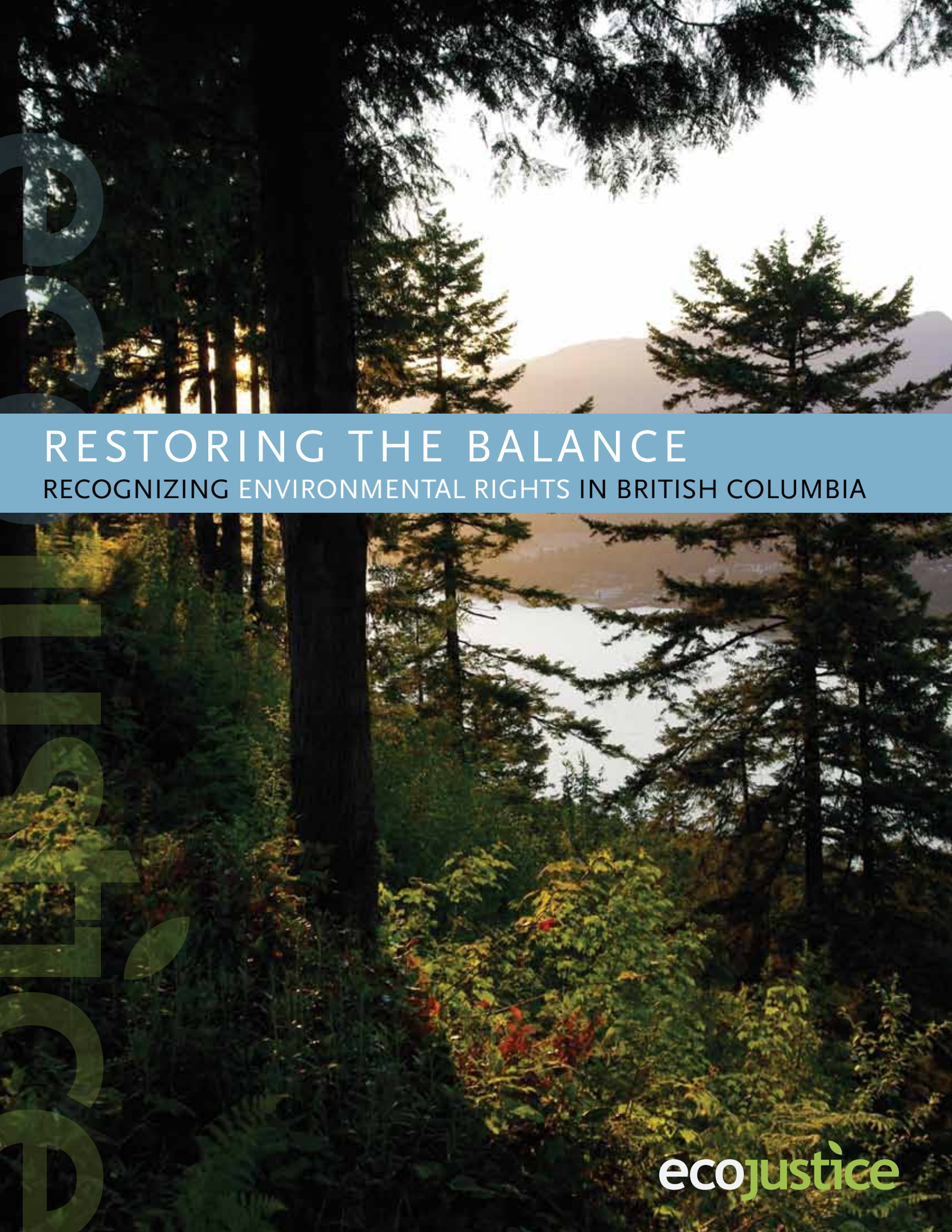

RESTORING THE BALANCE

RECOGNIZING ENVIRONMENTAL RIGHTS IN BRITISH COLUMBIA

ecojustice

RECOGNITION OF ENVIRONMENTAL RIGHTS IN BC

August 2009

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The decline of global environmental quality threatens the fundamental ability of many individuals and groups to lead lives with basic human dignity. Recognition of environmental rights is one tool that governments around the world are using to address these problems.

Introduction

Recognition of environmental rights is a recent global phenomenon. The constitutions of countries ranging from Argentina to Zambia recognize some form of a right to a healthy environment or duty to protect the environment. Declarations of international bodies, regional authorities, and local municipalities are emerging all over the planet recognizing rights to clean air, clean water, and uncontaminated land. Among these are four Canadian provincial and territorial laws and statutes that recognize environmental rights.

Environmental rights help reset the balance between polluting the environment and preserving its basic functions into the future.

This trend is occurring for good reason. Environmental rights help reset the balance between polluting the environment and preserving its basic functions into the future. As global environmental problems become more acute, an increasing percentage of the human population is feeling the burden of industrial development, pollution and resource extraction. Unfortunately, it is often the poor and the marginalized, unable to protect themselves from pollution by moving away or purchasing cleaner products, who bear a disproportionate burden of its effects. The decline of global environmental quality threatens the fundamental ability of many individuals and groups to lead lives with basic human dignity. Recognition of environmental rights is one tool that governments around the world at the international, national, provincial and municipal level are using to address these problems.

Despite widespread global recognition, environmental rights remain largely unconfirmed in Canada. This report urges that a right to a healthy and ecologically balanced environment is a fundamental right that should be enjoyed by all people, regardless of where they live. Recognition of environmental rights benefits the environment and all the people living in it, as well as our future generations.

This report is based on a year long research project made possible by the British Columbia Law Foundation and focuses on the recognition, rather than the enforcement or the effect of, environmental rights. Its goal is to evaluate the growing global trend towards recognition of environmental rights and consider how such rights might be recognized in British Columbia. Part I provides an investigative overview of environmental rights. Part II examines how environmental rights have been recognized in other jurisdictions. Part III considers options for recognizing environmental rights in B.C.

The report also includes two appendices providing options for immediate actions for national, provincial and regional governments. The appendices propose two models for recognition of environmental rights in Canada: appendix A is a model statutory provision that could be used in a national or provincial law; and appendix B contains a model municipal declaration of environmental rights.

This report focuses on the recognition, rather than the enforcement or the effect of, environmental rights. Its goal is to evaluate the growing global trend towards recognition of environmental rights and consider how such rights might be recognized in BC.

Environmental Rights 101

The Who, What, When, Where and Why

The notion of a right to a certain level of environmental quality is not new. Roman law recognized collective environmental rights by charging the government with the protection of the commons, which included the air, water and the fish in the sea. These environmental rights were public rights that only the government could uphold.

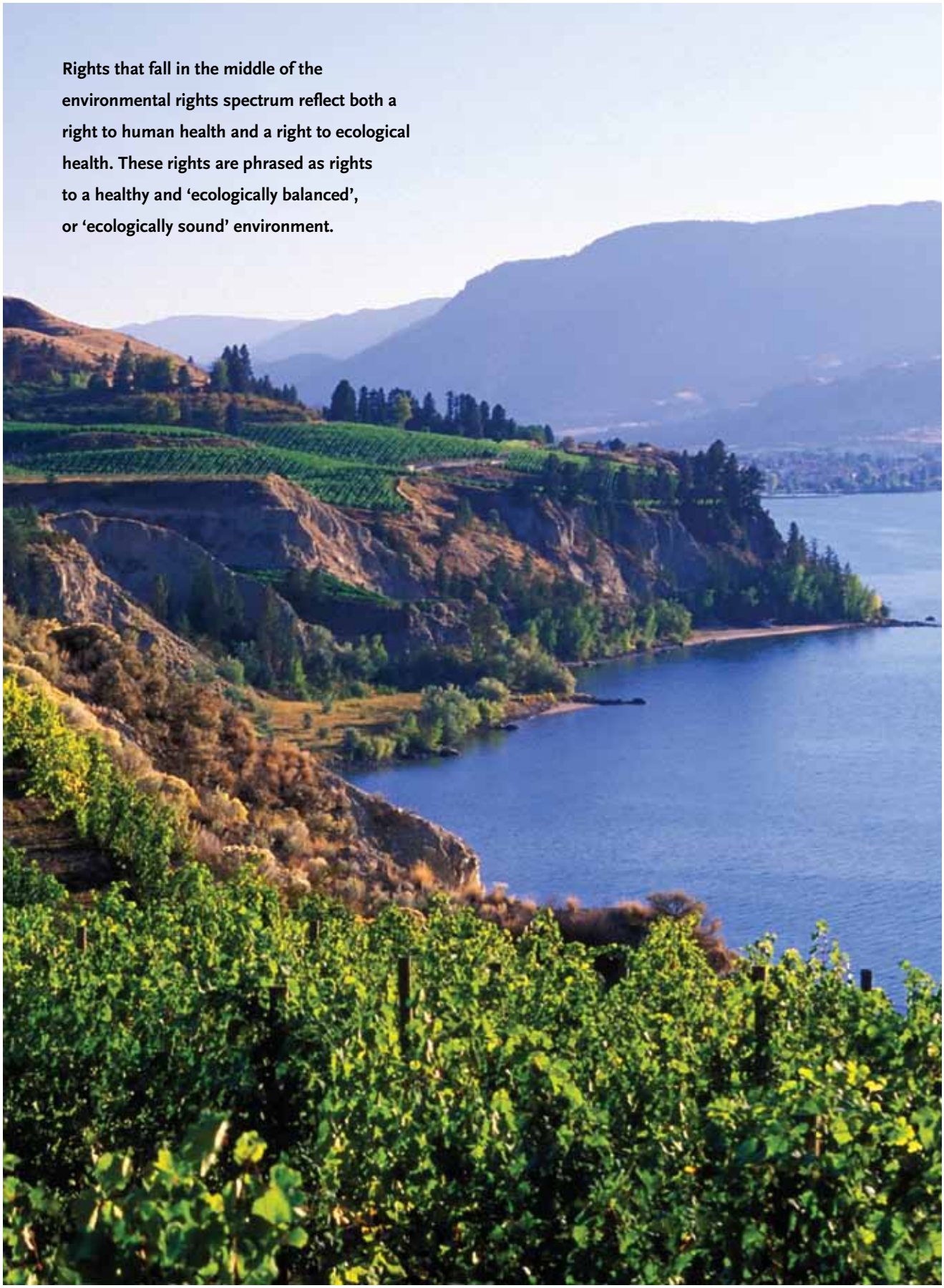
While some nations still recognize environmental rights as collective rights enjoyed by identifiable groups or people, in the 1970s a new generation of environmental rights emerged, generally referred to as the right to a healthy environment. These rights formed part of a suite of individual, social, economic, and cultural rights. As the law has evolved in some regions and nations, these rights have become directly actionable, so that individuals who suffer environmental harm may seek protection through the courts.

