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Ecological constitutionalism within the Canadian context: Charter-ing international standards of the human right to a healthy environment

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Abstract

The *Strengthening Environmental Protection for a Healthier Canada Act* (SEPHCA), Canada's most recent attempt at mobilising federal and provincial action, does not go far enough toward depoliticising environmental justice within its borders. Based on a comprehensive review of legislative and academic literature, the current paper argues for the codification of the right to a healthy environment to be enshrined in Canada's Charter of Rights and Freedoms. In doing so, Canada will realise the merits of ecological constitutionalism, meet the standards of the United Nations and the international human rights discourse, and realise its sustainable development goals in light of the triple planetary crisis.

Keywords

Right to a healthy environment, international human rights, ecological constitutionalism, the depoliticisation of environmental justice, environmental rule of law, anthropocentrism, United Nations, triple planetary crisis

Introduction

In light of the United Nations' recent recognition of the right to a healthy environment as an intrinsic human right, several states are joining others who have constitutionalised environmental protection measures. Despite actively participating in the international discourse around addressing the complexities of climate change, Canada falls behind other nations in the collective fight against environmental degradation. The potential to adopt international human rights in Canadian environmental legislation is limited by obscure legislative attempts at addressing ecological degradation in the past, the politicisation of the environment in its democratic landscape, and Canada's passivity in embracing ecological constitutionalism.

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To explore these limitations further and advance recommendations in line with international standards, the current paper explores the *Strengthening Environmental Protection for a Healthier Canada Act* (SEPHCA), Canada's most recent legislative attempt at mobilising federal and provincial action toward making environmental protection a human right. Drawing from academic research, legal jurisprudence, and existing and developing legislation, the following research questions are addressed: (1) How does environmental law in Canada reflect international standards governing the right to a healthy environment? (2) What can ecological constitutionalism contribute to environmental and human rights protection in a Canadian context?

Scholarly articles, found via the Omni Academic Search Tool[1] and the City, University of London Database network, were utilised to conceptualise an ecological constitutionalism framework and explore the applicability and efficacy of this model within a Canadian context. In doing so, regional court decisions, constitutional texts, and other forms of legal jurisprudence were explored. Lastly, Canada's environmental legislation and the SEPHCA's amendments (reflective of its assent on 13 June 2022) were collated to identify gaps and shortcomings in addressing environmental issues. This analysis was then utilised to inform future directives for the actualisation of legislation which adequately protects the right to a healthy environment illustrative of international human rights standards.

Previous literature pertaining to ecological constitutionalism has grown significantly over the last 50 years, with both proponents and sceptics voicing their praise or speculation on its validity, efficacy, and relevance amidst the climate crisis. Critics concerned with the maintenance of current political and economic structures are of the position that ecological constitutionalism is an extreme measure, unnecessary for the achievement of sustainable development goals. On the contrary, other critics suggest 'authentic' ecological constitutionalism is essential for addressing climate change but warn that any imitation derived from a human rights framework will only fuel a human-centric entitlement over the environment. Nonetheless, most scholars recognise that human-rights perspectives on ecological sustainability are key to addressing the triple planetary crisis and that such a perspective reassures states take immediate action.

Although there is debate among scholars on how to implement ecological constitutionalism, little attention has been paid to the applicability of ecological constitutionalism in the Canadian context. In particular, there is a dearth of discussion concerning how the SEPHCA, Canada's most recent legislative effort at environmental management, can build upon ecological constitutionalism to reflect Canada's commitment to human rights and environmental standards in place of the UN's recognition of the right to a healthy environment. Overall, I argue recent legislative attempts in Canada toward making environmental protection a human right do not go far enough. Instead, I suggest the SEPHCA be conceptualised as a stepping stone towards more sustainable amendments. Said differently, to realise the merits of ecological constitutionalism and uphold sustainable outcomes following international human rights standards, Canada must adopt a human-rights approach to ecological sustainability by reimagining the right to a healthy environment into its Charter of Rights and Freedoms (the Charter).

The academic investigation of how Canada can come to actualise the environmentally informed human rights standards already existing worldwide will unfold as follows. I will begin by delving into the materialisation of the right to a healthy environment as a human right in the conversation of international human rights. Next, I will detail the historical trajectory of Canada's environmental legislative efforts regarding the emergence of the SEPHCA, highlighting shortcomings in the realisation of sustainable environmental protection. The main discussion of this paper explores how and why Canada should come to recognise the right to a healthy environment in its Charter to reflect international human rights standards. Finally, a breakdown

1. The Omni Academic Search Tool is a Canadian database home to the primary and secondary research of 18 Ontario Universities. Access to the database was granted through alumni membership as a graduate of the network.

of the concept of ecological constitutionalism situates my argument within a theoretical framework and, as I suggest, justifies the immediate need to reinterpret constitutional law to align with international standards in achieving environmental sustainability in a Canadian context.

The right to a healthy environment

On 28 July 2022, the United Nations General Assembly, alongside the support of 161 member states, declared access to a 'clean, healthy, and sustainable environment', a universal human right.[2] Previously, the UN has characterised a healthy environment as one which promotes a life of dignity and well-being, built on the protection of basic human needs, including the right to food, clean water as well as air, health, and so forth.[3] António Guterres, UN Secretary-General, marked the recent declaration as a historic catalyst for the protection of vulnerable populations, the meaningful address of environmental injustices, and the expedition of the rate at which states come to recognise their 'environmental and human rights obligations'.[4] UN High Commissioner for Human Rights, Michelle Bachelet, despite expressing enthusiasm for such a development, articulately warns:

> Today is a historic moment, but simply affirming our right to a healthy environment is not enough. The General Assembly resolution is very clear: States must implement their international commitments and scale up their efforts to realize it. We will all suffer much worse effects from environmental crises, if we do not work together to collectively avert them now.[5]

The UN envisions the declaration as conducive to the undertaking of the triple planetary crisis: the extreme consequences of climate change, biodiversity loss, and pollution which currently plague the twenty-first century following a principally anthropocentric era.[6] Concerning international human rights, the UN and its supporting member states believe the materialisation of such a right promises the protection of ecosystems as relevant to the prosperity and liberty of all human beings. The right inherently advocates for the setting of higher bars for other intersectionalities within the system of public international law. It trickles this fervour into regional systems, largely responsible for the implementation of this substantial commitment to human rights. Although a 'homocentric' approach to environmental management is not without limitations, it is largely recognised that the right to a healthy environment will guarantee the realisation of other fundamental rights for the people of today as well as future generations.[7]

