done by the Canadian Medical Association estimated that air pollution alone causes tens of thousands of premature deaths and billions of dollars in preventable health care costs annually. Third, the Constitution’s silence on environmental protection has been acknowledged as problematic for more than 10 years. Prime Minister Wilfird Laurier’s Commission on Conservation reported that constitutional uncertainty about environmental protection was undermining efforts to address water pollution. In 1997, the Supreme Court of Canada came within a whisker of striking down critical provisions of the Canadian Environmental Protection Act because of the absence of a clear constitutional basis for the law.

A fourth reason is that environmental rights and responsibilities have been a cornerstone of Aboriginal legal systems for millennia. For the Haast, the Chishinaaks, the M’kimg and others, the earth’s sentience creates corresponding rights and obligations for them and nature. As our Supreme Court has repeatedly observed, incorporating indigenous law into the Canadian legal system is an important step toward reconciliation with Aboriginal peoples.

Fifth, citizens in more than 110 nations — from Argentina to Zambia — currently enjoy a constitutionally protected right to a healthy environment. This includes northern industrialized nations such as Finland and France as well as environmental leaders like Norway and Costa Rica. Finally, 9 in 10 Canadians polled by Angus Reid believe that governments should recognize their right to a healthy environment. Indeed, the same poll found that a majority of Canadians erroneously believe their right to a healthy environment is already included in the Charter of Rights and Freedoms.

Constitutional change is perceived as difficult in Canada, if not impossible after the Meech Lake and Charlottetown debacles. Yet there have been 11 amendments since 1982, including 2 direct amendments of the Charter. Narrowly worded changes that enjoy high levels of public support (like the right to a healthy environment) appear to have better prospects. However, given the position of the current majority government, an environmental amendment is unlikely in the short term.

There are three ways that the right to a healthy environment could gain constitutional recognition in Canada:

- direct amendment of the Constitution, requiring Parliament’s approval and the support of 7 of the 10 provinces, secured within a three-year period;
- litigation resulting in a court decision that there is an implicit right to a healthy environment in section 7 of the Charter (which states the right to life, liberty and security of the person); and
- judicial reference resulting in a court decision that there is an implicit right to a healthy environment in section 7.

Legal steps are already being taken along the constitutional path. A case is before the courts in Ontario in which Ada Lockridge and Ron Plain, members of the Aamjiwnaang First Nation, argue that the provincial government’s decision to allow additional pollution from a Suncor refinery near their community violates their rights to “life, liberty and security of the person” and equality under the Charter. In essence, their argument is that the Charter contains an implicit right to a healthy environment. Although they face an uphill battle, their case is bittersweet by the fact that courts in at least 20 other nations have concluded that the right to life includes an implicit right to a healthy environment.

The judicial reference is a unique proceeding through the legal process that allows the courts to ask questions that the political branches have failed to answer. In the absence of a clear constitutional basis for environmental protection, the courts have exerted authority to determine what rights should be enshrined in the Constitution. This has caused tens of thousands of premature deaths and billions of dollars in preventable health care costs annually.

The judicial reference in a healthy environment is already included in the Charter of Rights and Freedoms.

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ground to actually enforce and protect them have proven illusory or entirely dependent on government action.

Second, a rights framework limits our capacity for meaningful political debate and compromise. Rather than focusing on policy issues and the balancing of interests, we find rights being increasingly invoked by one side or another, employed as a trump card. Other considerations are deemed less legitimate in the face of a claim that someone's interests are deemed less legitimate — is predicated not on the lack of constitutional basis for the law — but on the ambiguity of its natural resource sector to the overall economy, and political culture and public attitudes are but a hand-}

Moreover, this leads to inflationary calls for the expansion of rights. Progressive legal scholars argue that social welfare rights ought to be included in the Charter. Conservatives demand that property rights receive constitutional protection. Others propose that animal rights be considered.