The first document in international law to recognize a right to a healthy environment was the 1972 Declaration of the United Nations Conference on the Human Environment, also known as the Stockholm Declaration.[1] Adopted June 16, 1972 at the 21st plenary meeting of the United Nations, the first principle of the Stockholm Declaration states:

> *Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*

Since the adoption of the Stockholm Declaration the world has seen a huge shift towards confirming environmental rights. Today, a proliferation of international law agreements and at least 85 national constitutions recognize some form of right to a healthy environment. Environmental rights are also enshrined in the sub-national constitutions of many nations, such as state constitutions and provincial charters. These rights are further upheld by the national and sub-national legislation of many nations, as well as the declarations of countless local governments.[2]

Today, a proliferation of international law agreements and at least 85 national constitutions recognize some form of right to a healthy environment.



Rights that fall in the middle of the environmental rights spectrum reflect both a right to human health and a right to ecological health. These rights are phrased as rights to a healthy and 'ecologically balanced', or 'ecologically sound' environment.

Given the breadth and diversity of legal instruments that recognize environmental rights, the "right" may be described in a number of ways. As stated above, the Stockholm Declaration describes an environmental right as "a right to environmental quality that permits a life of dignity and well-being." The Bruntland Commission confirmed the right to an environment that is "adequate for health and well-being".[3] Environmental rights have also been described as a right to an environment which is " healthy"; "healthful"; "safe"; "decent"; "adequate"; "secure, healthy and ecologically sound"; and "healthy and ecologically balanced".

Environmental rights may be seen to exist on a continuum, with human-centred rights on one end and direct legal rights for nature at the other. At the human-centred end of the continuum lie iterations of a right to an environment sufficient for human health, commonly worded as the right to an environment that is 'safe' or 'adequate.' Human-centred environmental rights are not absolute, but rather are rights to water, air and earth of a certain standard of cleanliness. There is some debate as to whether these rights are relevant when environmental degradation that would be harmful to human health occurs in areas with few or no human inhabitants. Legal challenges based on human health-centred phrasings tend to be about very serious cases of environmental contamination affecting human health. For example, the Inter-American Commission on Human Rights recently ordered Peru to take immediate precautionary measures to protect the health of a community threatened by contamination from a metal smelter.[4] This case was brought on the basis of, among other things, the rights to life, security of the person, health and a "healthy environment."[5] The evidence in the petition to the Commission showed that 99% children in La Oroya Peru, where the smelter was operating, had dangerously high blood lead levels.

At the far end of the rights-spectrum lie the inherent rights of nature. These are legal rights granted directly to nature regardless of whether it is relied upon or useful to human beings.

Rights that fall in the middle of the environmental rights spectrum reflect both a right to human health and a right to ecological health. These rights are phrased as rights to a healthy and 'ecologically balanced', or 'ecologically sound' environment. Such rights include consideration of the entire ecosystem function and may not focus on pollution. Cases brought on the grounds of a right to a healthy and ecologically balanced environment are broader than those brought under a right to a healthy environment alone. For example, in a case concerning the sea turtle fishery, the Constitutional Court of Costa Rica found that due to uncertainty regarding the health of sea turtle populations, fishing turtles threatened the right to a healthy and ecologically balanced environment. According to the court, an ecologically balanced environment was one that included all its parts, including sea turtles.[6]

At the far end of the rights-spectrum lie the inherent rights of nature. These are legal rights granted directly to nature regardless of whether it is relied upon or useful to human beings. Few examples of such rights exist other than the recently adopted Constitution of Ecuador, which states at Article 71:

> *Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution.*[7]

In addition to the right to a healthy environment, some jurisdictions recognize rights to specific environmental goods, such as the right to clean water. For example, South Africa recognizes a right to clean water through its national water legislation. These rights tend to be interpreted as human-centric with cases brought under these rights interpreting the right to water as a basic human right.[8] However, there are many who advocate for a broader notion of environmental rights to water or air that are not human-centric but that also contemplate ecosystem needs.

Forms of Environmental Rights

In addition to the *ways* in which environmental rights are phrased, there are also many *forms* that rights may take. Literature on this subject commonly categorizes environmental rights as taking one of three forms: aspects of existing human rights; freestanding rights; and procedural rights.

Environmental aspects of existing human rights

Environmental rights are recognized as aspects of existing rights because a healthy environment is often a pre-condition to they enjoyment of other basic human rights. However this link or nexus between human rights and environmental degradation has only recently been a subject of the law. Historically, human rights were engaged in certain contexts such as in interactions with governments, the police, or other potentially discriminatory majority powers. As environmental problems have grown more acute governments and courts around the world are beginning to recognize that the right to a healthy environment exists in tandem with the human rights to life, health, privacy, family life, property, suitable working conditions, adequate standards of living and culture.[9] Thus basic human rights can be deprived, for example, by the release of pollution from a factory or the contamination of drinking water from the extraction of natural resources.

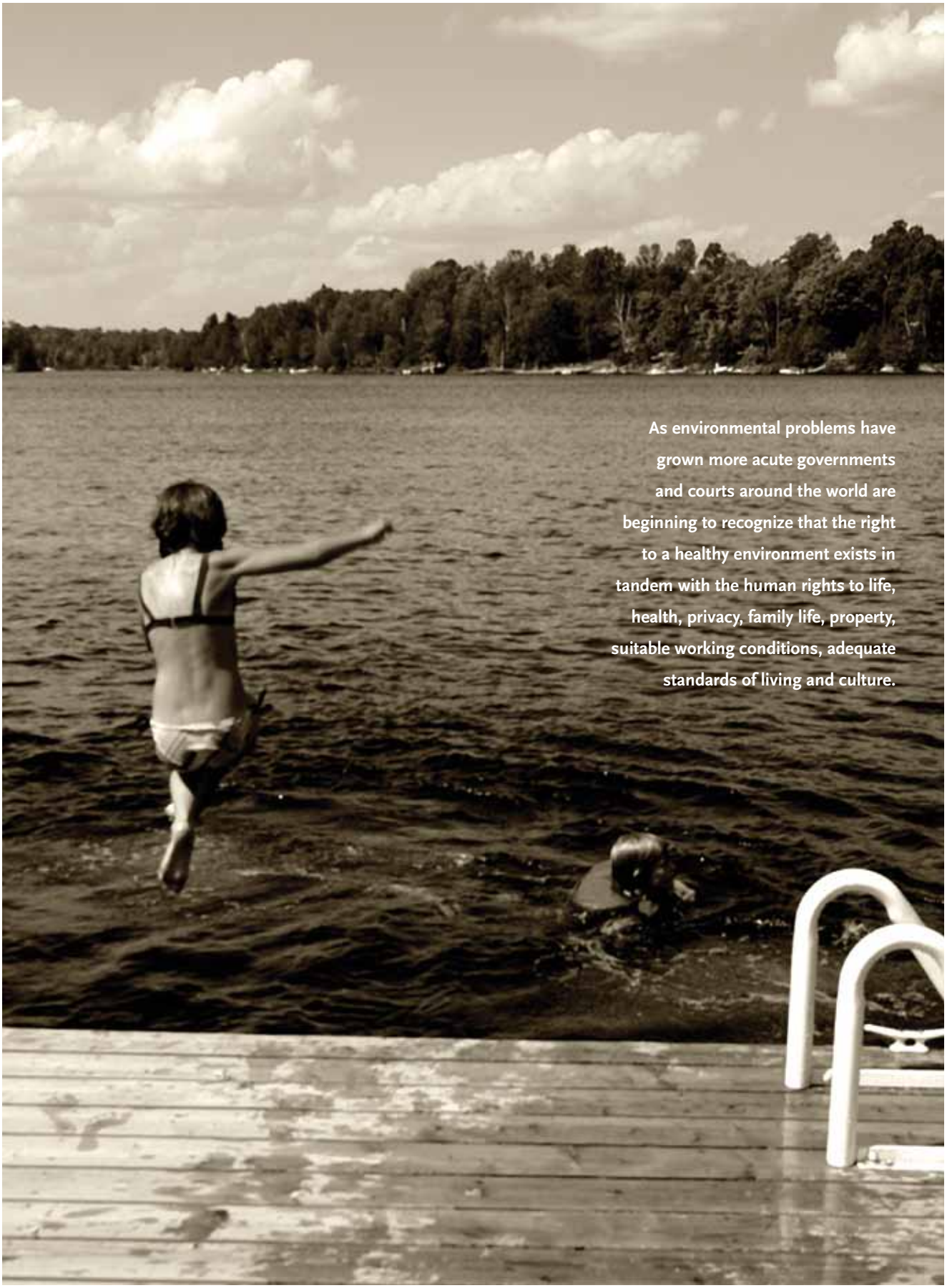
Procedural environmental rights include the right of access to justice when one objects to decisions taken in an environmental context.

Stand-alone environmental rights

Freestanding rights to a healthy environment have been incorporated into countless international declarations, international treaties and the domestic constitutions of numerous states.[10] These freestanding rights take on many forms, including express rights to a healthy and balanced environment.

Procedural environmental rights

Procedural or participatory environmental rights generally involve three pillars: the right to environmental information; the right to participate in environmental decision making; and the right of access to justice when one objects to decisions taken in an environmental context.



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Aspirational Rights

Aspirational rights are subject to the principle of "progressive implementation," which means that the rights, although not enforceable now, may be realized over time.

In some cases environmental rights are considered to be 'aspirational' rights, meaning, as the name suggests, that they are aspired to, rather than rights that exist at present. These rights are intended to direct state policy and not to create enforceable obligations. Such aspirational rights are subject to the principle of "progressive implementation", which means that the rights, although not enforceable now, may be realized over time.

While the contents of aspirational rights are often unspecified, they may still be realized. For example, in a recent decision of the South African Supreme Court of Appeal concerning the right to water, the court held that it was still possible to interpret the right to require a certain level of effort on the part of the government as a duty to ensure that the people of South Africa all have access to clean water.[11]

In the case of *Minors Oposa v. Secretary of the Environment and Natural Resources* the Philippine Supreme Court rejected that argument that the right to a healthy environment in the Philippine Constitution was a political statement that could not be adjudicated before a court of law. Instead the court declared that "a denial or violation of that right [to a healthy environment] by the other who has the correlative duty or obligation to respect or protect the same gives rise to a cause of action." *Oposa Minors* was brought on behalf of future generations as a challenge to excessive logging licences issued by the state. In setting aside the licences, the court ruled that the state had an obligation to protect the right to a healthy environment of the complainants.[12]

In other jurisdictions, however, the potential effect of environmental rights is limited by provisions in the document in which they are recognized. For example, Article 11 (1) of the *Additional Protocol to the American Declaration of Human Rights* (the "Protocol of San Salvador") recognizes that "Everyone shall have the right to live in a healthy environment and to have access to basic public services."[13] However, the enforceability of the right to a healthy environment is limited by Article 19 of the Protocol, which limits the nature of petitions that can be presented by either the Inter-American Commission or Court of Human Rights.[14] For this reason, it is not possible to bring a case before the Commission or Court, under the Inter-American human rights system, based on the right to a healthy environment alone. The right to a healthy environment is only actionable in combination with another recognized human right. This distinction between actionable and not actionable rights occurs in the case of many recognized environmental rights.