Canada is among the member states that have declared the right to a healthy environment a cornerstone human right; however, its sustainable development as a nation communicates otherwise. Historically, Canada's legislative attempts at environmental management and its most recent attempt, the SEPHCA, demonstrate ecological sustainability as peripheral to other facets of national development. This surge in

2. United Nations, 'UN General Assembly declares access to clean and healthy environment a universal human right' (*United Nations*, 2022). See https://news.un.org/en/story/2022/07/1123482 for more on this historic announcement.
3. United Nations, 'The right to a healthy environment: 6 things you need to know' (*United Nations*, 2021). See full article at https://news.un.org/en/story/2021/10/1103082.
4. ibid footnote 2.
5. Office of the High Commissioner for Human Rights, 'Bachelet calls for urgent action to realize human right to healthy environment following recognition by UN General Assembly' (*OHCHR*, 2022). See https://www.ohchr.org/en/press-releases/2022/07/bachelet-calls-urgent-action-realize-human-right-healthy-environment for full press release.
6. Liz Willetts and Liz Grant, 'The health–environment nexus: global negotiations at a crossroads' (2022) 399(10336) *The Lancet* 1677.
7. J. Kevin Summers and Lisa Smith, 'Role of Social and Intergenerational Equity in Making Changes in Human Well-Being Sustainable' (2014) 43(6) *Ambio* 718.

enthusiasm, but lack of actionable responses to environmental harm, is what Bachelet warns us of in her address. In light of such a historic time in international relations and environmental development, Canada needs to effectively meet the rising expectations of internationally exemplified commitments to ecological sustainability and human rights. As this article will explore, the SEPHCA is not enough, and should Canada seek to tackle the triple planetary crisis in alignment with the UN's human rights obligations, its best avenue for doing so is by way of a constitutional amendment or reimagination. To demonstrate this reality, I will briefly review the historical trajectory of environmental law in Canada to provide context for the emergence of the SEPHCA.

A brief history of environmental law in Canada

The SEPHCA is Canada's most recent legislative attempt to implement environmental protection measures. While the evolution of legislation regarding the environment in Canada has been progressive, these developments have not come without conflict or compromise. Canada's struggle to find harmony amongst competing interests – including economic, political, and social concerns – about environmental protection measures is not unique. It reflects similar challenges found in other progressive states.[8] Understanding Canada's unique landscape of environment-based legislative efforts, paired with an exploration of the sources responsible for resistance to change in the past, is integral to situating the argument that ecological constitutionalism is the best avenue for fulfilling the human right to a healthy environment in Canada. In the following section, I will provide a brief overview of the legislative attempts Canada has made to protect the environment and why these attempts do not go far enough to ensure Canada meets its international human rights obligations. This will situate the emergence of the SEPHCA in historical and critical scope and add context as to why ecological constitutionalism is a more sustainable, progressive approach for aligning with international standards for the right to a healthy environment.

The Environmental Contaminants Act

Canada's first well-recognized federal attempt at environmental legislation, the *Environmental Contaminants Act* (*ECA*) (1975), reasonably took an ecocentric approach to climate management. With an emerging scientific and social concern for wilderness protection, distinct from the concern for human health central to the climate crisis we face now, came an act reflecting the immediate need to control the manufacturing and disposal of toxic chemicals produced nationwide. While the ECA is monumental for sparking an environmental evolution of undeniable relevance in Canada, it faces criticism for taking a reactive approach to ecological harm rather than encouraging preventative measures to avoid harm to the ecosphere.[9] Although the act outlined several procedures and thresholds for investigating substances after they caused harm or posed a significant threat, it neglected to solidify plans for executing preventative steps to avoid harm or threat in the first instance. Additionally, the ECA was a federal document which meant it could not be utilised until provincial legislation was absent or evaluated as insufficient in authority.

8. Daniel Rogers, *Environmental Compliance and Sustainability: Global Challenges and Perspectives* (CRC Press, 2019).
9. April Girard, Suzanne Day and Laureen Snider, 'Tracking Environmental Crime Through CEPA: Canada's Environment Cops or Industry's Best Friend?' (2010) 35(2) *Canadian Journal of Sociology* 219.

The Canadian Environmental Protection Act

The ECA was joined by other pieces of legislation that contributed to the obscurity of Canada's environmental legislation efforts, including the *Clean Air Act* (*1970*), *Canada Water Act* (*1985*), and *Ocean Dumping Control Act* (1974). Collectively, these pieces of legislation shared similar clusters of responsibilities, resulting in issues of overlap in authority between levels of government, which resulted in a lack of meaningful change or action. Despite legislative developments in what seemingly was a positive direction for Canada, little could come of these eco-friendly aspirations in practice, an argument activists took to their platforms.

This myriad of inaction and the growing concerns of stakeholders seeking environmental change in Canada drove the passing of the *Canadian Environmental Protection Act* (CEPA) in 1988. The goal of this act was to consolidate the acts mentioned above, making one piece of legislation responsible for monitoring toxic substances and sanctioning violators of its new regulatory conditions. Intending to break up the gridlock caused by previous legislation, the CEPA promised to enable negotiation conducive to intergovernmental collaboration and to hold the largest contributors to environmental harm accountable through the 'polluters pay' principle.[10] Five years later, an evaluation was completed, resulting in a harsh report on its efficacy titled *It's Our Health! Towards Pollution Prevention* (*1995*). Much of the criticism faced by the ECA reappeared in the 141 recommendations for change to the CEPA presented by the Committee. Despite the meters put in place for monitoring toxic substances, the Committee found the act still prioritised pollution management over pollution prevention. Data on the investigation of environmental misconduct was utilised to illustrate how the CEPA, in practice, failed to follow its own 'strict compliance' policies.[11]

Amendments upon amendments

In 1996, Bill C-74 was introduced as a legislative response to the Committee's propositions; however, many of the recommendations went unaddressed at the expense of catering to the concerns of industries voicing worry about how environmental protection efforts affect business.[12] What these policy shifts demonstrate, as it is conducive to the main focus of this article, is the role political waves and the voices of stakeholders can have on the efficacy of legislative environmental efforts. Bill C-32 followed shortly with another evaluation period, resulting in 250 more recommendations for amendments for a newer, reformed CEPA. Lastly, in 1998, the Canada Accord on Environmental Harmonization enabled provincial governments to cede federal authority and challenge provisions counterproductive to their provincial provisions to eliminate the jurisdictional overlap seen by all environmental acts before the CEPA.

