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**A HEALTHFUL ENVIRONMENT:
PRIVILEGE, RIGHT OR RESPONSIBILITY?**

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A HEALTHFUL ENVIRONMENT: PRIVILEGE, RIGHT OR RESPONSIBILITY

1.0 INTRODUCTION¹

The federal government proposals to entrench property rights force us to continue to think in terms of negative rights - protecting private property from unwarranted intrusion, ignoring that much of society is effectively denied access to property. Where is the notion of a government's responsibility to the people - reflected in our founding document?

The constitution of Canada is the supreme law of the land - it is also our social contract which defines the relationship between the individual and the State, and the relationship between individuals.

The notion of a government duty to be the steward for the nation is the missing link between effectively integrating the economy and the environment. Poverty dictates who bears the brunt of the worst environmental degradation but we are increasingly faced with the knowledge that environmental degradation knows no boundaries - political or geographical.

¹ Parts of this paper are incorporated from a revised version of a submission to the House of Commons Standing Committee on Environment prepared jointly by the author and Paul Muldoon of Pollution probe. This submission critically analyzes the federal government proposals on the environment and also examines what should be in our Constitution to adequately protect the environment. It is entitled "Environment and the Constitution" and is available from the Canadian Environmental Law Association (CELA).

A government for the people is the trustee of the public good, and the provider, on behalf of society, of basic needs and the protector of freedoms to all its citizens. Both aspects of our standard of living are maintained by the State on our behalf.

Canadians have a history of caring for their neighbours.² The fundamental principle of universality in social programs is a cornerstone of our social contract for a just society. The actual claim an individual has over government resources, that is a measure of the public good, is the issue. A right or a privilege?

At common law government largesse is seen as a privilege from Her Majesty the Queen, a gift that can only be taken away if the right procedures are followed. If you have it you are entitled to make a case to keep it. If you do not you must base your argument for the "benefit" on discrimination. You have to point to a similarly situated person who is receiving the "benefit" and claim a violation of your equality rights. There is no constitutional obligation of our governments to manage the nation wisely to ensure maximization of our nation's wealth; meaning the health and well being of our environment, citizens and the economy.

² The Canadian Charter of Rights and Freedoms partly embodies the respect Canadians have for communitarian values. See "Discursive and Non-Discursive Symbolism", 49 U.of T. Faculty Law Review No.1; and Slattery, "A Theory of the Charter" (1978) 25 Osgoode Hall L.J. 701

The debate is not just about money or the economy. There are social costs to our pursuit of prosperity and we must decide to act proactively instead of continuing to try to repair damage after the fact.

Our governments provide basic services, in the form water, sewage, garbage, recycling, education, income support, health care, housing, health and safety, food and drug laws, protection of natural resources, our justice system, our culture and heritage and our economy, not to mention the machinery to ensure the provision of these services through taxation and the necessary government agencies. If people are unnecessarily sick or dying, undernourished, if they are homeless, without basic needs and dignity, if our water, air and land are polluted - the government is not fulfilling its part of the contract.

The political process fails us as the disenfranchised do not vote and/or do not have the economic clout to influence government. Many politicians rationally have a limited perspective and will often sacrifice long term interests for short term gains for their most influential constituents. Other politicians lose touch with the needs and desires of the people of the nation and make irreversible decisions that adversely affect all of our lives. The environment gets short shrift as it is perceived as an economic resource to be exploited for man's needs.

Some argue that positive constitutional rights are somehow undemocratic yet the debate is not about legislative versus judicial supremacy.³ The issue is about ensuring the proper checks and balances exist in the governance of our complex society.

Others will argue that we cannot afford social and economic rights. Yet the global trend is exactly that - towards collective decision-making to ensure that citizens of a community are entitled to some minimum standard of living. The European Community is engaged in that very task as a collectivity of nations. Even the United States, in considering the 200th anniversary of the formation of its "classical liberal" Bill of Rights, and twenty years of the National Environmental Protection Act, is asking itself whether positive rights are needed, including a constitutional law for the environment.⁴ Our constitutional debate must be about our values as a nation, educating ourselves to take care of one another and our home, the

³ The legislature clearly has supremacy over the courts by virtue of s.33 of the Charter. Section 1 also operates as a protection for laws demonstrably justified in a free and democratic society. Also, the inherent conservative nature of our judiciary has ensured that judges are extremely reluctant to engage in second guessing of the legislature. On this point see B.M. McLachlin, "Of Power, Democracy and the Judiciary", Gazette, Vol. XXV, No.1 (March 1991).

⁴ See A.L. Presser, "Thinking Positive: Do We Need More Rights", A.B.A. Journal (August 1991) and L.K. Caldwell, "A Constitutional Law for the Environment: 20 Years with NEPA Indicates the Need", Environment Vol.31, No.10. p.6 (December 1989). There is also considerable envy south of the border of our medicare system, and other social welfare protections.

earth.

Clearly we need to integrate our social development, as a nation and as people, with our economic pursuits. Accordingly we must look to enshrining positive rights or governmental obligations to balance the negative rights already enshrined in our Constitution.

The remainder of this paper will discuss the implications of enshrining (i) positive environmental rights and (ii) negative property rights.

2.0 THE ENVIRONMENT AND THE CONSTITUTION

In September of 1991, the Conservative government unveiled its latest series of constitutional proposals.

The preface to the first of the three proposal documents, "Shaping Canada's Future Together"⁵, begins:

Canadians are proud of their land and their shared values and the advantages and opportunities provided by Canadian citizenship. But Canadians are now searching for new arrangements that will serve as a blueprint for the future.⁶

With such a forward looking vision, it would seem clear that the

⁵ Canada Shaping Canada's Future: Proposals (Ottawa: Supply and Services, 1991).

⁶ Ibid., p.iii.

fundamental respect and concern Canadians have for their environment would figure prominently in the proposals. It is with great sorrow that we find nothing in the proposals enshrining constitutional protection for the environment, except for a proposal for the inclusion of the concept of "sustainable development" in the "Canada clause".