The Meaning and Effect of Environmental Rights

While an examination of the meaning and effect of environmental rights is beyond the scope of this report, there are a few outcomes generally associated with the recognition of environmental rights that are worth noting.

First, environmental rights signal that the environment and its protection are core societal values. Second, recognition of environmental rights creates a shift in environmental conflicts from rights-versus-interests to rights-versus-rights. Third, key themes and legal principles have emerged from court decisions interpreting the many different rights to a healthy environment, including: the principle of environmental fairness to future generations, the precautionary principle, the requirement for protection of aesthetic interests, and the standstill principle that nations may not weaken environmental standards once they have recognized a right to a healthy environment. Finally, successful cases brought on environmental rights grounds have resulted in environmentally harmful activities being halted, curtailed or compensated for by court orders.

Key themes and principles have emerged from court decisions, such as the principle of environmental fairness to future generations.

A right to a healthy environment as a principle of international law

Since the adoption of the Stockholm Declaration, the right to a healthy environment has been added to or included in the human rights declarations of several regional human rights bodies in Africa, the Americas and the Middle East.[15] The United Nations has considered, but not yet adopted, several versions of an international declaration of a right to a healthy environment.[16]

In 1998, under the auspices of the United Nations Economic Commission for Europe (UNECE), the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Aarhus Convention) was adopted. As of July 14th 2009 there were 42 parties to the Aarhus Convention, which entered into force in October 2001.[17] It is the first and largest legally binding international agreement on procedural environmental rights. Referred to by Kofi Annan as "the most ambitious venture in the area of 'environmental democracy'" undertaken by the UN,[18] the Aarhus Convention also recognizes a substantive right to a healthy environment. The Convention has resulted in a proliferation of national procedural environmental rights statutes throughout the world.

Although part of the Organization of American States, Canada has not adopted the San Salvador Protocol recognizing the rights to health and a healthy environment. Nor is Canada a party to the Aarhus Convention. However, these agreements are still important in Canada. The ever-increasing number of international statements recognizing environmental rights, in conjunction with an expanding state practice of recognizing environmental rights, bolsters the case for recognizing the right to a healthy environment as a principle of international law. Established principles of international law are binding on all nations – including Canada.

Direct Rights for Nature

Environmental rights are often criticized for being excessively human-centric. Many environmental rights advocates argue that it is possible to approach environmental problems by granting rights directly to nature. In his seminal 1972 article "Should Trees Have Standing?", law professor Christopher Stone argued that environmental rights should be granted directly to nature, or "natural objects."[19] Stone's direct rights-for-nature thesis was written at a time when American courts were grappling with how to hear environmental cases. Stone argued that in order to truly address environmental issues, natural objects should be afforded three basic legal rights: the right to institute legal action at their own behest; the right to have injuries to them taken into account in determining legal relief; and the right to benefit from that relief. Since trees and birds and beaches cannot exercise those rights themselves, individuals or groups should be able to apply to the court for legal guardianship, and for the right to litigate on behalf of the natural object.

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Stone argued that our legal system divides things into two basic categories: property, with which we have no ethical relationship, and things-with-rights, with which we do. Granting rights to nature would have the effect of creating an ethical relationship with nature so that we would protect natural objects not for future human generations but for themselves.

Stone's ideas were not accepted by the judiciary (although they were supported by a dissenting minority of the US Supreme Court in the Mineral King case, *Sierra Club* v. *Morton*).[20] Instead, courts in the United States (and later in Canada) expanded standing to protect nature based on a human plaintiff's genuine interest in the environment as opposed to any inherent right of nature to exist.

Since the courts first interpreted envirionmental rights as belonging to humans, the notion of any direct rights to nature has been largely limited to the realm of academic discourse. However, in 2008 Ecuador became the first nation to grant legal rights directly to nature in its national constitution. This action has prompted a renewed interest in the concept of environmental rights for nature's sake, which may in the future become particularly relevant in areas of abundant biodiversity such as British Columbia.

Why Recognize Environmental Rights in British Columbia?

Rights reflect what matters to a society

The most compelling reason for creating environmental rights in British Columbia may be a symbolic one. For better or worse, rights have come to reflect the fundamental values of western society. Granting legal rights to nature signals that nature matters to a society. In the western legal tradition we assign rights to things that are important. Rights are a reflection of those fundamental things that society deems must be guarded and protected. If we fail to include a healthy environment in the suite of basic fundamental values of our society, we will continue to fail to respect and protect the environment.

When a right meets interest, the right almost always wins

In the current Canadian legal political system, when a right meets an interest the right almost always wins. While some environmental legislation in British Columbia refers to a public *interest* in environmental protection, none of the province's environmental protection laws recognize individual or collective environmental rights or grant any inherent rights to nature.

Most environmental legislation in British Columbia takes the form of environmental management statutes, such as the *British Columbia Environmental Management Act* or the *Environmental Assessment Act*. These statutes are limited to setting conditions for environmentally harmful activities as well as granting permits, leases or licences to harm the environment. Most B.C. resource extraction statutes grant legal rights in the form of tenures, licences, permits and leases to exploit natural resources or pollute the environment. When conflicts arise over the disposition or development of resources and its associated pollution, the conflict is almost always framed as a debate between private rights to do an activity versus a public interest in protecting the environment. In a legal challenge, a right almost always beats an interest.

Recognizing environmental rights in British Columbia would increase the likelihood of the environment emerging victorious in cases of conflict. At a minimum, recognizing environmental rights should ensure a better balancing of competing rights thus levelling the playing field in environmental disputes.

While some legislation in BC refers to a public *interest* in environmental protection, none of the province's environmental protection laws recognize individual or collective environmental rights or grant any inherent rights to nature.

Living in a healthy and ecologically balanced environment is a fundamental right that should be enjoyed by all people regardless of where they live.

How Environmental Rights are Recognized

Living in a healthy and ecologically balanced environment is a fundamental right that should be enjoyed by all people regardless of where they live. The scope of environmental problems requires all levels of government – international, national, provincial and municipal – to recognize environmental rights. However, only select jurisdictions in Canada – Ontario, Quebec, Yukon and the NWT – currently recognize environmental rights. Notably, British Columbia is not on this list.

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Since the 1972 Stockholm Declaration, environmental rights have been recognized in countries around the world. Part II of this report examines how environmental rights have been recognized in other jurisdictions with the hope that this experience can provide guidance for the recognition of environmental rights in B.C.

While each country's experience is in some way unique, when considered together, environmental rights are generally recognized in one of three ways: in national or sub-national constitutions; in a decision of a court or tribunal; and in provisions of statutes or other forms of legal declaration.

Constitutional Recognition

At least 130 countries include environmental protection provisions in their national constitutions.[21] Approximately 85 of these recognize some form of express right to a healthy environment – all of which have been drafted since the 1972 Stockholm Declaration.[22] Environmental rights are also recognized in a number of sub-national constitutions.

While many of these environmental rights provisions appear in the constitutions of newly emerging states, many nations with long-standing constitutions have amended those constitutions to reflect the need to recognize environmental rights. France, for

example, amended its constitution in 2005 to include a "Charter for the Environment" that recognizes, among other things, in Article 1 a person's "right to live in a balanced environment which shows due respect for health."[23]

Some constitutional environmental rights provisions are very simple, while others are quite prescriptive, setting responsibilities to protect the environment along with the declaration of the right itself. These responsibilities to protect the environment are usually directed at the government; however, some constitutions impose a responsibility on citizens and businesses to protect the environment, as well. Finally, some constitutional provisions extend these responsibilities beyond the present day citizenry by invoking the rights of future generations.

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Some constitutions include environmental duties and responsibilities with respect to the environment without recognizing an express right to a healthy environment. For example, Article 5 of the Constitution of the Kingdom of Bhutan imposes responsibility on both citizens and government to protect the environment without granting any rights to environmental quality.

Government duties range from ensuring a safe and healthy environment to maintaining a minimum of 60% of Bhutan's total land under forest cover for all time. The Bhutanese Constitution further imposes on citizens, whom it declares to be "trustees of the environment," the duty to preserve, protect and respect the environment, culture and heritage of the nation. [24]

The most detailed constitutional environmental provisions may be found in the recently adopted constitution of Ecuador, which, in addition to recognizing individual and collective rights to a healthy and ecologically balanced environment as well as the rights of future generations, also grants rights directly to nature.[25]

Recognizing environmental rights in sub-national constitutions

In addition to recognizing environmental rights in national constitutions, many sub-national governments have recognized environmental rights in state, provincial or some other regional form of constitution. Sub-national constitutions often recognize environmental rights where the national constitution does not. For example, while the United States constitution does not recognize environmental rights, some state constitutions do, including Montana[26], Pennsylvania[27], and Hawaii[28]. Similarly, the Canadian Constitution does not recognize environmental rights, but the Quebec Charter of Fundamental Rights and Freedoms does. The Quebec Charter was recently amended to recognize a right to live in a healthful environment in which biodiversity is preserved.[29] While the Quebec Charter is not a constitutional document, it has been interpreted as a "quasi-constitutional" law to which all normal laws must conform.[30]

It is interesting to observe from the actions of these state and provincial governments that they have not waited for national governments to set the tone for environmental protection by recognizing constitutional environmental rights.

Judicial Recognition

In some cases where national constitutions or environmental legislation do not expressly recognize environment rights, they are recognized by a court or tribunal. In most of these instances, environmental rights are recognized as aspects of other expressly recognized human rights. For example, the right to a healthy environment has on many occasions been recognized as a fundamental part or inherent aspect of the right to life.

The most famous examples of judicial recognition of environmental rights as aspects of other human rights are found in Southeast Asia, in the decisions of the high courts of India, Pakistan and Bangladesh. It is important to note that at the time of those decisions, India, Pakistan, and Bangladesh did not provide express constitutional rights to a healthy environment.

Southeast Asia

India began the trend of recognizing environmental rights in a case called *Subhash Kumar v. State of Bihar*, which was about the contamination of a river with sludge and slurry from the processing of coal for steel manufacturing.[31] In that case the Indian Supreme Court recognized that a right to a healthy environment was a fundamental aspect of Article 21 of the Indian Constitution – the right to life and liberty.[32] Despite the fact that Article 21 does not refer to the environment, the Court held that the right to life guaranteed in Article 21 "includes the right of enjoyment of pollution free water and air for full enjoyment of life".[33] Since that time the Indian Supreme Court has consistently upheld this interpretation of Article 21 in environmental complaints brought under the right to life and liberty.[34] In fact there have been dozens of cases heard by courts in India based on the right to a healthy environment.