In 1999, the newer and supposedly improved CEPA was launched, asking all stakeholders to consider voluntary self-regulation, inter-stakeholder engagement, and rewards based on environmentally conscious behaviour. Companies were required to install pollution prevention measures suitable for their unique business models. There were procedures in place for internal staff to report acts of harm to the environment committed by their employers if the CEPA was not followed accordingly. On paper, the act adequately addressed the needs of environmentalists and economists by promising environmental protection at a level of commitment deemed appropriate by the given stakeholder. However, neither end of the spectrum, from environmentalists to free marketplace advocates, was entirely satisfied with this interim solution.

10. ibid.
11. Hugh Wilkins and Elaine MacDonald, 'The Lion that Squeaked: CEPA, Mercury, and the Need for Better Regulation and Enforcement' (2009) 19(2) *Journal of Environmental Law and Practice* 167.
12. Marie-Ann Bowden, 'The polluter pays principle in Canadian agriculture' (2006) 59(1) *Oklahoma Law Review* 53.

In these 25 years of legislative attempts at environmental protection in Canada, there had not been any explicit mention of Canadian citizens or species having an inherent right to a healthy environment.[13] The issue of climate change and, in turn, the solutions developed for environmental management, treated the protection of the environment as supplementary to human welfare rather than fundamental. More specifically, previous legislation failed to depoliticise environmental management and separate the inherent protection the environment requires from the priorities of those in political power. Similarly, until recently, there has been a notable absence of legislative attempts to 'charter' the right to a healthy environment to meet international calls to action. As I suggest in the following section, the SEPHCA represents the most recent piece of legislation in Canada's convoluted history of environmental protection. Although a more progressive attempt towards realising the right to a healthy environment, the SEPHCA does not go far enough towards protecting the environment and human rights. In the following section, I provide a legislative analysis of the SEPHCA and, more specifically, explore the progress, or lack thereof, towards Canada's most recent attempt to realise the right to a healthy environment.

A legislative analysis of the SEPHCA: Is it enough?

In June of 2022, almost 20 years after Canada's last legislative amendment to the CEPA, the *Strengthening Environmental Protection for a Healthier Canada Act*, or the SEPHCA, has received Royal Assent. In brief, the SEPHCA is the Government of Canada's most recent attempt to address environmental management on the federal level, amalgamating the CEPA and *Food and Drugs Act* (1985) while repealing the *Perfluorooctane Sulfonate Virtual Elimination Act* (2008).[14] In its third reading in June 2022, the Bill proposed nearly 70 amendments to the two acts and demonstrates satisfactory progress toward realising the right to a healthy environment. Some notable developments include the first explicit mention of the right to a healthy environment in Canadian legislative history, frameworks for enforcing pollution prevention plans for businesses, and stronger, more expansive bans on the use of toxic substances and ecologically harmful research methods. While the SEPHCA is a step in the right direction and does offer numerous pathways for sustainable development, these amendments to legislation do not go far enough. In particular, I argue the SEPHCA's resemblance to the lack of accountability measures demonstrated by the CEPA, linked to its failure to prioritise *in dubio pro natura*, and its susceptibility to change as a piece of federal legislation makes it unlikely to orchestrate the environmental protection necessary to meet international human rights standards.

Lack of accountability measures

In dubio pro natura, a maxim within customary international law posits that when in doubt of whether an action is harmful towards the environment and its constituents, nature should be favoured.[15] Rather compatible with the premise of the polluter's pay principle practised in Canada, the Latin phrase proposes those who choose to act, whether in ignorance or with intention, in ways which violate the environment's well-

13. This is not an exhaustive list of municipal and provincial/territorial legislative attempts at environmental management in Canada. Such a list would be peripheral to the exploration of federal environmental justice as it pertains to ecological constitutionalism. This is, however, an overview of the main pieces of federal legislation which resulted in the development of Bill S-5 which was more conducive to the research questions at hand.
14. Bill S-5, *Strengthening Environmental Protection for a Healthier Canada Act*, 1st Sess, 70th Leg, 2022 (as assented to 22 June 2022)
15. Maksim Lavrik, 'Customary Norms, General Principles of International Environmental Law, and Assisted Migration as a Tool for Biodiversity Adaptation to Climate Change' (2022) 4(2) *Jus Cogens* 99.

being should be held responsible for their actions. The CEPA, referred to as 'the lion that squeaked' by Wilkins and Macdonald, as alluded to earlier, was anticipated to accomplish much more than it inevitably did.[16] Despite accountability efforts and plans for evaluation, it failed to effectively enforce one of its primary sentiments: the polluter's pay principle aligned with the international expectations of environmental and human rights protection. According to Girard, Day, and Snider, who conducted a comprehensive investigation of data in annual CEPA reports, Environment Law Enforcement Program documents, and various Environment Canada archival texts, the number of investigations into corporate environmental misconduct demonstrated a steady decline over 20 years of the CEPA's initial enactment despite the increase of working officers.[17] Additionally, as time progressed, the mass majority of investigations and inspections conducted by officers into potential polluter misconduct resulted in the issue of warnings (from 512 in 1990–1995 to 5560 in 2005–2008), the lowest of the four tiers of enforcement for violations of ecological well-being: prosecutions, convictions, directives, and then, warnings.[18] The authors suggest this 'loosening of the reins' on pollution prevention resulted from procedural barriers to environmental management, budgetary restrictions, and the political ethos towards the environment in Canada at the time. Directives and warnings were a much simpler form of resolution. Environment Canada's budget faced an extensive $234 billion cut from 1994 to 1998, diminishing enforcement capabilities, and the government's emphasis on economic growth stunted the potential of the CEPA.[19]

Unfortunately, an analysis reveals that the SEPHCA does not demonstrate a distinct departure from the systems of accountability that proved ineffective by the CEPA. The SEPHCA's mention of the right to a healthy environment in the preamble without any consistent follow-up anywhere else in the act, its re-categorisation of toxic substances, rather than the exploration of non-toxic alternatives, and most relevant, its several loops holes which invite the manipulation of the act to avoid accountability under the polluter's pay principle, are resulting in its heavy criticism.[20] While the Government has demonstrated a semantic pledge to *in dubio pro natura* in the CEPA, and now in the SEPHCA, it has failed to realise these ideals by inadequately enforcing these expectations on the actors, namely corporations, responsible for mass pollution at the expense of progressing other, more profitable, developments in Canada.

While the issues that maimed the CEPA from effectively establishing ecological sustainability in Canada may initially appear as impressions of the era, the SEPHCA is too susceptible to these systemic, budgetary, and political barriers. Simply altering the infrastructural elements of the CEPA to fit the demands of the SEPHCA and projecting them into the climate crisis, which now presents itself even more ostensibly than two decades ago, will not prove these structures to be any more effective. The limitations of governmental interest or budgetary support can no longer constrain accountability. The Government of Canada can no longer get away with making semantic promises without substantial follow-up action. Above all else, repeating the practices of the CEPA but renaming them as the SEPHCA will result in a triple planetary crisis response that is insufficient to meet customary international law standards and the demands of international human rights developments taking shape around the globe.