In light of the state of the world environment, and the state of the environment in Canada, it is imperative that meaningful action take place to stem the onslaught of degradation and begin repairing our ailing globe. The Constitution, as the supreme law of the land, plays an important role in shaping Canadian values by guiding the courts and the legislatures, and therefore can play an important role in ensuring effective environmental protection.

Canadians need a constitutional right to environmental justice. Canada has not protected its citizens' rights to a healthful environment, nor do its citizens have the right to know and have access to current information on the state of the environment and natural resources. Moreover, Canada's citizens do not have the right to participate in decision-making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected.

To ensure the public has adequate access to environmental justice, legal tools must be available. The most important such tool is a constitutionally protected "positive" right to a healthful environment. The entrenchment of "negative" property rights, on the other hand, would be the most effective way to negate the public's access to environmental justice.

To fully ensure public access to environmental justice we advocate that the following vision for our Constitution:⁷

1. Recognition of the environment as a fundamental value;
2. A set of rights recognizing the role of the public and their governments in enhancing and protecting the environment;
3. Concurrent jurisdiction over environmental protection and resource conservation: in the event of conflict, paramountcy would operate to sustain the jurisdiction with the strictest regulation; and
4. No constitutional protection for property rights under any circumstances.

Without sound environmental planning, integration of environment and economy, and substantive and clear environmental rights and obligations, we will have no common future. We can not over-emphasize the breadth of the challenge ahead as it involves a fundamental restructuring of societal values. Without fundamental change in our attitudes and institutions and law and policy, environmental degradation will continue unabated at its

⁷ The division of powers issues (point no. 3) will not be explored at any length in this paper. For discuss of these issues, see the CELA/Pollution Probe submission cited in note 1.

exponential rate. What better way to start to change the path of a nation than by enshrining social and economic rights in its Constitution?

3.0 RECOGNITION OF THE ENVIRONMENT AS A FUNDAMENTAL VALUE

Environment is a value that unites, rather than divides, Canada. It should be recognized and included as a fundamental value in the Constitution. But how should this be done? In the package of constitutional reforms, Shaping Canada's Future Together, it is proposed that a "Canada Clause" be added in the body of the Constitution "to affirm the identity and aspirations of the people of Canada." It is proposed that entrenched in section 2 of the Constitution Act, 1867 would be:

...a commitment to the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve and protect the environment for future generations.⁸

It is possible that such a clause would be used as an aid to interpretation with respect to disputes under the Constitution Act, 1982, the "Charter"; however, such a clause will not have any binding effect and will not have the weight of entrenched rights and freedoms. Accordingly, it can not be seen as a substitute to the entrenchment of a right to a healthful environment.

⁸ Supra, note 5.

4.0 ENVIRONMENTAL RIGHTS: ENHANCEMENT AND PRESERVATION OF ECOLOGICAL INTEGRITY

Over the past two decades, the level of public concern over the environment has been unprecedented. It is demonstrated in the polls, in community action, publications, and in consumer demand. Yet there has been a failure of democracy as the legal framework of Canada demonstrates a clear lack of recognition of the public's concern about environmental protection. Both during the consultations during the development of the Canadian Environmental Protection Act ("CEPA")⁹ and the Green Plan, the same message has prevailed as will during this constitutional debate - **Canadians want to be vested with certain constitutional rights to a healthful environment which define both their rights and responsibilities and those of their government.** This proposal has been supported by leading constitutional scholars,¹⁰ public interest groups,¹¹ the Canadian Bar

⁹ Canadian Environmental Protection Act, R.S.C. 1985 (4th Supp.) c.16.

¹⁰ For example, see: "Constitutional Entrenchment of Environmental Rights" in N Duple, ed. *Le droit a la qualite de l'environnement: un droit en devenir, un droit a definir* (Quebec/Amerique, 1988).

¹¹ For instance, see: P. Muldoon, "The Fight for an Environmental Bill of Rights: Legislating Public Involvement in Environmental Decision-Making" *Alternatives*, vol. 15, no 2 (April/May 1988); F. Gertler and T. Vigod, "Submission by the Canadian Environmental Law Association to the Select Committee on Ontario in Confederation: Environmental Protection in a New Constitution: (Toronto: CELA June, 1991). A submission endorsed by twelve environmental groups called for provincial environmental rights, see: "An Overview to the Essential Principles of an Environmental Bill of Rights" A Briefing Document to the Minister of the Environment on a Proposed

Association, and other members of the legal community.¹² In this regard, the Canadian Bar Association Committee on Sustainable Development in Canada proposed in their recommendations for federal environmental reform that:

The Government of Canada should adopt a long-term strategy to entrench the right to a healthy environment in the Canadian Constitution.¹³

4.1 The Importance of Environmental Rights

There are a number of reasons why environmental rights are so important. These reasons underscore a number of the weaknesses in Canadian law concerning the protection of the environment.

Firstly, entrenching environmental rights would be a clear step toward mandating and requiring the full integration of due consideration of environmental quality into all public and private sector decision-making.¹⁴

Environmental Bill of Rights, March 20, 1991.

¹² J. Swaigen and R. Woods, "A Substantive Right to Environmental Quality" in J. Swaigen (ed.) *Environmental Rights in Canada* (Toronto: Butterworths, 1981); D. Saxe, Environmental Offences: Corporate Responsibility and Executive Responsibility (Aurora: Canada Law Book, 1990), at 5-20; M. Rankin, "An Environmental Bill of Rights for Ontario: Reflections and Recommendations, A Discussion Paper" (1991). See generally: C. Stevenson, "A New Perspective on Environmental Rights After the Charter" (1983), 21 *Osgoode Hall Law Journal* 390.

¹³ Report of the Canadian Bar Association Committee on Sustainable Development in Canada: *Options for Law Reform* (Ottawa: Canadian Bar Association, 1990), p. 27.

¹⁴ "Environmental Protection in a New Constitution" supra, note 11, p.3.