The Indian Supreme Court recognized that a right to a healthy environment was a fundamental aspect of Article 21 of the Indian Constitution – the right to life and liberty.

While the Indian Constitution explicitly imposes a duty on the government to protect the environment, many environmental cases continue to be brought under the right to life provision. For example, the Court's recognition of an environmental right has been used to pass far-reaching and progressive court orders in hundreds of public interest environmental cases, including to protect the Taj Mahal from corrosive air pollution, rid the River Ganges from trade effluents, address air pollution in Delhi and other cities, protect the forests and wildlife of India and clear cities of garbage.[35]

A similar approach to the recognition of environmental rights was taken by the Supreme Court of Pakistan in the case of *Zia v. WAPDA*, which was brought by a group of citizens concerned about adverse effects from the construction of a hydro-electric grid in a residential neighbourhood. The citizens brought the action on the grounds that the grid compromised their right to life. The Court interpreted the right to life and dignity in Articles 9 and 14 of the Pakistani Constitution to include a right to a healthy environment.[36] Courts in Bangladesh have taken a similar approach to the recognition of environmental rights.[37]

Africa

In the case of *Gbemre v. Shell*, the right to life and dignity of persons protected in the Nigerian Constitution was interpreted to include the rights to a clean, poison-free, pollution-free and healthy environment.

Domestic courts in Africa have also found that the right to life includes a right to a healthy environment. The African courts' expansive interpretation of the right to life is based in part on the right to satisfactory environment favourable to development, recognized in Article 24 of the African Charter of Human and People's Rights.[38]

In the Nigerian case of *Gbemre v. Shell*, the right to life and dignity of persons protected in article 33(1) of the Nigerian Constitution was interpreted to include the rights to a clean, poison-free, pollution-free and healthy environment.[39] The Gbembre case was brought by an applicant suing in a representative capacity, alleging that oil production activities – specifically gas flaring – violated his constitutional rights to life and the dignity of the human person in that they adversely affected his life and health as well as his immediate natural environment. This approach to recognizing environmental rights as aspects of the right to life was recently adopted in Kenya in *P.K. Waweru v. Republic of Kenya*, a case concerning contamination of a the Kiserian River with commercial and domestic sewage.[40]

Regional Human Rights Bodies Consider Environmental Rights

In the world of human rights law a number of regional bodies are charged with administering and adjudicating international and regional human rights agreements. The decisions of these bodies are often regarded as being important indicators of emerging trends in international law. The practice of reading a right to a healthy environment into an existing right has been adopted by a number of regional human rights bodies. In considering complaints from Brazil[41] and Peru,[42] the Inter-American Commission on Human Rights has recognized environmental rights as aspects of the right to life, security and health, which is protected under the *American Convention on Human Rights*. Similarly, in considering cases from Spain,[43] Italy,[44] Turkey[45] Russia,[46] and most recently Romania,[47] the European Court of Human Rights has recognized environmental rights as aspects of rights with respect to private and family life, protected by Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

Statutory Recognition

Another manner of recognizing environmental rights involves writing these provisions into newly created or existing laws. In Canada, four jurisdictions recognize environmental rights through statute: Ontario, Quebec, Yukon and the Northwest Territories. A statutory right to a healthy environment has been proposed in British Columbia on several occasions but never adopted.

Environmental Rights in Provincial Statutes

Enacted in 1993, the Ontario Environmental Bill of Rights (EBR) recognized the environmental rights of everyone in Ontario.[48] The purpose of the EBR is to conserve the integrity of the environment, provide for sustainability of the environment and protect the people of Ontario's right to a "healthful" environment. The right to a healthful environment is set out in the EBR's preamble and recognized in section 2 of the Act. The preamble also recognizes the inherent value of the natural environment, although no legal rights are granted directly to the environment.

The purpose of Ontario's Environmental Bill of Rights is to conserve the integrity of the environment, provide for sustainability of the environment and protect the people of Ontario's right to a "healthful" environment.

The EBR is administered by the Environmental Commissioner of Ontario (the "ECO"). The ECO is an independent body appointed by the provincial Legislative Assembly. The ECO is tasked with monitoring and reporting on the government's compliance with the Environmental Bill of Rights to ensure that Ontario's natural environment is protected and conserved for future generations.

The EBR protects citizens' right to a healthful environment by providing the procedural rights of access to information, participation in decision-making and access to the courts. It also provides whistleblower protection for employees who take action to protect the environment.

The Act prescribes how the procedural rights are to be fulfilled. Information is to be provided through postings to an environmental registry. Comment is permitted on proposed environmental laws and standards. Under the Act, citizens may question existing environmental law and policy or request the government to investigate a violation of a law. The *EBR* creates a right to apply for leave to appeal certain government decisions, such as the licences, permits, approvals and other instruments issued to industrial and commercial facilities. In certain circumstances the EBR also grants a right to sue a private individual for environmental damage. Ontario courts have recognized that the provisions of the Act provide a mechanism for realizing and protecting the right to a healthful environment.[49]

Quebec, the Yukon and the NWT also recognize environmental rights through provincial laws, although none of these jurisdictions have gone as far as Ontario in creating a system to give means of enforcing those rights.

The Quebec *Environment Quality Act* recognizes both a right to a "healthy environment and to its protection," as well as to the protection of the living species inhabiting it.[50] The right is not absolute. It is recognized "to the extent provided for in the Act and the regulations,

orders, approvals and authorizations issued under any section of this Act." This means that the Act is intended to protect people from illegal harm to the environment, as opposed to harm to the environment *per se*. In fact the right to a healthy environment cannot be used to challenge an activity for which proper administrative approval has been granted under the Act, no matter how harmful that activity may be to human health or the environment. In support of the right to a healthy environment and its protection, all residents of Quebec have the right to seek recourse to the courts to prohibit any act or operation that interferes or might interfere with the exercise of a right.[51] This has been interpreted to mean that any natural person may seek to enjoin or stop an unauthorized activity that is harming the environment. The environmental rights provisions in the Quebec *Environmental Quality Act* were added in 1978. Since that time the injunction provisions have been relied on in various cases to halt illegal environmental harm.[52]

Residents of Quebec have the right to seek recourse to the courts to prohibit any act or operation that interferes or might interfere with the exercise of a right. This has been interpreted to mean that any natural person may seek to enjoin or stop an unauthorized activity that is harming the environment.

The Yukon *Environment Act* recognizes that the people of the Yukon have a right to a healthful natural environment.[53] In support of this right, any person in the Yukon may bring a private prosecution of any offence under the Environment Act.

The Northwest Territories *Environmental Rights Act* actually recognizes the right to protect the environment.[54] This right is limited to protection from release of contaminants.

Very few cases have been brought under the provisions of the territorial legislation. The few decisions that do exist have not interpreted the provisions as granting free standing environmental rights.

Critics of existing environmental rights statutes, in particular the OEBR, identify a number of shortcomings in these statutes.[55] Often the statement of environmental right is considered to reflect only goals or aspirations rather than enforceable legal rights. Further, such laws are often criticized for being overly procedural and focusing only on how decisions are made, as opposed to what kinds of decisions are made. Finally, many environmental rights laws have provisions that cannot be or are not used because of how they are structured. In some cases provisions that allow access to the courts can only be used when the government has decided not to act to protect the environment, or where a government decision not to protect the environment is considered "unreasonable." These criteria are often difficult to meet, because they allow the government unlimited time or broad discretion about whether to act to protect the environment.

A comprehensive environmental bill of rights, such as the Ontario EBR, goes far beyond the information, participation, and access to justice provisions in effect in British Columbia.

Despite these shortcomings, however, a comprehensive environmental bill of rights, such as the Ontario EBR, goes far beyond the information, participation, and access to justice provisions in effect in British Columbia. Further, by learning from the challenges encountered with these early statutes a new version could overcome identified problems and make a significant contribution to protecting the environment by recognizing environmental rights.

Are Environmental Rights in BC Old News?

There have been a number of attempts to recognize environmental rights in British Columbia. Perhaps the strongest attempt was the *Environmental Bill of Rights Act,* which was twice introduced in the legislature in the early 70s.[56]

The proposed *Environmental Bill of Rights Act* was very short and sought to recognize "certain basic environmental rights" including "the right now and in the future to clean air, pure water, freedom from excessive noise and the preservation of the historic, scenic, natural and aesthetic values of the environment." The Bill also proposed to grant a civil right to sue, "without proof of damage" against any person, corporation, municipality, government department, or Crown agency that wilfully violated the environmental rights of any person. The proposed environmental rights were not absolute rights. The nature and degree of the proposed environmental rights to which a person would be entitled would be determined by what is "reasonable in the circumstances, due regard being given to the lawful interests of others."

On both occasions, the Bills were introduced by private members but dropped from the Order Paper before final reading.

Environmental Rights in Municipal Declarations

Environmental problems do not respect boundaries or the division of powers and that while they may be global in effect, they are often best addressed at the local level.

Municipalities from around the world are now making municipal declarations of environmental rights. Frustrated by what they perceived as recalcitrant national governments unwilling to recognize the importance of environmental health and the seriousness of the current global environmental crisis, a number of municipalities have taken it upon themselves to lead at the municipal level, through the recognition of environmental rights.

For example, the city of San Francisco recently recognized environmental rights as part of its precautionary principle policy statement:

> *Every San Franciscan has an equal right to a healthy and safe environment. This requires that our air, water, land, and food be of a sufficiently high standard that individuals and communities can live healthy, fulfilling, and dignified lives. The duty to enhance, protect and preserve San Francisco's environment rests on the shoulders of government, residents, citizen groups and businesses alike.*[57]

The Supreme Court of Canada, in what is often referred to as the Hudson decision, endorsed the legitimacy and the importance of local government regulation to address environmental problems.[58] In doing so the court recognized that environmental problems do not respect boundaries or the division of powers and that while they may be global in effect, they are often best addressed at the local level.

Cities of the World Set Sights on Right to Healthy Environment

The Urban Environmental Accord, signed by the mayors of 107 cities on World Environment Day 2005, is an agreement amongst local governments to take direct action to address environmental problems. In addition to setting goals for clean air, water, reduction of waste and energy efficiency, the Accord seeks to realize the right of all members of society to a "clean, healthy, and safe" environment for all. Amongst the signatories to the accord were the Mayors of two Canadian cities, Montreal and Vancouver.[59]

Right to a Healthy Environment Endorsed by the Supreme Court

Canada's Supreme Court may be ready to confirm the right to a healthy environment.