16. Hugh Wilkins and Elaine MacDonald, 'The Lion that Squeaked: CEPA, Mercury, and the Need for Better Regulation and Enforcement' (2009) 19(2) *Journal of Environmental Law and Practice* 167.
17. April Girard, Suzanne Day and Laureen Snider, 'Tracking Environmental Crime Through CEPA: Canada's Environment Cops or Industry's Best Friend?' (2010) 35(2) *Canadian Journal of Sociology* 219.
18. ibid.
19. ibid.
20. Joseph Castrilli, 'Bill S-5 Blues – Parliamentary Consideration of Toxics Law Amendments' (*Canadian Environmental Law Association*, 2022).

Susceptibility to change

Pieces of federal legislation are susceptible to change in a democratic system of governance. Though the SEPHCA has received Royal Assent, it is not necessarily immune from modification or political tampering. Acting governments within Canada possess the ability to amend legislation through the legislative process. While this parliamentary authority enables the evolution of legislation to reflect Canada's current priorities, it does not guarantee that the well-being of the environment is a priority for every government. The act is susceptible to the changes and agendas of the members of Parliament who may not act in a manner which adequately reflects the urgent protection the environment and human rights requires.

The position that the SEPHCA is susceptible to change, despite environmental protection measures' significant role in realising the right to a healthy environment, can also be supported by Canada's previous policies. As Leonard, Ragan St-Hilaire and 45 other contributors summarise, the focus of Canadian policy has consistently been interconnected to eight main themes: human capital, climate change (to an insufficient extent), natural capital, population ageing, economic security, health outcomes, productivity, and trade and globalisation.[21] They illustrate the diversification, potential reach, and admirability of these interests, highlighting briefly, yet notably, that these goals are entirely interdependent on the prosperity of the environment. Canada has committed to these priorities but has done so without adequate environmental protection measures. This is counterintuitive considering how much more likely Canada would be to meet these policy goals if ecological sustainability were of the utmost importance in the political arena.[22] This record and untenable logic seem to still be Canada's approach to policy prioritisation aside from the emergence of the SEPHCA.

More recently, the Canadian government's 2030 National Strategy core objectives emphasise functional intergovernmental relations, transparency towards racial and geographical minorities as well as Indigenous Peoples, and a strong commitment to the UN's Sustainable Development Goals (SDGs), all of which, again, continue to lay on the foundational assumption of a prosperous environment.[23] All this to say, Canada's political parties have actively reframed ecological sustainability as an auxiliary to other policy goals, regardless of the evidence that prioritising the environment would enhance all other components and goals of the political arena, including human rights. Political parties cannot be left with the choice to protect the environment; the depoliticisation of environmental management in Canada is necessary for meaningful change to be realised. This is why a constitutionally bound and ecologically literate endeavour towards meeting Canada's admirable vows to human rights and international standards is the best approach to realising the right to a healthy environment, moving towards more sustainable goals, in contrast to the SEPHCA or other previous legislative amendments.

Environmental sustainability, or protection at the bare minimum, must be of the utmost priority in Canada, not just a mere by-product of economic welfare or political power. Canada must treat the environment as equal, perhaps principal, to economic and social policy goals. As I suggest, a way for Canada to meaningfully activate this devotion to ecological sustainability, to the benefit of its citizens and fellow nations, is to depoliticise environmental justice: remove environmental commitments from a position of vulnerability in the political arena. As the core proposition of my work, inspired by the United Nations developments and as the research of scholars before me suggests, this is possible by updating the Charter to reflect

21. Jeremy Leonard, Christopher Ragan and France St-Hilaire, *A Canadian Priorities Agenda: Policy Choices to Improve Economic and Social Well-Being* (Institute for Research on Public Policy, 2007).
22. David Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (UBC Press, 2014).
23. Government of Canada, 'Moving forward together: Canada's 2030 Agenda National Strategy' (*Government of Canada*, 2022). See here for the full list of commitments to sustainable development goals in Canada: www.canada.ca/en/employment-social-development/programs/agenda-2030/moving-forward.html#h2.23

international developments made in environmental law to fulfil the right to a healthy environment. This amendment or reimagination would be an exemplification of ecological constitutionalism, a theoretical framework proven to be not only possible in a variety of socio-political contexts but also effective in realising sustainable development outcomes in numerous nations.

Ecological constitutionalism and the right to a healthy environment

The United Nations, by way of missions, declarations, and education, has long supported stronger environmental protection to meet international human rights needs. Their mobilisation of human rights and aspirations for a more just world have consistently relied on interstate cooperation and respect for the environment, both supporting pillars of ecological constitutionalism. David Boyd, the UN's Special Rapporteur on Human Rights and the Environment, says in light of the UN's recognition of the right to a healthy environment in October 2021:

> This has life-changing potential in a world where the global environmental crisis causes more than nine million premature deaths every year … It will spark constitutional changes and stronger environmental laws, with positive implications for air quality, clean water, healthy soil, sustainably produced food, green energy, climate change, biodiversity and the use of toxic substances.[24]

His words illustrate the significance of recognising the right to a healthy environment in inspiring constitutional change around the world and the importance of recognising environmental degradation as a human rights concern. This appreciation for environmental justice as being linked with the actualisation of human rights is consistent with the theoretical framework of ecological constitutionalism and all of the UN's work. For instance, the UN's Sustainable Development Goals call for inter-state cooperation, state commitment to ecological sustainability, and consistent engagement in the evolution of human rights. Given this interconnectedness between the right to a healthy environment and ecological constitutionalism, in alignment with the UN's operations, I argue Canada must follow suit with constitutionalising environmental rights. To effectively explore environmental justice developments as favourable to human rights, I will briefly delve into the relationship between ecological sustainability and constitutional law, define ecological constitutionalism, interpret its criticisms, and then ground these ideas in the Canadian context. In doing so, I reinforce the SEPHCA falls short of international standards and that the Charter is the most appropriate avenue for holding Canada accountable in the triple planetary crisis.