Secondly, in contrast to ordinary statutory guarantees, such rights could not easily be repealed by subsequent legislatures or overridden without the serious political consequences which accompany disregard for fundamental rights.¹⁵

Thirdly, constitutional protection would have an educational function. Public and private sector actors are more likely to take all environmental norms and issues more seriously if a healthful environment is recognized as a fundamental right.¹⁶

Fourthly, it is also suggested that entrenching a Charter right to a healthful environment is consistent with recommendations from the Brundtland report which concludes that because "perceived" needs are culturally and socially determined, "...sustainable development requires the promotion of values that encourage consumption standards that are within the bounds of the ecological possible and to which all can reasonably aspire"¹⁷ It has been suggested by one commentator that a Charter right to a safe and healthy environment would give moral authority to environmental rights which would forge an environmental ethic: "In giving courts a foundation upon which arguments against the traditional legal conceptions of property could be accepted, an

¹⁵ Ibid.

¹⁶ Ibid. p. 4.

¹⁷ World Commission on Environment and Development, Our Common Future (New York: Oxford University Press, 1987), p.44.

educational function would ultimately be performed."¹⁸

Other reasons for the importance of environmental rights are as follows.

4.1.1 Environmental Rights Recognizes the Inherent Value of Nature and Natural Resources

Typically, people have "rights." These rights are based upon some notion that there is societal contract whereby everyone is vested with certain obligations and corresponding benefits. Who speaks on behalf of, and for, the environment? The environment has special intrinsic value and worth apart from being its value in use and for consumption by humans. By entrenching environmental rights, the inherent value of the environment would be formally recognized. Such recognition is consistent with the understanding that without our environment, individual rights can have no meaning.

4.1.2 Environmental Rights Empower People to Protect the Environment that Sustains Them

Environmental rights give individuals the tools to protect the environment. At present, Canadians must rely on their government to act in their interest to ensure environmental integrity and

¹⁸ M. Walters, "Ecological Unity and Political Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order" (1991) 29 Alta. Law Review 420, at p. 431; citing Colin Stevenson, "A New Perspective on Environmental Rights after the Charter" (1983) 21 Osgoode Hall Law Journal 390 at p.403.

resource conservation. Surely the government, playing all roles of owner, manager and arbitrator of environmental and natural resource issues, is subject to many conflicts of interest. It is fundamentally important that citizens be empowered with legal rights to protect their health and environment, and to require that any question of a conflict of interest will be adjudicated in an independent forum.

According to the report of the World Commission on Environment and Development, Our Common Future,¹⁹ participatory rights are an integral component of the principle of sustainable development. The report states that governments must recognize not only their responsibility in ensuring a viable environment for present and future generations, but they must also recognize certain other environmental rights enjoyed by citizens:

...progress will also be facilitated by recognition of, for example, the right of individuals to know and have access to current information on the state of the environment and natural resources, the right to be consulted and to participate in decision-making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected.

¹⁹ Brundtland Report, supra, note 17, p.330.

4.1.3 Environmental Rights Have Become Legitimate Provisions of National Constitutions

At least twenty-five countries²⁰ now have constitutions which either expressly or impliedly have the right to a healthful environment, including several western democracies, many European countries, China and a number of other countries. As well, the right to a clean environment has been recognized in a number of U.S. state constitutions. According to one author, Canada may be the only country to have adopted or amended a constitution since 1975 which did not include a recognition of some environmental right.²¹ Not waiting for constitutional reform, jurisdictions in Canada are gradually moving ahead and vesting citizens with environmental rights; such as in the Yukon, Northwest Territories, and Ontario.²²

4.1.4 Environmental Rights are Becoming Recognized Under International Law

Constitutional recognition of a right to a healthful environment

²⁰ "The Protection of Social and Economic Rights: A Comparative Study", prepared by the Constitutional Law and Policy Division, Ministry of the Attorney General, September 19, 1991, p.7.

²¹ Saxe, supra, citing New Human Rights, a discussion paper prepared by A.H. Robertson and A.C. Kiss, at 5.

²² Bill 20, Environment Act, 2nd Sess. 27 Leg. Yukon, 1991 (assented to 29 May 1991). Bill 17, Environmental Rights Act, 7th Sess, 11th Leg. Northwest Territories, 1990 (assented to 11 June 1990). Ontario has created a task force to develop an environmental bill of rights. For the history of this effort, see: Muldoon, "The Fight for Environmental Rights," supra, note 11. Also see: Environment Quality Act, (Quebec), ss. 19.1.

would bring Canada into conformity with the growing recognition in international instruments, including several to which Canada is a party, of the emerging right to environmental quality.²³ At present, the Stockholm Declaration recognizes this right to environmental quality.²⁴ Many other international rights codes may imply such a right, such as the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights.²⁵ Further, the most recent formulation of the right to environmental quality is in the Legal Experts Report to the World Commission on Environment and Development, the Brundtland Report. The text provides that:

All human beings have the fundamental right to an environment adequate for their health and well-being and States shall ensure that the environment and natural resources are conserved and used for the benefit of present

²³ For example, see: Declaration of the United Nations Conference on the Human Environment June 16, 1972, Principle 1, reprinted in UNEP, In Defence of Earth: The Basic Texts on Environment (Nairobi: UNEP, 1981); Universal Declaration of Human Rights December 10, 1948, G.A. Res. 217 A (III), Articles 3 and 25 (right to life and standard of living adequate for health and well-being); International Covenant on Civil and Political Rights (1976) C.T.S. 47, Article 6 (right to life); and International Covenant on Economic, Social and Cultural Rights (1976), C.T.S. 46, Articles 7 and 12 (safe and healthy work conditions and right to physical and mental health). See generally, F. Gertler, P. Muldoon and M. Valiante, "Public Access to Environmental Justice: in Canadian Bar Association, Committee Report, supra, note 13 (1990), at 79-84.

²⁴ Ibid.