The Court has repeatedly endorsed, in *obiter dicta* (statements not necessarily binding on other courts), a passage from a Law Reform Commission report stating "a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we shall refer to as the right to a safe environment."[60] The full passage from the Supreme Court of Canada's decision is as follows:

> *It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment.... Everyone is aware that individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, Crimes Against the Environment, supra, which concluded at p. 8 that:*
>
> > *... 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. [emphasis in original text]*

The Supreme Court of Canada referred to this passage with approval again in 1997.[61]

The Supeme Court of Canada has repeatedly endorsed, in *obiter dicta* (statements not necessarily binding on other courts), a passage from a Law Reform Commission report stating "a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we shall refer to as the right to a safe environment."

British Columbia does not have any existing environmental rights statutes. It does not have a provincial Charter of Rights and Freedoms, nor are environmental rights recognized in the primary human rights statute.

Options for Recognizing Environmental Rights in BC

The goal of recognizing environmental rights in British Columbia presents some formidable obstacles that require creative solutions.

First, the Canadian Constitution does not recognize environmental rights or a government responsibility to protect the environment – the only discussion of environment deals with the division of powers between Canada and the provinces. The *Canadian Charter of Rights and Freedoms* does not recognize any kind of environmental right.

Second, the current Canadian government does not recognize the international law right to a healthy environment. In fact, in recent years Canadian government delegations have stood in the way of the global move to recognize environmental rights. For example, Canada has voted against recognition of the human right to water.[62]

Third, few human rights bodies have considered environmental cases involving Canada. Canada is not subject to the jurisdiction of the Inter-American Court of Human Rights. While Canada is subject to the jurisdiction of the United Nations Human Rights Commission, the Commission has as yet been unwilling to decide environmental cases involving Canada. The case of *EHP v. Canada,* concerning a nuclear waste storage facility, was dismissed by the Commission because the complainants had failed to exhaust domestic remedies.[63] Therefore the existence of a robust court system in Canada could prevent international tribunals from adjudicating matters arising in Canada.

Fourth, British Columbia does not have any existing environmental rights statutes. It does not have a provincial Charter of Rights and Freedoms, nor are environmental rights recognized in the primary human rights statute—the *British Columbia Human Rights Codes*, RSBC, 1996 c. 210. Further, no individual or collective right to a healthy environment is recognized in any of British Columbia's environmental protection statutes.

No individual or collective right to a healthy environment is recognized in any of British Columbia's environmental protection statutes.

So what are the options for recognition of an environmental right in BC? Looking back at our three main choices – constitutional amendment, judicial declaration, statutory recognition – we can conclude the following:

- Constitutional amendment, while a strong affirmation of environmental rights, is not a likely option;
- Judicial recognition of an environmental rights as an aspect of an existing Charter right, such as the section 7 Rights to life, liberty and security of the person, may be an effective means of ensuring a human-centred right to protection from environmental degradation and pollution;
- Provincial legislative reform could create stand-alone environmental rights; and
- Environmental rights may be recognized at the municipal or regional level.

Judicial recognition of an environmental rights as an aspect of an existing Charter right may be an effective means of ensuring a human-centred right to protection from environmental degradation and pollution

Constitutional Amendment

It is very difficult, both politically and practically, to amend the Canadian Constitution.

It is technically possible for the Province of British Columbia, if it were willing to do so, to initiate a constitutional amendment. However, the amending procedure requires the support of the Senate and the House of Commons as well as two-thirds of the provinces that have at least 50% of the population of all the provinces. This process may be commenced by the Senate, the House of Commons or the Legislative Assembly of any province.[64]

Were one of these bodies willing and interested in taking up that charge, we have included options for model constitutional environmental rights provisions in Appendix A to this Report. These provisions reflect several of the concepts that have come out of the constitutional jurisprudence considering environmental rights provisions around the world. The provisions speak both to the rights of individuals and the responsibilities of government. The responsibility of government is a key aspect of many rights provisions considered actionable by the courts. Such a provision would be appropriate for the Canadian Constitution, or a provincial or territorial charter or bill of rights.

British Columbia has no provincial constitution to amend. Unlike Quebec, British Columbia also has no Charter of its own. Therefore, short of the province electing to create a British Columbia Charter or some other quasi-constitutional provision, it is unlikely that environmental rights in B.C. will be recognized through constitutional amendment.

British Columbia does have a *Human Rights Code* that could theoretically be amended to recognize a right to a healthy environment. However, the provisions of that code currently focus on equality and discrimination. For this reason significant structural and policy changes would have to be made to the existing human rights system in British Columbia to reflect the recognition of environmental rights. Of course it would be possible, should the government decide to go this way, to make these structural changes. Such an approach might be easier than starting from scratch.

Judicial Recognition of Environmental Rights as Part of the Right to Life

Perhaps the clearest option for people who are not in government to achieve recognition of environmental rights is to seek to have this matter resolved by the courts, through a lawsuit seeking recognition of environmental rights as an aspect of existing human rights. Such a lawsuit would most likely be brought based on the Charter, although it could also be brought in defence of the public's environmental rights. A benefit of this approach to recognizing environmental rights is that it could have an effect throughout Canada.

The objective of such a test case would be to have the courts recognize that the Charter applies in certain environmental contexts because environmental rights are aspects of existing Charter rights. This approach has been described as an "ecologically literate" interpretation of the Charter.[65] Such an approach follows the lead of the many national and international courts described above who have recognized that environmental rights are implicit in, and therefore already protected by existing provisions of national constitutions and international agreements. As set out in Part II, environmental rights have been considered as aspects of the right to life, the right to health, privacy and family life, property, suitable working conditions, adequate standard of living and or culture.

Just as was held to be the case for people in India, Peru or Nigeria, in order for Canadians to live a life of dignity we require a certain level of environmental quality that includes clean air to breathe, water to drink, food to eat and an environment where pollution does not threaten health and security.

If we take a look at Canada's Charter it is possible that environmental rights could exist as aspects of:

- section 2 (a), freedom of religion and conscience;
- section 7, life, liberty and security of the person; and
- section 15(1), the equality provision.

It is also possible that environmental rights could be recognized as aspects of Aboriginal and treaty rights in section 35 of the Constitution. These rights are not part of the Charter, and are collective rights that are only enjoyed by certain identifiable peoples.

According to academic scholars the most likely Charter right to include a right to a healthy environment is section 7.[66] The right to life and the right to security have been considered by other court in other jurisdictions to include a right to a healthy environment. Further, section 7 of the Charter, has been relied on in Canada in cases about mental and physical health.[67] The right to health, in other jurisdictions, has been found to include a right to a healthy environment.

Just as was held to be the case for people in India, Peru or Nigeria, in order for Canadians to live a life of dignity we require a certain level of environmental quality that includes clean air to breathe, water to drink, food to eat and an environment where pollution does not threaten health and security.

Raising section 7 in an environmental context is not without its challenges. An exhaustive review of the case law of section 7 and how it might apply in the context of an environmental hazard is beyond the scope of this report.[68] However, it is likely that an environmental

rights test case based on section 7 would contain at least the following 3 elements: (1) An individual seriously threatened or harmed by an environmental problem; (2) a clear connection between the environmental harm and the government action; and (3) a violation of the principles of fundamental justice.

An individual seriously threatened or harmed by an environmental problem

Charter rights apply to protect individuals. Section 7 is intended to protect very core and fundamental aspects of human integrity, such as life itself. The notion of human dignity is also at the core of section 7. Therefore the environmental hazard that is involved in an environmental rights test case must very clearly harm or risk harming actual identifiable people in a significant way. In the case of pollution from two stroke engines in Deli, India air pollution from particulate matter from the exhaust was associated with significant respiratory illness. In the case of the La Oroya, Peru metal smelter, children living in the community suffered from lead poisoning that affected their health, as well as mental and physical development. In the case of sour gas flaring in Nigeria, community members were exposed to high concentrations of sulphur dioxide gas – a known toxin that causes respiratory and other health effects.

The environmental hazard involved in an environmental rights test case must very clearly harm or risk harming actual identifiable people in a significant way.

A clear connection to government action

The Charter only applies to government action. Therefore the environmental hazard that causes the harm must be done by the government, or authorized or approved by the government. There is an argument to be made that in certain circumstances the failure to act to protect the environment could also be construed as a failure to protect fundamental human rights. There is a great debate over this interpretation of our Charter.

Constitutional Reference

If you are reading this report and you are the Attorney General of British Columbia then you have the option of bringing a reference to the Court of Appeal to seek judicial recognition of a constitutional environmental right. The reference power allows the government of the day to place important questions before the Court to assist in good governance. The federal government is permitted to make a reference to the Supreme Court of Canada, a power that has been exercised in many important legal debates such as the possible separation of Quebec and the legalization of same sex marriage. Each of the ten provinces has enacted legislation permitting the provincial government to direct a reference to the provincial court of appeal. If you are not the Attorney General of British Columbia, and therefore unable to bring a reference of your own, you could always convince the AG to do it for you...

A violation of the principles of fundamental justice

The three protected rights to life, liberty and security of person are not absolute. They may be deprived if done so in conformity with the "principles of fundamental justice." The principles of fundamental justice are unique to the Canadian Charter. They are similar to the principles of fairness in government action – that government officials not act arbitrarily when depriving people of their rights. The principles of fundamental justice are also similar to the principles of procedural fairness that require that decisions affecting rights be made *after* the affected people have had the opportunity to participate in the decision making process. However, they also include unique concepts such as the principle that actions of the government that deprive rights should not shock the conscience of Canadians. It is also possible for new principles of fundamental justice to emerge to fit the needs of a new situation, such as environmental protection. From a practical perspective this means that the environmental hazard that causes the harm must have been approved or otherwise have come to be in a way that is procedurally incorrect, unfair, arbitrary vague, or extremely unjust.

These arguments are beginning to surface in Alberta, where a number of oil and gas developments have faced challenges before a provincial regulatory authority based on alleged violations of section 7 rights. One such case, *Kelly v. Alberta,* was granted leave to appeal to the Alberta Court of Appeal on section 7 grounds.[69] In the *Kelly* case residents in the vicinity of a proposed natural gas well containing toxic hydrogen sulphide or "sour gas" objected to the fact that the well had been approved after the Board agreed that the drilling and completion phase of the project would put residents at risk of death or serious bodily harm. After leave was granted the company proposing the well withdrew the request for approval and the case was dismissed. While it is unfortunate that this important legal question was never heard by the Alberta Court of Appeal, it is likely only a matter of time before these arguments are raised again somewhere in Canada.

The principles of fundamental justice are similar to the principles of procedural fairness that require that decisions affecting rights be made *after* the affected people have had the opportunity to participate in the decision making process.

Environmental rights in pollution hot spots?