These new rights often come into conflict with existing ones. And because constitutional rights are the purview of courts (at least in the eyes of some), the courts are increasingly called upon to resolve our most important political, social and policy disagreements. Politicians encourage this tendency by passing the buck. After all, why take political heat when the courts can be held accountable for tough decisions? This constant appeal to unelected arbiters is unhealthy in a democracy, where it should be expected that such challenges be addressed in the political sphere. Boyd argues that the Constitution's current lack of clarity on the environment is a significant problem, and he sees this opaqueness as an argument for entrenching rights. But the evidence he cites — a 1912 federal Commission on Conservation report and a 1997 Supreme Court case that “came within a whisker of striking down critical provisions of the Canadian Environmental Protection Act because of the absence of a clear constitutional basis for the law” — is predicated not on the lack of constitutional rights but on the ambiguity of federal versus provincial jurisdiction over environmental policy. The 1997 Court decision Boyd refers to is a division of powers case. Indeed, even if environmental rights were a part of the Charter, this jurisdictional confusion would remain.

Yet the most problematic element of Boyd’s argument is the suggestion that courts ought to read environmental rights into the right to “life, liberty and security of the person” section (section 7) of the Charter, through either a Charter case or a reference opinion.

Section 7 is the first provision in the “Legal Rights” section of the Charter as intended to be limited to infringements relating to procedural aspects of the criminal justice system, and while the Supreme Court quickly determined that it applied to substantive issues, the justices have limited its application to the administration of justice, specifically those subject to a criminal process. The Court has, fortunately, refused (so far) to apply section 7 to positive social or economic rights, in part because some of the justices recognize the limitations inherent in their roles.

Legal scholars who would like to see a more expansive interpretation of the right to life, liberty and security of the person rely heavily on the idea of the Constitution as a “living tree” — something that can grow and adapt to changing social realities. This makes sense when it means applying existing rights to new contexts. (It is why we can expect that freedom of expression will be protected on the Internet, even though home use of the Web did not become common until over a decade after the Charter’s enactment.) But a version of the living tree metaphor that allows judges to add entirely new rights to the Charter is unacceptable because it completely floats the need for a super-majoritarian (and democratic) approval process for amending the Constitution.

Notably, one area of the Constitution where environmental rights may more reasonably be said to have been (indirectly) established is section 35’s Aboriginal and treaty rights. As Boyd notes, there are strong reasons to favour seeing indigenous understanding of the law as a part of broader constitutional interpretation in Canada, particularly as it relates to the rights of indigenous peoples. The environment is a common concern for constitutional rights. Boyd notes that the content of Aboriginal rights is intrinsically tied to the land and to traditional customs and activities like resource management, and that even environmental rights that might emerge from a broad application of section 35 would necessarily be confined to the context of policies affecting indigenous peoples.

The only principled and legitimate way a new, broad right to a healthy environment might be added to the Charter would be through formal constitutional amendment, which is a very difficult process requiring substantial provincial consent (Parliament plus seven provinces representing at least 50 percent of the population).

Boyd notes that there have been 11 amendments to the Constitution since 1982, including two relating to the Charter, but these were all relatively minor changes (all but one were minor enough to fall under the less demanding formula of the amending process, requiring only Parliament’s approval or Parliament’s approval in conjunction with that of one other province). Adding new rights to the Charter would be a significant amendment and would likely precipitate wider demands from various provinces relating to constitutional reform, resulting in an unwieldy process unlikely to generate the sort of consensus that would be required for success.

None of this is to deny that Canada faces enormous environmental challenges. Successive governments have failed to address them in a reassuring manner. The country’s size and diversity, the relative importance of its natural resource sector to the overall economy, and political culture and public attitudes are but a handful of factors that complicate decision-making when it comes to setting environmental policy.

However, none of these are sufficient reasons to effectively replace ordinary policy-making and political debate with judicial review of constitutional environmental rights. Rather than short-circuiting the need for fundamental change, environmentalists should focus their energies on convincing governments, political parties and the public that environmental rights to the Charter would be a significant amendment and would likely precipitate wider demands from various provinces relating to constitutional reform, resulting in an unwieldy process unlikely to generate the sort of consensus that would be required for success.

If they cannot do that, then how do they envisage that these same commitments in the Constitution?