²⁵ Ibid.

and future generations.²⁶

4.2 Nature of the Environmental Rights

A number of options have been proposed concerning the nature and precise content of the environmental rights included in the Constitution. Models for such rights could be those rights drafted by the Legal Working Group of World Commission on Environment and Development, those rights included in the recent legislation in the Yukon and the North West Territories, or proposals set out in scholarly literature. These proposals, however, have two common components:

- (1) the vesting in citizens of the right to a healthful environment; and
- (2) the imposition of a duty of governments to protect public resources in the nature of a public trust.

To adequately enshrine a set of rights to accomplish our objectives as set out in the main brief and directly above, we recommend that a set of constitutional substantive provisions ensuring a right to a healthful environment have five key elements and characteristics.²⁷ These rights would be

²⁶ World Commission on Environment and Development, Experts Group on Environmental Law, Environmental Protection and Sustainable Development: Legal Principles and Recommendations (London: Graham & Trotman/Martinus Nijhoff, 1987), at 38-42.

²⁷ See T. Vigod & F. Gertler, Environmental Protection in a New Constitution (Toronto: Canadian Environmental Law Association, June 1991) which deals with environmental rights in the Ontario constitution. We are grateful for the valuable discussion with Franklin Gertler regarding the application of his work in this brief to the incorporation of such a right in the constitution of Canada.

enforceable by members of the public and unincorporated associations representing the public.

1. There should be a separate part of the Constitution Act, 1982, which would be entitled something like "Enhancement and Preservation of Ecological Integrity". This separate status would ensure that this part is applicable both to the public and the private sector; similar to the interpretation of s.35, the rights of the aboriginal peoples of Canada.

2. Given that the rights would not be included in the Charter per se, there should be some limiting language incorporated such that the balancing exercise involved in section 1 would be applicable.

3. These rights should be drafted as to make it clear that it is not merely declaratory of existing rights and protections, but rather imposes a positive first-order constitutional duty on all persons and organizations, including governments, to legislate, administer public and private property and act in all matters in strict accordance with the substantive right to a healthful environment.

4. Although section 52 would clearly apply, operating to render inconsistent laws inoperative, a provision such as s.24, providing any remedy a court of competent jurisdiction considers appropriate and just in the circumstances, should be added. This remedy section would include injunctions against the Crown. The court of competent jurisdiction should include inferior tribunals charged with land and resource use and environmental matters.

5. Finally, the right would be subject to a strictly limited notwithstanding clause allowing for legislative override. Such a provision may be necessary to allow for the validity of certain specific and circumscribed legislation or government action which would otherwise breach the right to a healthful environment. The notwithstanding clause would be an effective override for a renewable period of five years and could only be activated by a two-thirds (2/3) majority of all the members (including those not present) of the government seeking to apply the override.

A review of other jurisdictions would assist in deciding upon the exact wording of such rights.

4.2.1 Recognition of the Public Trust Doctrine

The notion of a public trust doctrine is not new. It has been discussed at length in the literature²⁸ as well as implied in a number of initiatives, such as the Green Plan²⁹ and the National Task Force on Environment and Economy.³⁰ In fact, the present constitutional reform proposals suggest the public trust doctrine when it states that "the land itself, vast and beautiful, is a rich inheritance held in trust for future generations."³¹ The essential notion of the trust is that the governments hold public resources in trust for present and future generations. As holders of the trust, they have certain obligations to ensure for the sustainability of the trust property.

4.3 Recommendation

Within the package of constitutional reforms, there is no recognition of the rights and responsibilities of governments and the public in terms of the environment and natural resources. This notable absence is out of step with the global trend of

²⁸ Hunt, "Public Trust", in Swaigen, supra, note 12.

²⁹ The Green Plan states that "The Governments are the trustees of the environment on behalf of the people." See: Canada's Green Plan (Ottawa: Minister of Supply and Services, 1990), p. 17.

³⁰ The Task Force report states that the "Governments act as trustees of the resources we will pass on to future generations." See: Report of the National Task Force on Environment and Economy (Canadian Council of Resource and Environment Ministers, 1987), p. 6.

³¹ Proposals, supra note 5

nations to ensure the public has a meaningful role in the protection of the environment.

We recommend that the Constitution vest in Canadians a set of rights to a healthful environment which define their environmental rights and responsibilities and the responsibilities of their governments to protect the environment.

5.0 PROPERTY RIGHTS AND THE ENVIRONMENT

5.1 Introduction

The definition of property is very broad at common law. It encompasses rights of possession, rights of ownership, rights of user, rights to preservation, rights to exclude others, rights of disposition and transmission, rights to enjoy the fruits and profits generated by property, and rights to injure or destroy property.³² Almost every law passed by Parliament or the legislatures is related to property.³³

In Shaping Canada's Future Together,³⁴ the federal government proposes to entrench the right to property in the Canadian Constitution. The recommendation states:

It is...the view of the Government of Canada that the Canadian Charter of Rights and Freedoms should be

³² H. Poch, Corporate and Municipal Environmental Law (1989 The Carswell Company Limited), p. 450.

³³ Ibid.

³⁴ Proposals, supra, note 5 .

amended to guarantee property rights.³⁵

We contend that the proposal to include the right to property in the Constitution should be defeated. We advance number of arguments are to support this position. In particular, we argue that the proposal to include property rights would:

(1) instill an unprecedented degree of uncertainty in the regulatory frameworks governing property and in particular, pose a threat to a number of regulatory and policy regimes relating to environmental protection and resource management;

(2) in effect, bestow an inherent right to pollute onto property owners, transfer the onus of those seeking to limit such rights to pollution victims, with the rights of nature to be protected for its own sake totally lost; and

(3) be redundant in the context that the existing common law and statute provisions provide a sufficient basis to protect those property interests in need of protection.

The overall impact of this proposal is clear. It would fundamentally undermine the constitutional validity of environmental and resource management legislation and the ability of governments to develop new or different regimes to protect and enhance the environment. Furthermore, it will in practice significantly hinder provincial autonomy as most regulation affecting property is within provincial jurisdiction. Provinces will have to bear the political pressure such a provision will bring, in addition to bearing the costs of defending its legislation in court during lengthy Charter battles.