The relationship between ecological sustainability and constitutional law

Ecological sustainability and constitutional law are one and the same in that they are idiosyncratically non-derogable, inseparable conceptions of justice. Meaningful life on earth for every human and non-human entity cannot be achieved without systems that uphold evolving ideals of equity and the ecosystems that nurture those successive freedoms and responsibilities. As the label 'non-derogable' suggests, these foundational elements are essential to the human–earth relationship, which enables human life and that will stand true for as long as life on earth is possible. As the climate crisis is compellingly demonstrating, however, while ecological sustainability can exist without constitutional law, as before the 17th century, the human

24. United Nations, 'UN recognition of human right to healthy environment gives hope for planet's future – human rights expert' (*United Nations*, 2021). See https://www.ohchr.org/en/press-releases/2021/10/un-recognition-human-right-healthy-environment-gives-hope-planets-future

race, and its non-human counterparts cannot survive a point in history where constitutional law exists without ecological sustainability. It is simply impossible to celebrate any level of human rights or uphold any component of a social contract without a livable backdrop on which we are ultimately dependent for life.

In disregarding the inescapable truth about the human race's reliance on the ecological well-being of our planet, our conceptualisation of governance, the law, and the other social contracts so fused to the human experience puzzlingly take the environment for granted. In due course, present legal and political jurisdictions view environmental law as a marginalised practice of law rather than a fundamental pillar of the systems that require ecological sustainability for endurance. Areas of law that better serve the wealthier, seemingly more auspicious ventures of the human experience – corporate, property, tax law, etc. – which structurally rely on the earth to be practised, receive more praise and consideration.[25] Perhaps what is most peculiar about such a hierarchy of priorities is that even though environmental law is subject to marginalisation, we now expect such an underappreciated, underfunded sector of law to fix all the catastrophic environmental issues we face as a society when these other, more exploited parts of the law are responsible for the harm being done.[26] As discussed earlier, the SEPHCA is a manifestation of this flawed logic. It relies on structures which continue to prioritise other social, economic, and political systems to manage environmental degradation to address the triple planetary crisis.

While the comforts of an era cushioned by developments in informational, technological, and life sciences might encourage reservations about humans' dependency on our planet, the earth is persistently illustrating how our destructive behaviours are orchestrating irreversible harm to other forms of existence and our own. Environmental sustainability has invariably been of grave importance. Still, perhaps once it is categorised as a human rights issue, actionable steps can encourage an approach to governance which views ecological issues as an injustice conducive to the prosperity of all other elements of constitutional law. As ecological constitutionalism leaders such as David Boyd, Lynda Collins, and Klaus Bosselmann posit (and I agree), constitutionally codifying commitments to ecological protection and restoration is a legal avenue for mobilising human sentiments towards protecting the environment. Ecological constitutionalism can be how Canada, like many other states that have done so already, may fulfil its citizens' right to a healthy environment and realise sustainable environmental protection measures respected on an international level.

What is ecological constitutionalism and what does it look like?

Ecological constitutionalism is the reframing of constitutional law to reflect the indivisible truth that the environment must be at the forefront of all decisions regarding the governance of a state. In particular, an ecological constitution, as Lynda Collins eloquently describes:

> [is] one that codifies the following key principles: the principle of sustainability; intergenerational equity and the public trust doctrine; environmental human rights; rights of nature; the precautionary principle and non-regression; and rights and obligations relating to a healthy climate.[27]

It requires that a state actively practice ecological literacy to preserve its citizens and institutions in a way that primarily considers the operations of our earth.[28] It is legitimised by the human rights-based approach to

25. Geoffrey Garver, *Ecological Law and the Planetary Crisis: A Legal Guide to Harmony on Earth* (Taylor & Francis Group, 2021).
26. Lynda Collins, *The Ecological Constitution: Reframing Environmental Law* (Routledge, 2021).
27. ibid.
28. Massimiliano Montini, *From Environmental to Ecological Law: The Transformation of Environmental Law into Ecological Law* (Routledge, 2021).

environmental protection and the recognition that law, a central component of human cooperation and life, is the best tool for guaranteeing major political as well as social powers are held accountable amidst the climate crisis and beyond.[29]

While the United Nations' recent recognition of the right to a healthy environment as a human right is inviting states to develop legislation which will symbolise their commitment to ecological sustainability, constitutionally protected rights to a healthy environment, and constitutional provisions for a healthy environment, already exist in at least 150 states.[30] These testaments to environmental protection and ecological law have taken numerous forms. Ecuador's constitution, for instance, has prioritised its climate by giving nature, Mother Earth or 'Pachamama', a set of rights sparked by the presidency of Rafael Correa and successfully upheld by the Provincial Court of Loja in the Vilcabamba River case.[31] The Ecuadorian Constitution articulates the rights of nature as follows:

> Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature…
>
> Article 72. Nature has the right to be restored … In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.
>
> Article 73. The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles…
>
> Article 74. Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living…[32]

Similarly, Portugal, the first nation to consolidate ecological constitutionalism with its constitutional law, incorporates rights regarding the environment into articles 9, 52, 64, 66, and 90 of its constitution.[33] Article 66 explicitly acknowledges the right to a healthy environment. In contrast, the other articles recognise the role a healthy, ecologically balanced environment has in fulfilling other parts of governance such as health, the economy, democracy, and other state obligations to citizens. Lastly, the Supreme Court of India ruled in *Subhash Kumar vs State Of Bihar And Ors* that the right to life 'includes the right to the enjoyment of pollution-free water and air for full enjoyment of life'.[34] Though this is not in the Constitution of India verbatim, acknowledging the environment as integral to the enjoyment of fundamental human rights is a significant win for customary international law, legal jurisprudence, and the state itself.

29. Birgit Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention' (2018) 30(1) *Journal of Environmental Law* 1.
30. United Nations Environment Programme, 'Environmental Rule of Law: First Global Report' (*United Nations,* 2019) See page 159 for full list of states as of 2017: https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report?_ga=2.180223972.1736133701.1661617111-788197046.1660222564
31. Craig Kauffman and Pamela Martin, 'Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail' (2017) 92 *World Development* 130.
32. *Constitución Política de la República del Ecuador* [Ecuador], 20 October 2008. See Title II, Chapter 7.
33. *Constitution of the Portuguese Republic* [Portugal], 25 April 1976. See articles 9, 52, 64, 66, and 90.
34. Subhash Kumar vs State Of Bihar And Ors (1991).

The right to a healthy environment is taking shape through numerous constitutional oaths to environmental protection, with examples of states granting the earth rights, recognising their citizens have the right to a healthy environment, and/or building the right to a healthy environment into the already established right to life.[35] This development on the national level worldwide is symbolic of the relationships of accountability states and their citizens are building with the notions of constitutional law and justice. As will be discussed later, not only is this guarantee of sustainable action a glimpse of hope amidst the climate crisis, but this approach has proven to be effective at regulating environmental protection.