Those who defend the failure to recognize environmental rights in Canada argue that Canadian's basic environmental needs are already being met. Environmental rights are only necessary in places where people are subject to horrible pollution while governments stand idly by. Consider the case of southwestern Ontario's chemical valley. There are 62 large industrial facilities within 25 kilometres of the City of Sarnia and adjacent Aamjiwnaang First Nation reserve. In 2005, these facilities released more than 131,000 tonnes of air pollution – a toxic load of more than 1,800 kilograms per Sarnia and Aamjiwnaang resident. People in this community are subjected to chemical exposure on a regular basis that exceeds identified standards for protecting human health. While some action has been taken to evaluate the extent of the problem, real on-the-ground solutions have been slow. Despite disturbing levels of existing pollution, governments continue to consider permitting new facilities.[70]

Statutory Recognition of Environmental Rights

Another option for British Columbia is the recognition of environmental rights in a provincial statute.

The goal of legally recognizing environmental rights is to ensure that environmental risks and hazards are controlled and that the rights and interests of those who seek to pollute and degrade the environment for economic gain are balanced against the rights and interests of those individuals and communities that suffer the burden of that pollution.

One goal of recognizing environmental rights is to ensure that the rights and interests of those who seek to pollute and degrade the environment for economic gain are balanced against the rights and interests of those individuals and communities that suffer the burden of that pollution.

Environmental rights statutes protect the individual right to a healthy environment by creating provisions that protect, conserve and restore of the natural environment for the benefit of present and future generations. While the government has the primary responsibility for achieving this goal, the people are also given a means to ensure that it is achieved in an effective, timely, open and fair manner.

An environmental rights law could take the form of a stand alone Environmental Bill of Rights, following the example of the Province of Ontario, or form part of a broader environmental protection statute, following the example of the Province of Quebec.

Another option is that proposed in the Ecojustice model Canadian Environmental Bill of Rights – which is available on our website at http://www.ecojustice.ca/media-centre/media-release-files/CEBR%20summary%20FINAL.pdf/view.

The goal of the model Canadian Environmental Bill of Rights (EBR) is to ensure that the right to a clean environment is upheld in relation to the federal government's environmental responsibilities. However, the model is easily transferable to any provincial or territorial jurisdiction. It prioritizes the values of transparency, access to information, accountability, public participation in decision-making, and adequate enforcement. It establishes a right to a clean environment, and imposes a public trust duty upon the federal government to adequately protect the environment. It empowers Canadians, in specific circumstances, to access justice by bringing legal proceedings where federal enforcement is lacking.

The model EBR should be seen as a kind of "environmental contract" between the government and the people. Under the EBR model, the people explicitly entrust the government with the primary responsibilities for environmental protection. However, where such responsibilities are abdicated, the people may hold government to account. By empowering individuals, the EBR will better ensure that our environment will be respected and protected.

The goal of the model Canadian Environmental Bill of Rights is to ensure that the right to a clean environment is upheld in relation to the federal government's environmental responsibilities. The model is easily transferable to any provincial or territorial jurisdiction.

Regardless of which option is taken there are many lessons to be learned from the places that already have environmental rights laws. An environmental rights statute for British Columbia should include the following elements:

THE ENVIRONMENTAL RIGHT MUST BE ENFORCEABLE. This means it needs to appear as a provision of the law, and not simply in the preamble. Preambular statements are important but do not create legally enforceable rights and obligations. Defining the meaning of a right to a healthy environment is one way to infuse content and enforceability into the provision. Finally, it should be clear that the right is actionable – meaning that it is possible to go to court under certain circumstances to defend the right. As a guide, we recommend our model statement of environmental right which is included as Appendix A to this report.

THE GOVERNMENT'S RESPONSIBILITY TO PROTECT THE ENVIRONMENT SHOULD BE INCLUDED ALONGSIDE ENVIRONMENTAL RIGHTS. The most successful environmental rights provisions globally are those that also include provisions setting out the responsibilities associated with the right.[71]

THE LAW MUST ADDRESS THE THREE PILLARS OF PROCEDURAL ENVIRONMENTAL RIGHTS: the right to environment information; the right to participate in environmental decision making; and the right to access to the courts to protect the environment. These procedural rights form the internationally recognized standard for public participation in environmental decision-making, a core value of environmental rights.[72]

THE LAW SHOULD MAKE THE PUBLIC A PARTNER IN ENVIRONMENTAL PROTECTION AND ENFORCEMENT. Access to justice provisions should make very clear when the public can act to protect the environment. These provisions would ideally not be limited to taking action to stop harm that has already occurred. Provisions should also clearly set out when an individual can take action to prevent environmental harm from occurring. These provisions should be broad enough to allow anyone with a genuine interest in environmental protection to step in and address environmental harm. They must also be structured in a clear and practical way to ensure that they can and will be used.

A BC Environmental Bill of Rights should address issues of court costs, lowering financial barriers to seeking injunctive relief to prevent environmental damage, and remedies that encourage public involvement in environmental protection.

AN EXPERT AND INDEPENDENT BODY, SUCH AS AN ENVIRONMENTAL COMMISSIONER, SHOULD BE ESTABLISHED TO OVERSEE THE IMPLEMENTATION OF THE LAW. Understanding and addressing environmental problems often requires expertise in a number of areas. Expert bodies can more efficiently and effectively investigate and evaluate potential issues. Independent bodies are removed from the kind of political decision-making that necessarily characterizes government. In 2001, British Columbia briefly established the office of an independent Commissioner for Environment and Sustainability as part of the Auditor General's office to review and report on government progress towards sustainability and the state of British Columbia's ecological health.[73] Such an approach could again be adopted in B.C. Alternatively, a separate office, such as the Environment Commissioners Office in Ontario, could be created.

AN ENVIRONMENTAL COURT OR TRIBUNAL SHOULD BE ESTABLISHED TO HEAR ENVIRONMENTAL CASES. B.C. already has an Environmental Appeal Board, the structure and procedure of which could be modified to implement an Environmental Bill of Rights. Alternatively, some jurisdictions have separate environmental courts that are considered to be very effective at handling environmental matters. For example the Land and Environment Court of New South Wales is a specialist environmental and planning court with a wide jurisdiction responsible for interpreting and enforcing environmental law in the state of New South Wales, Australia.[74] Critics have praised the court for its purposive and effective decision making in environmental matters.

ACCESS TO JUSTICE PROVISIONS SHOULD CLEARLY ADDRESS BOTH THE LEGAL AND THE PRACTICAL BARRIERS TO ACCESS TO JUSTICE. In addition to granting legal standing to enforce an environmental right, a British Columbia Environmental Bill of Rights should address issues of court costs, lowering financial barriers to seeking injunctive relief to prevent environmental damage, and remedies that encourage public involvement in environmental protection. Time lines should be reasonable and practical, addressing the fact that the provisions will be relied upon by individuals who may not be represented by counsel and have no previous experience with the legal system.

THE LAW SHOULD PROTECT DEFENDERS OF THE ENVIRONMENT THROUGH BOTH WHISTLE BLOWER PROVISIONS AS WELL AS ANTI-SLAPP PROVISIONS. Whistleblower provisions protect those individuals who, in the course of their employment, try to deal with environmental problems by publicizing environmental hazards where they work. Public participation in environmental issues also requires the ability of private citizens to engage in debate about environmental harm without the fear of being slapped with a lawsuit. Strategic Law Suits Against Public Participation (or "SLAPP" suits) are normally civil suits in defamation or liable intended to chill public discussion of an issue. Anti-SLAPP legislation is intended to protect public participation. British Columbia briefly had such legislation in 2001.[75] It created a process though which defendants to a lawsuit could go to the court and seek an expedited determination of whether the case was brought for the purpose of silencing debate. Similar provisions could be included in an Environmental Bill of Rights to encourage and protect public debate about environmental issues.

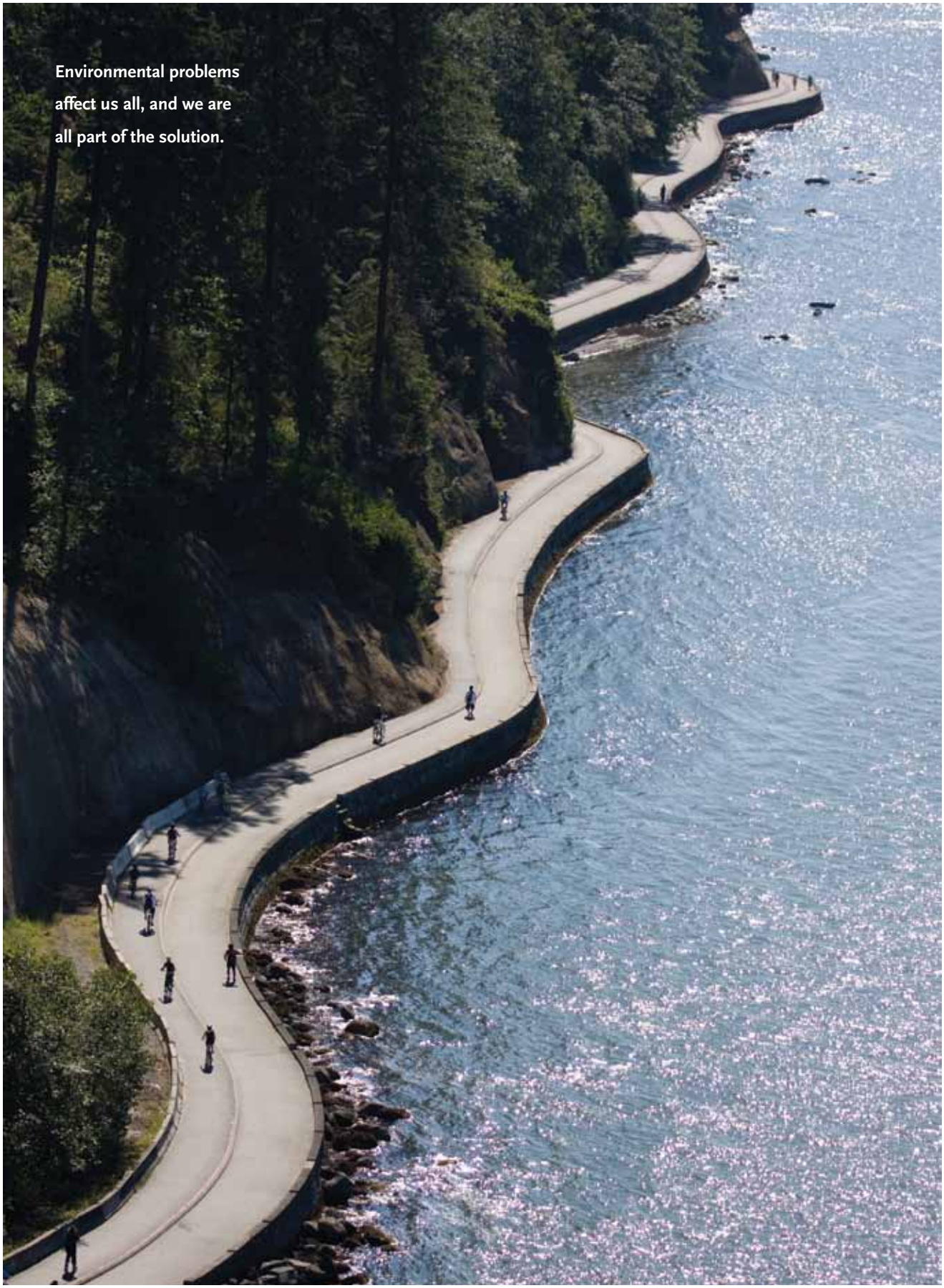
THE LAW SHOULD REFLECT ESTABLISHED PRINCIPLES OF ENVIRONMENTAL LAW. Such principles include the principle of sustainable development,[76] the precautionary principle,[77] the polluter pays principle,[78] the principle of intergenerational equity[79] and the standstill principle.[80] The Bill should also leave room for the incorporation of environmental rights principles that may emerge in the future.