³⁵ Ibid., at p. 3.

5.2 Property Rights: Entrenching Uncertainty

No definition of property is given, including whether it includes "economic rights". The federal proposal to entrench a right to property does not reveal the nature, extent and precise wording of how to include this right in the Constitution. For example, it is unclear if the proposal is to include the right to property in section 7 (where the right to "life, liberty and the security of the person" is guaranteed), in some other existing section of the Charter, in a new section of the Charter or other components of the Constitution. Moreover, it is unclear whether the right to property would be a substantive right, a procedural or due process right, or an ancillary right to some other right guaranteed in the Charter.

A "procedural" right entitles a review of whether a property owner was treated fairly by the process that restricted his rights. In contrast, a "substantive" right requires the court to review the purpose of the legislation to see if it appears to be appropriate. The distinction is somewhat academic given that regardless of the wording chosen, the courts will conduct whatever depth of review they feel warranted by the circumstances. In large part, their decision of how far to foray into the legislative arena will depend upon the perceived importance of the type of right being restricted. We assume from the common law tradition that property rights will be taken very seriously indeed. An analysis of two of the Supreme Court

decisions respecting section 7 of the Charter, a "procedural" right, shows that the court is clearly engaging in substantive review.³⁶

Finally, we must look south of the border where it is said that the entrenched right to property causes no obstacles to the pursuit of social and economic rights. It must be remembered that at one time, albeit a tragic time in U.S. history, the U.S. Supreme Court ruled that slaves were property.³⁷ What implications are there for plant and animal species, biogenetics or bioengineering? Will our anthropomorphic rights system lead to the inclusion of such entities as property of mankind?

Further, the U.S. Court engaged in substantive review of several pieces of social welfare legislation, and under the guise of upholding property rights struck down such fundamental laws as minimum wage regulations.³⁸ It is possible that with property rights entrenchment we could be looking forward to decades of turmoil while our courts engage in substantive review of all our

³⁶ Reference Re Section 94(2) of the Motor Vehicle Act R.S.B.C., [1985] 2 S.C.R. 486; R. v. Morgentaler [1988], 1 S.C.R. 30; See P. Hogg "Interpreting the Charter of Rights" (1990) 28 Osgoode Hall Law Journal 817; at pp. 822-823.

³⁷ Dred Scott v. Sandford (1857), 19 How. 393.

³⁸ This period of U.S. constitutional law is known as the "Lochner era". After the decision in Lochner v. New York (1905), 198 U.S. 45 in which the Court struck down maximum hours legislation. See P. Hogg, Constitutional Law of Canada, 2d ed., p.654; Tribe, American Constitutional Law (1978), ch.8.

social welfare legislation, sorting out the legal impact of entrenched property rights, such as a right to a certain quality of air and water. There is no doubt that the courts will not confine themselves to a procedural due process review. In addition, we should not underestimate the "chilling effect" entrenched property rights would have upon legislatures, especially provincial legislature. These governments would likely shy away from further enactments affecting property rights to avoid confrontation with the business lobby in politics and in court. Environmentalists and other members of the public may find themselves with another reason for governmental inaction and frustration of the public's demands.

Assuming property rights would be subject to the balancing test under s. 1, the analysis required under the Charter may prove unsatisfactory. This section requires a court, among other things, to determine whether the end justifies the means and whether the government has looked at other ways to obtain the objective without affecting the right infringed. In this context, it is sometimes very difficult to support the objective of legislation and to prove harm and what caused that harm. Finally, it is not clear that a court will attach due regard for common property rights, such as rights to a certain quality of air or water.

It is unclear how the courts will decide issues involving a

constitutional right to property. The litigation over such rights will be extremely costly, and therefore a great deal of society's scarce resources will be wasted maintaining and defending the current inadequate state of regulation.

Even in absence of a concrete proposal, the very inclusion of a right to property would instill a degree of uncertainty as to the constitutional validity of every statute pertaining to property in the country. In the province of Ontario alone, there are over 540 statutes. A very cursory estimate suggests that some one-half of these statutes in one way or another pertain to property. In addition to statute law, there is a broad and intertwined regime of common law governing property, including tort law (such as trespass, nuisance) and riparian rights. A right to property sets the stage to have every aspect of property law in the country subject to challenge - property rights in the context of matrimonial property; labour law, landlord and tenant, taxation, real property conveyance, easements, registration and foreclosure; economic, tax and fiscal policy; environmental legislation and virtually every area related, even remotely, to property.³⁹ In effect, property rights and property law would be left in a state of chaos.

The state of uncertainty left by the inclusion of property rights

³⁹ See: Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988), 24 Alta. L. Rev. 548, at 576-580.

is not justified in terms of the corresponding benefits. Quite the opposite, the inclusion creates little benefit while imposing considerable harm to the regulatory fabric of the country.

5.3 Challenges to Existing Environmental Regimes

A new right to property would impose an unacceptable degree of uncertainty over all legal regimes governing property in the country. More particularly, the area most impacted in terms of a long, sustained wave of legal challenges would be in the realm of land use and environmental management legislation. There are many examples.

5.3.1 Land Use Planning Laws

At present, every province has legislation, together with municipal by-laws, governing the land-use planning process. Within this process, there are a whole array of regulations on the use of property, such as zoning by-laws, property standards, subdivision regulations and severance controls that could be subject to challenge.⁴⁰ What are the reasonable limits of these restrictions with the right to property? Should courts have to decide these questions as opposed to provincial and local governments in consultation with planning experts? Depending on the judicial interpretation of the right to property, it may be argued that the onus would be on government and the public-at-

⁴⁰ Peter Mulvihill, "Would Constitutional Property Rights Inhibit Environmental Protection?" *Alternatives*, vol. 15, no. 2, 1988, 5 at p. 7.

large to demonstrate the unreasonableness of the development before restrictions could remain on land use.