How ecological constitutionalism has been successful in other states

The argument that a constitution which recognises the right to a healthy environment would enable better ecological sustainability results in the Canadian context, more so than the SEPHCA, would be null without evidence of ecological constitutionalism proving to be effective in various states around the world. The questions as to whether legal promises to be ecologically sustainable make a state more sustainable and how the efficacy of ecological constitutionalism should be measured are of contentious debate. The most recent empirical evidence suggests, however, that there is a positive relationship between the adoption of substantive constitutional environmental right (CER) provisions in a state and that state's environmental protection outcomes.[36] Jeffords concludes, for example, that states which have taken the step towards constitutionalising environmental protection have generally achieved their sustainable commitments to their citizens through the use of the notable evaluative tool, the Sustainable Development Index (SDI).[37] The data indicates that substantive CERs lead to improvements in a state's SDI score and in achieving its overall environmental objectives. Quite compellingly, Jeffords concludes with the significant recognition that:

> [Constitutions] represent the most enduring qualities and characteristics a country wishes to expound upon through policies, case-law, statutory law, norm cascades, and the like. Placing a substantive environmental human rights provision within a national constitution is not only a signal that the country and its people believe in this right and hold it to be important, but that there is now an additional mechanism through which the environment can potentially be impacted.[38]

To echo Jefford's concluding ideas and their relevance to my argument, constitutionalising environmental values is a vow to ecological sustainability which goes on to influence all other elements of not just the law but the social infrastructures linked to the law. This is why states who have delved into codifying the right to a healthy environment in their respective constitutions, have seen such influential strides towards environmental protection. Granted Canada's rather developed legal system, including civil and common law structures, parliamentary review processes, and other supporting government institutions, the positive relationships between CER provisions and sustainable development outcomes could be realised, too.

Other scholars suggest the rise of ecological constitutionalism in a state, as in how a state arrives at codifying the right to a healthy environment or any other environmental protection measures within its constitution, plays a significant role in the efficacy of its sustainability efforts. They argue the 'context of

35. Stuart Casey-Maslen, *The Right to Life under International Law: An Interpretative Manual* (Cambridge University Press, 2021).
36. Chris Jeffords, 'On the relationship between constitutional environmental human rights and sustainable development outcomes' (2021) 186 *Ecological Economics* 107049.
37. Jason Hickel, 'The sustainable development index: Measuring the ecological efficiency of human development in the anthropocene' (2020) 167 *Ecological Economics* 106331.
38. ibid.

constitutional change', made up of various social, economic, and political conditions, both internal and external of the state, at the time of adopting environmental provisions into a constitution influences that state's ability to effectively carry out their environmental objectives.[39] O'Gorman found that out of the 148 states (at the time) that had constitutionalised ecological sustainability, 97 states did so in a time of crisis where changes to legal systems were a necessity, 25 states recognised environmental rights amidst the consolidation of their constitutional regime, and the remaining 26 did so in a time of non-crisis. In essence, O'Gorman suggests the data communicates that those states who struggled to arrive at the intersectionality of ecological sustainability and constitutional law but did so through meaningful and adversarial debate were more likely to effectively fulfil environmental objectives than those states who made constitutional changes unquestioningly and on a superficial basis. Said differently, the states with citizens, governmental institutions, and NGOs invested in altering constitutional law to protect the environment have seen more sustainable developments than those governments whose stakeholders were not as invested in protecting the environment. Acknowledging these significant relationships between constitutional commitments, their onset, and their sustainable development outcomes, it is no surprise that scholars and I are urging Canada to codify the right to a healthy environment into its constitution in a meaningful way. The earth and its inhabitants are in such a vulnerable position that Canada's constitutionalisation of the right to a healthy environment would be meaningful and a dire necessity.

Criticisms of ecological constitutionalism

As the previous analysis suggests, codifying the right to a healthy environment through ecological constitutionalism provides a theoretical framework to uphold international human rights standards in Canada and meet sustainable development goals. Despite such benefits, important limitations and critiques still require further analysis and attention. In other words, although over 150 states have constitutionally committed to environmental protection in some form, ecological constitutionalism is not immune to criticism. Particularly, critics suggest a human-rights approach to environmental protection reinforces the belief that humans have priority over all aspects of the environment. Others posit the constitutionalisation of environmental rights will hinder other social, economic, and political pursuits central to a democratic society. In light of these limitations, I argue ecological constitutionalism is a framework with the potential to provide suitable levels of environmental protection while nurturing all other elements of Canada's social and political realms.

One of the largest criticisms is that, in an anthropocentric era, ecological constitutionalism is solely driven by human-serving objectives. Anti-anthropocentric proponents of ecocentrism suggest the incorporation of environmental protection into human rights further perpetuates the entitlement humans believe they possess over nature.[40] This conception of environmental justice can be traced to the Kantian perspective that sustaining the Earth for any other purpose but out of respect for its integrity in and of itself is morally unjust.[41] Now, in an ideal world unriddled by other challenges such as the residue of colonial legacies or social inequality, bona fide ecological constitutionalism would entail the knocking down of existing systems of governance, repairing and reforming our conceptions of the social, economic, as well as political realms around the well-being of our earth.[42]

39. Roderic O'Gorman, *Environmental Constitutionalism: A Comparative Study* (Cambridge University Press, 2017).
40. Louie Kotzé and Paola Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6(3) *Transnational Environmental Law* 401.
41. Toby Svoboda, *Duties Regarding Nature: A Kantian Environmental Ethic* (Routledge, 2015).
42. Rosalind Warner, *The ethical place of the non-human world in Earth system law: Pathways of transformation* (Routledge, 2021).

In light of these criticisms, however, given the urgency of the climate crisis, reforming existing constitutions to incentivise and authorise environmental protection is much more realistic than rebuilding entirely Earth-centric constitutions. This is especially true in a state like Canada, where sentiments of environmental sustainability exist. Still, nature or even citizens do not yet have an enshrined right to a healthy environment. Codifying the right to a healthy environment into the Charter is a more tactical and immediate commitment to sustainability than the SEPHCA. Still, it is not as far out of reach as an entire restructuring of the Canadian Constitution. The interpretation of the right to a healthy environment is a reimagination of constitutional law that can be accomplished reasonably soon before Canadians and citizens around the world feel the effects of the earth's decay any further. Even though critics suggest a human-rights-centred approach to environmental justice is egotistic for the human race to put forth, human problems require human solutions. It is no secret that environmental degradation results from a culmination of human (in)action.

