urgenda, ibid* at paras 4.36, 4.89; KJ de Graaf & JH Jans, “The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change” (2015) 27 J Envtl L 517 at 519-521.

[13] Boyd, *Revitalizing Canada’s Constitution, supra* note 1 at 161-162; Business & Human Rights Resource Centre, “Matanza Riachuelo lawsuit (re Argentina)”, online: <business-

humanrights.org/en/matanza-riachuelo-lawsuit-re-argentina>.

[14] *Ibid*; *Mendoza v Argentina* (2008), M 1569 XL (SC Argentina). It should, however, be noted that while Argentina's Supreme Court called for aggressive measures to be taken to clean up and restore the Riachuelo River, billions of dollars have now been spent with little progress to show for it, and government corruption may be one of the reasons why. See Daniel Gutman, "Argentina's Never-ending Environmental Disaster", *Inter Press Service* (11 February 2017), online: <www.ipsnews.net/2017/02/argentinas-never-ending-environmental-disaster/>; Jason MacLean, "Greening the Charter? Why trying to constitutionalize a right to a healthy environment is misguided", *National Magazine* (28 February 2017), online: <nationalmagazine.ca/Articles/February-2017/Greening-the-Charter-Why-trying-to-constitutionali.aspx>.

[15] Boyd, *Revitalizing Canada's Constitution, supra* note 1 at 163-164; *Concerned Residents of Manila Bay v Metropolitan Manila Development Authority* (2008), GR No 171947-48 (Philippines). Like the case of the Riachuelo River in Argentina, while some progress has been made in the cleanup of Manila Bay, billions of dollars and years of hard work remain necessary before the Bay's "toilet bowl" status can be dispelled. See Simone Orendain, "Pollution Cleanup Progresses in Manila Bay", *Voice of America News* (1 May 2013), online: <www.voanews.com/a/manila-bay-progress-in-enviornment-pollution-cleanup/1652230.html>.

[16] Boyd, *Revitalizing Canada's Constitution, supra* note 1 at 3, 19.

[17] *Ibid* at 21-22.

[18] *Ibid* at 20-21, 150-152.

[19] *Ibid* at 20.

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

[21] Boyd, *Revitalizing Canada's Constitution, supra* note 1 at 171-175.

[22] Being Schedule B to the *Canada Act 1982* (UK), 1982, c11 .

[23] Boyd, *Revitalizing Canada's Constitution, supra* note 1 at 171-172; MacLean, *supra* note 14.

[24] *Charter*, s 25; Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Toronto: Thomson Reuters, 2007) at 4.3(a).

[25] Boyd, *Revitalizing Canada's Constitution, supra* note 1 at 171, 176-177, 188.

[26] *Ibid* at 185, 188.

[27] *Ibid* at 186. One famous example of a judicial reference was the case of the federal government asking the Supreme Court of Canada whether the term “persons” in section 24 of the *Constitution Act, 1867* included women. See *Reference Re meaning of the word "Persons" in s 24 of British North America Act*, [1928] SCR 276.

[28] Boyd, *Revitalizing Canada’s Constitution, supra* note 1 at 176-177.

[29] *Ibid*. It could be argued that the section 15 equality rights of Aboriginal peoples are engaged by government actions or laws that result in air or water pollution because of the differential adverse impacts that such pollution has on historically disadvantaged First Nations communities. The differential adverse effects arise because of the close physical and cultural connections that First Nations people have to their lands and the fact that First Nations reserves are often located near sites of industrial pollution. See *Lockridge v Ontario (Ministry of Environment)* (10 January 2012), Toronto, Ont Sup Ct 528-10 (amended notice of application) at 15-16 . The section 2(a) guarantee to freedom of conscience and religion may also be engaged in the case of some First Nations peoples living in Canada. Aboriginal peoples who hold sincere beliefs related to the integrity of the natural environment and who rely on wildlife or undisturbed ecosystems in order to practice their beliefs can argue that their freedoms are violated when government intervention causes environmental harm. See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 250-254, 259.

[30] *Carter v Canada (AG)*, [2015] 1 SCR 331 at paras 57-58, 62.

[31] *Ibid* at para 64; *Chaoulli v Quebec (AG)*, [2005] 1 SCR 791 at paras 117-119.

[32] See e.g. *Lockridge* Application, *supra* note 29 at 14. Note that the lawsuit brought in this case was discontinued in 2016 in the face of improvements made and promised by Ontario’s provincial government. See Ecojustice, “Defending the rights of Chemical Valley residents – Charter Challenge”, *Ecojustice Cases*, online: <www.ecojustice.ca/case/defending-the-rights-of-chemical-valley-residents-charter-challenge/> [Ecojustice, “Charter Challenge”].

[33] *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66; *Carter, supra* note 30 at paras 66-68.

[34] *Gosselin v Québec (AG)*, 2002 SCC 84 at para 81 ; Boyd, *Revitalizing Canada’s Constitution, supra* note 1 at 178-179.

[35] *Ibid*.

[36] *Supra* note 31 at para 104.

[37] *Ibid*.

[38] *Gosselin, supra* note 34 at paras 82-83, McLachlin CJ.

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

[40] *114957 Canada Ltée (Spraytech) v Hudson (Town)*, 2001 SCC 40 at para 1.

[41] Boyd, *Revitalizing Canada's Constitution, supra* note 1 at 42-47.

[42] Bill C-202, *An Act to establish a Canadian Environmental Bill of Rights and to make a related amendment to another Act*, 1st Sess, 42nd Parl, 2015 (first reading 9 December 2015).

[43] Boyd, *Revitalizing Canada's Constitution, supra* note 1 at 59-61.

[44] *Lockridge* Application, *supra* note 29.

[45] Ecojustice, "Charter Challenge", *supra* note 32.

[46] P Berry et al, "Human Health" in FJ Warren & DS Lemmen, eds, *Canada in a Changing Climate: Sector Perspectives on Impacts and Adaptation* (Ottawa: Government of Canada, 2014) 191 at 197-209.