It should also be noted that every province has a different regime with respect to property rights. Some provinces have literally re-written common law property rights through an array of statutes affecting property rights. By entrenching the right to property in the Constitution, not only would these regimes be challenged, but the entrenched property can be viewed as an infringement on traditional legislative authority of the provinces under section 92(10) of the Constitution Act, 1867 to make laws concerning property and civil rights.

5.3.2 Resource Extraction and Environmental Management

Apart from land use laws, provincial and municipal regimes governing a whole range of resource and environmental management schemes would be up for a challenge. In other words, environmental protection measures may be taken to be an encroachment on the rights of property owners to freely enjoy their property. Hence, there are numerous examples where challenges could be foreseen, including land rehabilitation requirements, controls over the extraction of minerals and aggregates, woodlot preservation policies, wetlands protection programs and air and water quality controls.⁴¹ The common feature of these schemes is an historical progression of, or

⁴¹ Ibid.

evolution, of policies attempting to balance the rights of developers and polluters to undertake their economic activities with the interests of society as a whole and the sustainability of the environment. In effect, this evolution of the tenuous reconciliation of these goals would be subject to being questioned and re-evaluated.

5.3.3 Impediments to Environmental Enforcement

At present, enforcement of environmental legislation is less than satisfactory. Indeed, in Ontario, 57% of direct dischargers to Lake Ontario are not in compliance with existing requirements.⁴² With property rights, every aspect of environmental enforcement and compliance policies and practices could be challenged, including such issues such as the validity of strict and absolute liability offences, the requirements for prosecution initiation, including such issues as search and seizure, monitoring and reporting regimes, the parameters of the "due diligence" defence, among many other issues. Especially important to environmentalists, is the ability to obtain information from corporations on discharges, etc. Information is a form of property and if protected in the Constitution, it would allow corporations to resist reporting such information.

In light of the vast uncertainty a property rights provision in

⁴² Ministry of the Environment, Direct Dischargers Report - 1988 (1988).

the Constitution would cause, on this ground alone, it is necessary to ask whether such inclusion is justified. We contend that it is not. Others agree. One learned commentator concluded this way:

Do the benefits of entrenchment of property rights in s.7 outweigh the risks now that we know that s.7 is not merely a procedural protection? The answer must be a clear no.⁴³

5.4 The Ill-Conceived Links Between Environmental Protection and Property Rights

Proponents of property rights argue that, by entrenching the right to property in the Constitution, there will be some positive benefits in terms of environmental protection. This argument is premised on the basis that the constitutional protection of private property rights will instill some additional and further sense of stewardship over their property.⁴⁴ This assumption is simply not supportable.

Indeed, quite the opposite. Further property rights could erode the environmental protection measures. At present, environmental legislation commonly prohibits pollution and resource degradation unless there is some approval or permit granted. This approval is based on a whole regime of standards, guidelines and objectives

⁴³ McBean, supra, note 39, at p. 575.

⁴⁴ Terence Corcoran, "Save the Environment, Fix Property Rights" Globe and Mail, Report on Business, September 1991, page B2.

designed to maintain the sustainability and integrity of the environment. With property rights, the presumption will shift to the notion that there is an absolute right to use and abuse one's property, limited only to the extent that it will interfere with the specific and defined rights of another owner. The consequences, hence, will be:

- * since the presumption is that one can do what one wants with his/her property, there is an inherent, and constitutionally recognized right to pollute, subject only to the extent other property rights holders are infringed;

- * the onus of establishing the "limits" of the right to pollute will be on those complaining of harm (the pollution victim or their representative, the government); while this is the case at present, the courts will have to define the precise nature of that burden in the context of the entrenched property right;

- * with the onus on those interests trying to limit the rights of property rights holders, it will be the courts, and not the legislatures which will have the power to adjudicate the extent and degree of environmental and resource protection in Canada; and

- * the rights of the environment, and the notion of protecting nature for its own sake, will be simply lost. The individual will triumph over the collective and nature.

5.5 Property Rights - A Right to Develop?

Proponents of property rights outline a number of reasons to justify the inclusion, including the potential for governments to expropriate without compensation (an argument dealt with below). Other justifications include the fact that delays in land use approvals and restrictive zoning and land use requirements unreasonably interfere with the full enjoyment of benefits of

landownership. In effect, proponents of property rights are suggesting that there is a right to develop that cannot be unreasonably interfered with. Such a proposition may have dire consequences for the land use planning regimes in Canada. Just one example may be the whole issue of delay. Could anyone have anticipated that the right to a trial within a reasonable time could result in the Askov decision where trial must be undertaken within eight months? Can now anyone anticipate the ramifications of the right to develop, especially when the issue of delay is one of the more vocal justifications for the inclusion of the right? If there is a need to remedy the ailments of the land-use planning regimes, it should be done provincially through legislative changes.

5.6 Are Property Rights Needed?

In light of the potential problems with the constitutional entrenchment to property, a simple question needs to be asked: Are property rights needed in the first place? The weight of scholarly legal opinion, and seemingly judicial opinion, suggests that, despite the absence of specific entrenchment of property rights in the Charter, these rights are significantly protected both through common and statute law.

Both common law and statute law provide significant property rights, including land ownership (such as the right to acquire property and the right not to have property taken away) and land

use (such as limits on governments and administrative bodies' power to restrict property use).⁴⁵ The question of expropriation is discussed below. In terms of land use, certainly the common law concepts of nuisance, trespass, riparian rights, and even the principle of Rylands v. Fletcher,⁴⁶ provide rules as what is the reasonable use of property.

5.6.1 Expropriation

The right not to have property taken away is protected by traditional public law.⁴⁷ It would seem that even in absence of the Charter, the courts will imply that a fair procedure must be employed in taking the property, unless there an express exemption to that.⁴⁸

If there are problems with this regime, which we maintain have not been demonstrated, the solution is legislative reform, not constitutional reform.

5.7 Recommendation

The federal government proposes to include property rights in the Canadian Charter of Rights and Freedoms. This provision would create enormous uncertainty for every environmental protection

⁴⁵ Robert G. Doumani and Jane Matthews Glenn, "Property, Planning and the Charter" (1989), 34 McGill Law Journal 1036, at pp. 1040 to 1043; 1047 to 1050.