Another argument brought forth by those reluctant to honour sustainability measures through an ecological constitution is that the right to a healthy environment is not worthy of constitutional acknowledgement. This is mainly submitted by those who best benefit from the subordination of the planet, including those in economic and political power. To this, I and many others argue that the right to a healthy environment must precede the enjoyment of all other human rights. Not only is exercising human rights null without a habitable earth, as previously established, but the earth requires an advocate. Further, the idea of a social contract, which comprises the foundational elements of governance in most states, also includes future generations. By continuing to address the right to a healthy environment only in its present contextual relevance, human rights abuses that sabotage the rights of prospective generations, or intergenerational inequity, could take shape.[43] Again, while a human rights-based approach to environmental protection advantages the human race, it incentivises states to act responsibly and in a manner that protects the Earth in a way it inherently deserves.

Ecological constitutionalism in the Canadian context: Barriers to, and support for, realising the right to a healthy environment

After an investigation of what ecological constitutionalism is, its practice in other states, its efficacy, as well as its criticisms, it is significant to apply these ideas directly to the Canadian context. This can be best appreciated by identifying existing legislative barriers, support for, and environmental protection structures in Canada. Furthermore, insight into how implementing the right to a healthy environment in the Canadian context will hopefully encourage the adoption of such environmental protection measures will follow.

As mentioned, in July of 2022, Canada was among the 161 states that voted in favour of the General Assembly's adoption of the right to a healthy environment as a human right. At this time, Canada may not be in an overt, external state of crisis. Still, internally, it faces a plethora of human rights challenges and social welfare concerns which require immediate, long-standing devotion. Canada's deep roots in colonisation and its rocky journey in making reparations with Indigenous Peoples continue to strain those relationships as well as the views of the government held by other minority populations in Canada.[44] Among a list of many other threats to the well-being of its people, its borders, and everything in between, outside of the Canadian context, Canada actively faces the social issues of collapsing healthcare systems, the

43. Otto Spijkers and others, 'Intergenerational Equity and the Sustainable Development Goals' (2018) 10(11) *Sustainability (Switzerland)* 3836.

44. Terry Mitchell, Courtney Arseneau and Darren Thomas, 'Colonial Trauma: Complex, continuous, collective, cumulative and compounding effects on the health of Indigenous peoples in Canada and beyond' (2019) 14(2) *International Journal of Indigenous Health* 74.

regulation of weapons, homelessness, mental health issues, and substance abuse, most felt now as the nation enters a post-COVID-19 era.[45] As explored earlier, the Canadian federal government has long struggled with environmental management and upholding international and human-rights-based environmental standards, which serve as a tether between all other social issues.

Despite internal conflicts threatening the state's well-being and the ever-changing landscape of international relations, Canadians have consistently maintained a strong sense of environmental ethics, viewing the environment and its welfare as a core component of the 'Canadian identity'. This connection to nature shared amongst Canadian citizens is suggested to be largely correlated to the geographical, biodivergent landscapes which make up the nation. The environment, to Canadians, has a unique and pivotal role in their health, employment, and value on a global scale.[46] In the opening chapter of *Unnatural Law: Rethinking Canadian Environmental Law and Policy*, Boyd recognises the persistence of Canadians in supporting ideals of environmental protection even when Canada's environmental performance trailed behind other nations due to its weaker policy schemes. For instance, in 1999, eight out of 10 Canadians expressed the belief that the welfare of the environment should trump goals of economic growth.[47] Further, in *The Decline of Deference*, by way of hypotheses and data, Nevitte concluded the protection of the environment is morphing into the fundamental moral belief system of Canada.[48]

Canadians' eagerness to realise environmental sustainability has persisted into the first two decades of the 21st century. According to a 2020 survey of Canadian perspectives on the economy and climate change, Canadians deemed inter-provincial/territorial agreement with a climate change strategy, meeting greenhouse gas reduction targets, and setting a good example for other countries as high priorities in the context of fighting climate change.[49] Furthermore, regarding the environmental engagement of businesses in Canada, Statistics Canada's *Environmental Management Practices in Canadian Businesses*, *2016*, illustrates that just over half of Canadian businesses have implemented at least one environmental management practice connected to their operations, indicating a prevalence of sustainability interests in some consumer markets in Canada.[50] In terms of youth education and environmental awareness, a report entitled, *Education Indicators in Canada: An International Perspective*, *2019* reveals that Canadian youth were most likely to self-report awareness of growing environmental issues, including the use of GMOs, the extinction of plants and animals, pollution management, and natural resource exploitation among other OECD countries.[51] NGOs, including the Canadian Environmental Law Association (CELA) and the Canadian Society for Ecology and Evolution, see the SEPHCA as a step in the right direction. Still, Canada requires more accountability measures for adequate environmental protection.

Among advocates for better, stronger environmental protection measures in Canada are its courts responsible for the interpretation of legislation. The courts, including provincial and territorial tribunals as well as the SCC, have consistently alluded to the imperative for heightened environmental protection measures in

45. Statistics Canada, 'COVID-19 in Canada: A Two-year Update on Social and Economic Impacts' (*Government of Canada,* 2022) See <https://www150.statcan.gc.ca/n1/pub/11-631-x/11-631-x2022001-eng.htm> for more.
46. Christopher Evans, 'What is Canada's Environmental Identity?' (2005) International Institute for Sustainable Development.
47. Environics International Report (1999).
48. Neil Nevitte, *The Decline of Deference: Canadian Value Change in Cross National Perspective* (University of Toronto Press, 1996).
49. Environics Institute, '2020 Survey of Canadians: Regional Perspectives on the Economy and Climate Change' (*Institute for Research on Public Policy*, 2020).
50. Statistics Canada, 'Environmental management practices in Canadian businesses, 2016' (*Statistics Canada*, 2019).
51. Statistics Canada, 'Education indicators in Canada: An international perspective' (*Statistics Canada*, 2019).

response to ecological harm and breaches of human rights.[52] In light of recent jurisprudence, particularly exemplified by the SCC decision in R. v. Canadian Pacific (1995), there emerges a potential pathway towards establishing a right to a healthy environment within Canadian legal frameworks. Of particular significance, Justice Sopinka asserts:

> Whether citizens appreciate that particular conduct is subject to legislative sanction is inextricably linked to societal values … 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.[53]

The judgement continues to support the notion of legal reform by quoting the Law Reform Commission of Canada's description of the 'right to a safe environment' in *Crimes Against The Environment*:

> To some extent, this right and value appear 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 … 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.[54]

With increasing public awareness and scientific consensus regarding the urgency of addressing environmental challenges amidst the triple planetary crisis, the momentum towards ecological constitutionalism in Canada is palpable. Citizens' advocacy, coupled with judicial support for robust environmental management measures, signals an opportune moment for advancing ecological constitutionalism as a cornerstone of Canadian governance.