While such law may seem like a major undertaking, all of these principles and provisions are included in statutes in Canada and around the world. Further, many of them have previously existed in British Columbia.

While such law may seem like a major undertaking, all of these principles and provisions are included in statutes in Canada and around the world. Further, many of them have previously existed in BC.

Municipal Declaration

People often feel frustrated at their inability to address global environmental problems. In many cases it is easier to focus on local contributions to global problems; i.e., to "think globally, act locally." Municipal declarations of environmental rights and responsibilities offer an opportunity for local governments and their communities to take environmental matters in hand without having to wait for provincial or federal governments to get on board. A grassroots network of communities that recognize environmental rights and reflect environmental protection principles in local by-laws can, on certain issues, begin to fill in the gap created by inaction at higher levels. As discussed above, municipal declarations of environmental rights are part of a burgeoning trend in North America and around the world. In support of this trend we offer, in Appendix B, a model declaration of environmental rights for local governments throughout British Columbia.


Environmental problems
affect us all, and we are
all part of the solution.

Conclusion

Environmental problems affect us all, and we are all part of the solution. Until we grant greater protection powers directly to nature or indirectly to defenders of the environment, the ability of our legal system to form an effective part of that solution will remain compromised.

Recognizing environmental rights and thereby enhancing the ability of our legal system to address environmental problems is one way of granting power to the environment. Of course, simply recognizing an environmental right will not alone be enough to protect human health and ecological balance. The recognition of the right is one part of a suite of government actions that are necessary to enable individuals to meaningfully address environmental harm to themselves, to their children, and to nature as a stand-alone entity.

We have learned from the experience of other nations, regions and cities that recognizing environmental rights is something that can be done at many levels. It is not necessary for us to wait until our national leaders have taken up the charge. Once recognized, environmental rights can provide the impetus governments need to address environmental issues, the leverage that the public needs to effectively engage in environmental protection, and the grounds on which courts can stop environmental harm.

Until we grant greater protection powers directly to nature or indirectly to defenders of the environment, the ability of our legal system to form an effective part of that solution will remain compromised.

Model Environmental Rights Provision

ENVIRONMENTAL RIGHTS AND OBLIGATIONS

This provision is drafted for a National constitutional or statutory provision. It can easily be modified for a Provincial charter or Environmental Bill of Rights.

*. (1) Every resident of Canada has a right to a healthy and ecologically balanced environment.

(2) The Governments of Canada, the provinces and territories each have an obligation, within their respective jurisdictions, to protect the right of every resident of Canada to a healthy and ecologically balanced environment.

(3) The Governments of Canada, the provinces and territories act as trustee of the environment and each has the obligation, within their respective jurisdictions, to preserve the environment in accordance with the public trust for the benefit of present and future generations.

(4) Every person, natural or legal, has a responsibility to protect and conserve the environment.

Model Municipal Declaration

DECLARATION OF ENVIRONMENTAL RIGHTS

The local government finds and declares that:

1. Every resident has an equal right to live in a healthy and ecologically balanced environment. This means every resident has the right to air, water, land, and food that is healthy, safe and free from contamination.

2. The local government has the responsibility, within its jurisdiction, to protect, preserve and enhance this right.

3. In addition, all levels of government, residents, citizen groups, people and businesses operating within the municipal boundaries have a duty to protect, preserve and enhance the environment.

4. The public bears the ecological and health consequences of environmental decisions. The public therefore has the corresponding right to complete and accurate information regarding harmful pollutants and contaminants that are emitted into the local environment. Residents shall also have the right to participate in government decisions that will affect the environment. Residents shall also have the right to challenge government decisions that affecting their health and the local environment.

5. The local government shall apply the precautionary principle in its decision-making which means the local government shall ensure:

    a. Where threats of serious or irreversible damage to people or nature exist, the government shall take cost effective measures to prevent the degradation of the environment or to protect the health of its citizens. Lack of full scientific certainty about cause and effect shall not be viewed as sufficient reason for the local government to postpone such measures.

    b. Any gaps in scientific data uncovered by the examination of alternatives will provide a guidepost for future research, but will not prevent the local government from taking protective action;

    c. As new scientific data become available, the local government will review its decisions and make adjustments when warranted; and

    d. Full cost accounting is applied which means that when evaluating potential alternatives, the local government will consider all reasonably foreseeable costs, including costs to human health and the environment, even where such costs are not reflected in the initial price. Once costs are assessed, the local government must ensure that short-term gains do not trump long-term costs in its decision-making;

6. The local government will, within its jurisdiction, take actions to promote residents rights to a healthy and ecologically balanced environment. Particular actions by the municipality that promote the residents' right to a healthy and ecologically balanced environment include:

   a. Purchasing products for the municipality that are environmentally preferable;

   b. Promoting efficient building and development;

   c. Ensuring that municipal land-use permitting results in an equitable distribution of environmental benefits and burdens within the municipality, preventing the development of environmental "hot spots"; and

   d. Making decisions with respect to planning and development that are beneficial for the environment.

Endnotes

1 *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, A/CONE48/14 and Corr..1, reprinted in 11 ILM 1416 (1972) ["Stockholm Declaration"].

2 David R. Boyd, *The Environmental Rights Revolution: Constitutions, Human Rights, and the Environment* (Ph. D. Dissertation, University of British Columbia, forthcoming in 2010).

3 *Report of the World Commission on Environment and Development: Our Common Future,* GA Res. 42, WCED, Annex 1: Legal Principles for Environmental Protection and Sustainable Development, UN Doc. A/42/427 (1987) at Principle 1.

4 Annual Report of the IACHR 2007 – Chapter III – The Petition and Case – Precautionary Measures Summary, No. 46 Community of La Oroya Peru. Online: www.cidh.org/annualrep/2007eng/chap.3e.htm

5 Peticion de Caso, Communidad de la Oroya, Diciembre, 2006. Online: www.aida-americas.org/templates/aida/uploads/docs/LA_OROYA_Petition_DICIEMBRE_2006.pdf

6 *Carribian Conservation Corporation v. Asociacion ProgramaDe Restauracion de Tortugas Marinas* [1999] Expediente 98-003684-0007-CO, Resolución 1999-01250 (Constitutional Court of Costa Rica).

7 *Constitución de la República del Ecuador*, Asamblea Constituyente. Online: www.asambleaconstituyente.gov.ec/documentos/constitucion_de_bolsillo.pdf

8 *City of Johannesburg v. L Mazibuko,* [2009] ZASCA 20 (S.A. Supreme Court of Appeal).

9 L. Collins, "Are We There Yet: The Right to Environment in International and European Law" (2007) 3 McGill Int'l J.S.D.L.P. 2.

10 Earthjustice, *Environmental Rights Report 2007: Human Rights and the Environment* (2007). Online: www.earthjustice.org/library/references/2007-environmental-rights-report.pdf

11 *City of Johannesburg v. L Mazibuko,* [2009] ZASCA 20 (S.A. Supreme Court of Appeal).

12 *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources,* [1993] G.R. No. 101083, (1994) 33 I.L.M. 173. Online: www.elaw.org/node/1343

13 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Right*, 17 November 1988, OAS, GA 18th Sess., OAS. Treaty Series No. 69 ["San Salvadore Protocol"].

14 San Salvador Protocol, *ibid*, at Article 19 (6). Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

15 See the *African (Banjul) Charter of Human and Peoples' Rights,* Organization of African Unity, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) entered into force 21 October 1986, at Article 24; the San Salvadore Protocol, *supra* note 13, at Article 11; the *Arab Charter on Human Rights*, 22 May 2004, 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force 15 March 2008, at Article 38.

16 L. Collins, "Are We There Yet? Revisiting the Right to Environment in International and European Law," *supra* note 9. Note that in 1990 Ms. Fatma Ksentini, United Nations appointed Special Rapporteur on Human Rights and the Environment, concluded that a right to environment has been a recognized principle at national, regional and international levels. This early declaration of the right as an established principle of international law is contested by many nations including Canada.

17 Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998). Online: www.unece.org/env/pp/ratification.htm

18 E. Morgera, "An Update on the Aarhus Convention and its Continued Global Relevance" (2005) 14:2 R.E.C.I.E.L. 138.

19 C. Stone, "Should Trees Have Standing: Towards Legal Rights for Natural Objects" (1972) 45 S. Cal. L. Rev. 450.

20 *Sierra Club v. Morton*, 405 U.S. 727 (US Sup. Ct. 1972).

21 For a compiled list of constitutional provisions relating to the environment see Earthjustice, *Environmental Rights Report: Human Rights and the Environment*, *supra* note 10.

22 David R. Boyd, *The Environmental Rights Revolution: Constitutions, Human Rights, and the Environment*, *supra* note 2.

23 Wolfrum, R. Grote, eds. 2008. G.H. Flanz, Editor Emeritus. Constitutions of the Countries of the World. New York: Oxford University Press, Vols. I-XX (hereinafter referred to as "Consitutions of the Countries of the World") Constitution of France, Charter for the Environment (2004) Articles 1-10. Online: www.assemblee-nationale.fr/english/8ab.asp

24 [23] Constitutions of the Countries of the World, *supra* at note 22, Constitution of the Kingdom of Bhutan, Articles 5 and 8. Online: www.constitution.bt

25 Constitution of Ecuador, *supra* at note 7

26 Mont. Const. arts. II and IX. Online: http://leg.mt.gov/css/Laws%20and%20Constitution/Current%20Constitution.asp

27 Pa. Const. art. I, s 27. Online: http://sites.state.pa.us/PA_Constitution.html

28 Hawaii Const. art. IX. Online: http://hawaii.gov/lrb/con/

29 Québec *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, Article 46.1: Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law.

30 See for example the Supreme Court of Canada in: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R. 789, at para. 15 citing Article 52 of the Québec Charter.