⁴⁶ [1861-73] ALL E.R. Rep. 1.

⁴⁷ Glenn, supra, note 45, at p. 1041 to 1043.

⁴⁸ McBean, supra, note 39, at p.551.

regime in the country as well as constitutionally entrench the right to pollute.

We recommend that the proposal to include property rights in the constitution be withdrawn.

6.0 CONCLUSION

We have analyzed what is necessary to adequately protect the environment and the health of Canadians in the Constitution. This requires at the very least a set of enforceable constitutional rights which encompass a healthful environment and the protection of the public trust. In addition, the division of powers must be clarified to allow the federal government jurisdiction to establish national environmental and resource conservation standards and national policies where necessary.

Further, we have analyzed the federal government's proposals and found them to be sorely lacking in environmental protection. Instead of "positive" environmental rights, we have been handed "negative" property rights and a gratuitous unenforceable reference to sustainable development. Instead of a strong federal role, we have been handed significant devolution of federal powers. Clearly, the proposals are unacceptable and all present and future Canadians will suffer if the debate is not now expanded to include consideration of positive rights, and specifically an enforceable right to a healthful environment and

an enforceable duty of governments to conserve and maintain our
common resources.

APPENDIX A

**FORM AND CONTENT OF ENSHRINING MECHANISMS IN THE CONSTITUTION TO
ENHANCE AND PRESERVE ECOLOGICAL INTEGRITY**

As set out in the main brief⁴⁹ above, Canada has not protected its citizens' rights to a healthful environment, nor do its citizens have the right to know and have access to current information on the state of the environment and natural resources. Moreover, Canada's citizens do not have the right to participate in decision-making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected.

To adequately enshrine a set of rights to accomplish our objectives as set out in the main brief⁵⁰ and directly above, we recommend that a set of constitutional substantive provisions ensuring a right to a healthful environment have five key elements and characteristics.⁵¹ These rights would be

⁴⁹ See the main brief; the section on "Enhancing and Preserving Ecological Integrity.

⁵⁰ See p. 2-3 of the main text.

⁵¹ See T. Vigod & F. Gertler, Environmental Protection in a New Constitution (Toronto: Canadian Environmental Law Association, June 1991) which deals with environmental rights in the Ontario constitution. We are grateful for the valuable discussion with Franklin Gertler regarding the application of his work in this brief to the incorporation of such a right in the

enforceable by members of the public and unincorporated associations representing the public.

1. There should be a separate part of the Constitution Act, 1982, which would be entitled something like "Enhancement and Preservation of Ecological Integrity". This separate status would ensure that this part is applicable both to the public and the private sector; similar to the interpretation of s.35, the rights of the aboriginal peoples of Canada.

2. Given that the rights would not be included in the Charter per se, there should be some limiting language incorporated such that the balancing exercise involved in section 1 would be applicable.

3. These rights should be drafted as to make it clear that it is not merely declaratory of existing rights and protections, but rather imposes a positive first-order constitutional duty on all persons and organizations, including governments, to legislate, administer public and private property and act in all matters in strict accordance with the substantive right to a healthful environment.

4. Although section 52 would clearly apply, operating to render inconsistent laws inoperative, a provision such as s.24, providing any remedy a court of competent jurisdiction considers appropriate and just in the circumstances, should be added. This remedy section would include injunctions against the Crown. The court of competent jurisdiction should include inferior tribunals charged with land and resource use and environmental matters.

5. Finally, the right would be subject to a strictly limited notwithstanding clause allowing for legislative override. Such a provision may be necessary to allow for the validity of certain specific and circumscribed legislation or government action which would otherwise breach the right to a healthful environment. The notwithstanding clause would be an effective override for a renewable period of five years and could only be activated by a two-thirds (2/3) majority of all the members (including those not present) of the government seeking to apply the override.

A review of other jurisdictions would assist in deciding upon the exact wording of such rights.

Following this discussion is a summary of other jurisdictions which have constitutional protection of environmental rights, including several U.S. states.⁵²

Another example worth noting is the applicable draft language for a proposed Ontario Environmental Bill of Rights, Private Member's Bill 13, s.2;

- (1) The people of Ontario have a right to clean air, pure water and the preservation of the natural, scenic, historic and aesthetic values of the environment.
- (2) Ontario's public lands, waters and natural resources are the common property of all the people, including generations yet to come, and, as trustee of those lands, waters and resources, the Government of Ontario shall conserve and maintain them for the benefit of present and future generations.
- (3) It is hereby declared that it is in the public interest to provide every person with an adequate remedy to protect and conserve the environment and the public trust therein from contamination and degradation.

CONCLUSION

We must seize this opportunity to enshrine protection for our health and our environment in the Constitution. This is not a radical proposal and would likely be met with widespread approval from the Canadian public. We urge the federal government to begin consultation on these issues immediately.

⁵² This compilation comes from Appendix A of the paper "Environmental Protection in a New Constitution", supra, note 3.

ENVIRONMENTAL CLAUSES IN CONSTITUTIONS

A. Foreign Constitutions

1. Bulgaria, 1971, Art. 31

The state bodies and enterprises, the cooperatives and public organizations, as well as every citizen, are duty-bound to protect and preserve nature and natural resources, the water, air and soil, as well as the cultural monuments.⁵³

2. Chile, 1980, Art. 19 sec.(8)

The right to live in an environment free from contamination. It is the duty of the State to watch over the protection of this right and the preservation of nature.

The law may establish specific restriction on the exercise of certain rights or freedoms in order to protect the environment.⁵⁴

3. China, 1982, Art. 9

The state ensures the rational use of natural resources and protects rare animals and plants. The appropriation or damage of natural resources by any organization or individual by whatever means is prohibited.⁵⁵

4. German Democratic Republic (GDR), 1974, Art. 15

1. The soil of the GDR is one of its most valuable natural riches. It must be protected and utilized rationally. Forest and cultivated land may be withdrawn from such use only with the agreement of the responsible state organs.
2. In the interests of the well-being of citizens, the state and society care for the protection of nature. The competent bodies shall insure the purity of water and the air, and protection for flora and fauna and the natural beauties of the homeland; in addition this

⁵³ Blaustein Flanz, Constitutions of the Countries of the World, vol. 3.

⁵⁴ Ibid., Historic Constitutions, vol. 3.

⁵⁵ Ibid., vol. 4.

is the affair of every citizen.⁵⁶

5. Greece, 1975, Art. 24

1. The protection of the natural and cultural environment constitutes a duty of the State. The State is bound to adopt special preventive or repressive measures for the preservation of the environment...⁵⁷

6. India, 1989, Sec. 48A, 51A(g)

48A The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

51A(g) It shall be the duty of every citizen of India...to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.⁵⁸

7. Mexico, 1987, Art. 27

...The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them to ensure a more equitable distribution of public wealth, to attain a well-balanced development of the country and improvement of the living conditions of the rural and urban population. With this end in view, necessary measures shall be taken to put order to human settlements and establish adequate lands, waters and forests provisions, uses, reserves and purposes, so as to carry out public works and to plan and regulate the foundation, conservation, betterment and growth of the centers of population; to preserve and restore the ecological balance; ...and to prevent the destruction of natural resources and to protect property from damage to the detriment of society.⁵⁹

⁵⁶ Ibid., vol. 4.

⁵⁷ Ibid., vol. 6.

⁵⁸ Ibid., vol. 7.

⁵⁹ Ibid., vol. 10.

8. Mozambique, 1980, Art. 11

The state shall promote knowledge, surveys and evaluation of natural resources, guaranteeing the ecological balance and the conservation and preservation of the environment.⁶⁰

9. Namibia, Art. 95(1), 91(c)

95(1) ...the ecosystems, essential ecological processes and biological diversity of Namibia are maintained and living natural resources are utilized on a sustainable basis for the benefit of all Namibians, both present and future; in particular the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.

91(c) (The Ombudsman has)...the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of nonrenewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia.⁶¹

10. Netherlands, 1987, Art. 21

It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.⁶²

11. Nicaragua, 1987, Art. 102

The natural resources are national patrimony. The preservation of the environment, and the conservation, development and rational exploitation of the natural resources are responsibilities of the state; the state may formalize contracts for the national exploitation of these resources when required by the national interest.⁶³

⁶⁰ Ibid., vol. 11.

⁶¹ "Environmental Law", Centre for Applied Legal Studies, University of Witwatersrand, Oct. 1990, p. 63.

⁶² Ibid., vol. 11.

⁶³ Ibid., vol. 12.

12. Peru, 1979, Art. 123

Everyone has the right to live in a healthy environment, ecologically balanced and adequate for the development of life and the preservation of the countryside and nature. Everyone has the duty to conserve said environment.

It is the obligation of the State to prevent and control environmental pollution.⁶⁴

13. Poland, 1952, Art. 71

Citizens of the Polish People's Republic shall have the right to benefit from the natural environment and it shall be their duty to protect it.⁶⁵

14. Portugal, 1982, Art. 66

1. Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it.
2. It shall be the duty of the State, acting through appropriate bodies and having recourse to popular initiative to:
 - a. Prevent and control pollution and its effects and harmful forms of erosion;
 - b. Have regard in regional planning to the creation of balanced biological areas;
 - c. Create and develop natural reserves and parks and recreation areas and classify and protect landscapes and sites so as to ensure the conservation of nature and the preservation of cultural assets of historical or artistic interest;
 - d. Promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.
3. Everyone shall have the right, in accordance with the law, to promote the prevention or cessation of factors leading to the deterioration of the

⁶⁴ Ibid., vol. 14.

⁶⁵ Ibid., vol. 14.

environment and, in the case of direct losses, to a corresponding compensation.⁶⁶

15. Soviet Union, 1977, Art. 18

In the interests of the present and future generations, the necessary steps are taken in the USSR to protect and make scientific, rational use of the land and its mineral and water resources, and the plant and animal kingdoms, to preserve the purity of air and water, ensure reproduction of natural wealth, and improve the human environment.⁶⁷

16. Spain, 1978, Art. 45

1. Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.
2. The public authorities shall concern themselves with the rational use of natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment, supporting themselves on an indispensable collective solidarity.
3. For those who violate the provisions of the foregoing paragraph penal or administrative sanctions, as applicable, shall be established and they shall be obliged to repair the damage caused.⁶⁸

17. Sri Lanka, 1978, Sec. 27(14)

The State shall protect, preserve and improve the environment for the benefit of the community.⁶⁹

18. Yugoslavia, 1974, Art. 87

Working people and citizens, organizations of associated labour, socio-political communities, local communities and other self-managing

⁶⁶ Ibid., vol. 15.

⁶⁷ Ibid., vol. 18.

⁶⁸ Ibid., vol. 16.

⁶⁹ Ibid., vol. 16.

organizations and communities shall have the right and duty to assure conditions for the conservation and improvement of the natural and man-made values of the human environment, and to prevent or eliminate harmful consequences of air, soil, water or noise pollution and the like, which endanger these values and imperil the health and lives of people.⁷⁰

B. U.S. State Constitutions⁷¹

19. Massachusetts, amend. Art. 49

The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agriculture, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights. In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefore, or the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court.

20. Rhode Island, Art. 37, sec. 1

The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the

⁷⁰ Ibid., supplement.

⁷¹ Other U.S. state constitutions with environmental rights include Alaska Constitution, art. 8; Florida Constitution, art. 2, s.7; Georgia Constitution, art. 3, s.8; Hawaii Constitution, art. 10, s.1; Montana Constitution, art. 9, s.1; New Mexico Constitution, art. 20, s.21; New York Constitution, art. 14, s.4; North Carolina Constitution, art. 14, s.5 and Virginia Constitution, art. 11, s.1.