31 *Subhash Kumar v. State of Bihar,* [1991] INSC 3 (9 January 1991).

32 Constitutions of the World, *supra* at note 22, Constitution of India (26 January 1950) Article 21: No person shall be deprived of his life and liberty except in accordance with the procedure established by law.

33 *Subhash Kumar v. State of Bihar, supra* at note 31, para 7.

34 See for example: *M.C. Mehta v. Union of India* [1992] INSC 165 (15 May 1992).

35 L. Rajamani, "The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?" (2007) 16:3 R.E.C.I.E.L. 274; see also J. Razzaque, Public Interest Environmental Litigation in India, Pakistan and Bangladesh (The Hague: Kluwer Law International, 2004) at Chapter 2: Environmental Protection and the Constitution.

36 *Zia v. WAPDA,* (1994) P L D 1994 Supreme Court 693, para. 14: "The Constitution guarantees dignity of man [Article 14] and also right to life under Article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment."

37 *Dr. Mohiuddin Farooque v. Bangladesh and Others*, Civil Appeal No. 24 of 1995, 17 BLD (AD) 1997. In that case the right to life was held to encompass "the protection and preservation of the environment, ecological balance free from pollution of air and water, and sanitation without which life can hardly be enjoyed."

38 *African (Banjul) Charter of Human and Peoples' Rights,* Organization of African Unity, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) entered into force 21 October 1986. Article 24 reads: "All peoples shall have the right to a general satisfactory environment favourable to their development."

39 *Gbemre v. Shell* Federal High Court of Nigeria, Benin City, 14th November 2005, Suit No: FHC/B/CS/53/05, (Judge C.V. Nwokorie). The court held that flaring of gas in a Niger Delta community by Shell Nigeria was a "gross violation" of the constitutionally guaranteed rights to life and dignity."

40 *P.K. Waweru v. Republic of Kenya* (2006) High Court of Kenya, Misc. Civil Application No. 118 of 2004. Online: www.elaw.org/system/files/Kenya-Waweru.pdf. In interpreting the meaning of the section 70 right to life in the Kenyan Constitution, the court held at p. 10: "Whereas the literal meaning of life under s. 71 means absence of physical elimination, the dictionary covers the activity of living. That activity takes place in some environment and therefore the denial of wholesome environment is a deprivation of life."

41 *Yanomami Indians v. Brazil,* IACHR case no. 7615, Annual Report of the Inter-American Commission on Human Rights: 1985. Online: www.cidh.oas.org/annualrep/84.85eng/Brazil7615.htm. Note this was a case concerning construction of a highway through indigenous land.

42 *Community of La Oroya, Peru,* IACHR Petition to State No. 07-04-24, Annual Report of the Inter-American Commission on Human Rights 2007. Online: www.cidh.org/annualrep/2007eng/chap.3e.htm. Note this was a case concerning heavy metal pollution from local smelting plants.

43 *Lopez-Ostra v. Spain* (1994), 20 ECHR 277, concerning fumes from a tannery waste treatment plant. Online: www.escr-net.org/caselaw/caselaw_show.htm?doc_id=673084

44 *Guerra and others v. Italy*, (1998) judgement of 19 February 1998, Reports 1998-1, a case concerning the release of large quantities of inflammable gas and highly toxic substances from a fertiliser plant. Online: www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/guerra%20and%20others%20v.%20italy.htm

45 *Taskin and Others v. Turkey*, (2004), no. 46117/99, § 115, ECHR. 2004-X, a case concerning the release of cyanide from a gold mine. Online: www.echr.coe.int/Eng/Press/2004/Nov/ChamberjudgmentTaskin&OthersvTurkey101104.htm

46 Fadeyeva v. Russia, (2005), Application no. 55723/00 a case concerning pollution from a state owned iron smelter. Court summary online: www.echr.coe.int/Eng/Press/2005/June/ChamberjudgmentFadeyevavRussia090605.htm

47 *Tatar v. Romania* (January 27 2009) Application no. 6720/01 a case concerning contamination from a breached tailings pond at a gold mine. Summary online: http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=67021/01&sessionid=27049550&skin=hudoc-pr-en

48 Ontario *Environmental Bill of Rights*, *1993*, S.O. 1993, c. 28.

49 *Cassidy v. Ontario (Director, Ministry of the Environment)*, 2005 Carswell Ont 7612 2248, 21 C.E.L.R. (3d) 176 at para. 48.

50 Québec *Environment Quality Act,* R.S.Q. c. Q-2, s. 19.1 provides that: Every person has a right to a healthy environment and to its protection, and to the protection of the living species inhabiting it, to the extent provided for by this Act and the regulations, orders, approvals and authorizations issued under any section of this Act and, as regards odours resulting from agricultural activities, to the extent prescribed by any standard originating from the exercise of the powers provided for in subparagraph 4 of the second paragraph of section 113 of the Act respecting land use planning and development (chapter A-19.1).

51 Quebec, EQA, ibid, 19.2. A judge of the Superior Court may grant an injunction to prohibit any act or operation which interferes or might interfere with the exercise of a right conferred by section 19.1.; and 19.3. The application for an injunction contemplated in section 19.2 may be made by any natural person domiciled in Québec frequenting a place

or the immediate vicinity of a place in respect of which a contravention is alleged.

52 *Bechard c. Selenco Inc.* (1988) R.J.Q. 2267 (S.C.) local residents sought an injunction against construction of an unauthorized PCB treatment and destruction complex in their community; and Nadon c. Ville d'Anjou [1994] R.J.Q 1823 (C.A.) a plaintiff launched a class action on behalf of all the persons affected by ragweed pollen against the municipalities of the Montreal region for failing to enforce regulations on eradication of ragweed. See also *Gestion Serge Lafreniere c. Calve* in which the legality of government action was challenged on the basis of the right to a healthy environment. In that case the court held "a victim of environmental damage has sufficient standing to claim for the nullification of a government authorization allowing this harm to be done... In the quest of protecting an important social value, the citizen can attack the legality of government decisions and add, meeting the criteria, a claim for a permanent injunction" [translated from original French].

53 Yukon *Environment Act,* R.S.Y. 2002, c. 76, s. 6.

54 Northwest Territories *Environmental Rights Act,* R.S.N.W.T. 1988, c.83 (Supp.), s. 6(1).

55 Sierra Legal Defence Fund. 2005. Comments on the 10-year Review of the *Environmental Bill of Rights* EBR Registry Number XQ04E002.

56 British Columbia, 1971, Bill 101, Environmental Bill of Rights Act, 29th Legislature, 2nd Session (Victoria: Queens Printer) ss. 2, 3 and 4; and British Columbia, 1972, Bill 79, Environmental Bill of Rights Act, 30th legislature, 2nd Session, (Queen's Printer: Victoria) ss. 2, 3, and 4.

57 City and County of San Francisco, California, Environment Code, Ch 1, s.100 (Supp. No. 22, 2009). Online: www.municode.com/Resources/gateway.asp?pid=14134&sid=5

58 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40.

59 Urban Environmental Accord, 25 June 2005, San Francisco. Online: www.sfenvironment.org/downloads/library/accords.pdf

60 See for example: *Ontario v. Canadian Pacific Ltd.* ,[1995] 2 S.C.R. 1031 at para. 55.

61 *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 at para 124.

62 L. Diebel, "Canada Foils UN Water Plan", Toronto Star, (2 April 2008); see also Canada, "Government of Canada Response to Environmental Petition 163 filed by Mr. David Boyd under the Auditor General Act: Right of Canadians to Clean Air, Clean Water and a healthy Environment" (2 June 2006). Online: www.oag-bvg.gc.ca/internet/English/pet_163A_e_28897.html

63 *EHP v. Canada* Communication No. 67/1980, in United Nations, 2 Selected Decisions of the Human Rights Committee (1990), 20, U.N. Doc. CCPR/C/OP/2 (1990).

64 *Constitution Act, 1982,* ss. 38 & 46, being Schedule B to the *Canada Act 1982* (U.K.), *1982*, c. 11.

65 L. Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 29 Windsor Rev. Legal Soc. Issues 7.

66 See for example: L. Collins, *ibid*.; see also A. Gage, "Public Health Hazards and Section 7 of the Charter" (2004) 13 J.E.L.P. 1.

67 *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35.

68 For a broader discussion of the case law of section 7 and how it might apply in an environmental rights case see: M. Venton, "Constitutional Environmental Rights in Canada" (Paper presented to the Environmental Law: In the Public Interest, Continuing Legal Education Society, September 2008); see also: N. Vlaviamos, "Health, Human Rights and Resource Development in Alberta: Current and Emerging Law" (2003) Canadian Institution of Resources Law: University of Calgary, Alberta.

69 *Kelly v. Alberta,*2008 ABCA 52, rev'd *West Energy Ltd., Re*, 42 C.E.L.R. (3d) 35, 2009 ABCA 161.

70 Ecojustice, *Exposing Canada's Chemical Valley, An Investigation of Cumulative Air Pollution Emissions in the Sarnia, Ontario Area* (2007). Online: www.ecojustice.ca/publications/reports/report-exposing-canadas-chemical-valley

71 David R. Boyd, *The Environmental Rights Revolution: Constitutions, Human Rights, and the Environment*, *supra* note 2.

72 E. Morgera, "An Update on the Aarhus Convention and its Continued Global Relevance," *supra* note 16.

73 *Environment and Sustainability Statutes Amendment Act,* S.B.C. 2001, c. 12, Parts 1, 2 and 3 as repealed by the *Budget Transparency and Accountability Act*, S.B.C. 2000, c. 23.

74 www.lawlink.nsw.gov.au/lec

75 *Protection of Public Participation Act,* S.B.C. 2001 c. 19 as repealed by the *Miscellaneous Statutes Amendment Act*, *2001*, S.B.C. 2001, c. 32.

76 "sustainable development" means development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

77 "precautionary principle" means that where there are threats of serious or irreversible damage to the environment, a lack of full scientific certainty should not be used as a reason for postponing action to protect the environment.

78 "polluter pays principle" means that a polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to society or the exceeding of an acceptable level (standard) of pollution.

79 "intergenerational equity" means that current generations of Canadians hold the natural environment in trust for future generations, and may only use and enjoy its resources on condition that they deliver the environment to the next generations in as good, or better, condition than originally found.

80 "Standstill principles" means that once environmental rights are recognized in a jurisdiction it is not possible to subsequently weaken environmental laws or standards.

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Ecojustice, formerly Sierra Legal Defence Fund, is Canada's leading non-profit organization of lawyers and scientists devoted to protecting the environment. Since 1990, we have helped hundreds of groups, coalitions and communities expose law-breakers, hold governments accountable and establish powerful legal precedents in defence of our air, water, wildlife and natural spaces.

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