As Canada navigates the complexities of its political and administrative landscapes, the discourse surrounding ecological constitutionalism must recognize both the obstacles and opportunities inherent in existing institutional frameworks. By engaging in constructive dialogue and strategic action, Canada has the potential to emerge as a global leader in prioritizing environmental sustainability and integrating ecological principles into its constitutional fabric. Canada's political and administrative avenues will now be discussed and framed as both barriers to and support for ecological constitutionalism in its context.

Barriers to embracing ecological constitutionalism in Canada

The challenge of constitutional amendment in Canada

In Canada, a constitutional amendment can be realised through an amending formula. Part V of the Constitution Act (1982) has two provisions, each outlining an amending formula with subsequent procedures for approval. Section 38, the General or Federal Procedure, can facilitate an amendment of the

52. Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, R. v. Hydro-Québec, [1997] 3 SCR 213, British Columbia v. Canadian Forest Products Ltd., 2004 SCC 38, Attorney General of Quebec v. IMTT-Québec inc., 2019 QCCA 1598

53. Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031. See para 55.

54. Department of Justice Canada, 'Crimes against the Environment, Working Paper 44,' (*Department of Justice Canada*, 1985) Department of Justice Canada.

Constitution on the federal level. This amendment requires obtaining the approval of the House of Commons, the Senate, and the legislatures of at least two-thirds of the provinces representing at least 50% of the national population.[55] Amendment to the constitution by way of the Provincial Procedure, Section 43, requires the approval of the federal parliament and the legislatures of the province or provinces affected by the proposed amendments. General or Federal Procedure would be the most viable contender for amending the Charter to include the right to a healthy environment granted its intended national scope. Arguably, the most challenging aspect of constitutional amendment is that it requires unanimous consensus among legislatures with various perspectives on what deserves constitutional protection. The amending formulas reflect federalism, the federal nature of the constitution, while also striking the balance between federal and provincial interests in the amendment process.[56]

In pursuing a constitutional amendment to solidify ecological constitutionalism, the journey is fraught with challenges, as consensus proves elusive despite the clear imperative for environmental protection. Historical precedents, such as the *Meech Lake Accord* (1987) and the *Charlottetown Accord* (1992), underscore the complexity of achieving unanimity among governments and legislatures in Canada. These accords, while ambitious in their aims, faltered in the face of entrenched interests and divergent priorities. The collapse of the *Meech Lake Accord* and the rejection of the *Charlottetown Accord* in a national referendum serve as stark reminders of the formidable obstacles inherent in constitutional negotiations.

Moreover, the significance of environmental concerns may further amplify the hurdles to achieving unanimity in decision-making. Given the paramount importance of environmental sustainability in contemporary discourse, any constitutional amendment pertaining to ecological constitutionalism would likely necessitate unanimous agreement among all stakeholders. However, the historical precedent of failed constitutional negotiations casts doubt on the feasibility of such unanimity, highlighting the inherent tension between collective action for environmental preservation and the complexities of political consensus-building.

Nevertheless, while acknowledging the formidable challenges ahead, it is imperative for Canada to continue striving towards ecological constitutionalism, recognizing the urgent need for robust environmental governance frameworks in the face of escalating planetary crises. Despite the daunting odds, the pursuit of consensus and meaningful reform remains essential for safeguarding the environment and the well-being of present and future generations.

Federalism and environmental law dynamics – The case of Alberta

Further, the dynamics between federalism and environmental law significantly hinder Canada's realisation of ecological constitutionalism. The case of Alberta and its persistence in developing oil sands illustrates how federal initiatives can conflict with the objectives of provincial legislatures and prevent consensus on environmental protection from being achieved. Through its jurisdiction over environmental concerns, the federal government has sought to regulate national standards for environmental protection. However, Alberta has opposed the federal government's intervention in provincial approaches to environmental management, claiming federal regulations constitute an infringement of provincial jurisdiction.[57] Premier Jason Kenney particularly opposed the Federal Carbon Pricing System, the federal government's attempt to put a price on carbon emissions. The province brought the matter to court, which has since reached the SCC. In the new landmark case, *Reference re Greenhouse Gas Pollution Pricing Act* (2021), the SCC held the federal government did have the constitutional authority to implement the national carbon pricing

55. Richard Albert, 'The difficulty of constitutional amendment in Canada' [2015] 53(1) *Alberta Law Review* 85.
56. Peter Hogg, 'The Difficulty of Amending the Constitution of Canada' [1993] 31(1) *Osgoode Hall Law Journal* 41.
57. References re Greenhouse Gas Pollution Pricing Act 2021 SCC 11.

system, illustrating the federal government's ability to address environmental issues despite the objection of provincial legislatures.[58] Although a win for the environment, this case demonstrates that current legislatures, despite plentiful evidence of the triple planetary crisis, oppose environmental protection measures, making the ambitious goal of consensus in favour of ecological constitutionalism in Canada seem all the more unattainable. Nonetheless, it's important to note that while the case does not directly aim to establish or develop the explicit right to a healthy environment in Canada, its implications are conducive to its establishment. By affirming the federal government's authority to implement the national carbon pricing system, the SCC's decision provides momentum for advancing environmental protection within the framework of constitutional law. This underscores the importance of ecological constitutionalism as a means to safeguard the environment and lays the groundwork for potential future developments in recognizing and protecting the right to a healthy environment in Canada. It is significant to consider that ecological constitutionalism can take shape without the extensive amendment of the Constitution. Alternatives to constitutional amendment, that is, support for ecological constitutionalism, which will still result in the protection of the environment through the Charter, will be considered in the next section.

A shift from constitutional amendment to Charter reinterpretation for environmental protection

As addressed earlier, ecological constitutionalism is about reframing constitutional law to reflect the need for environmental protection and our moral obligation to fulfil the right to a healthy environment. While ecological constitutionalism has manifested in the amendment of constitutions in other states – Ecuador, Columbia, and New Zealand – there are other means for bringing about environmental protection in place of a constitutional amendment. Leveraging existing provisions to foster the fulfilment of the right to a healthy environment is a convincing way to reframe constitutional law.

Section 7 of the Charter

Advocates argue the right to life, liberty, and security of the person, s. 7 of the Charter encompasses the right to a healthy environment. Collins argues environmental health is a precondition to the right to life.[59] Feasby, DeVlieger, and Huys argue existing jurisprudence has found a serious environmental threat to the life and security of the person could be a breach of s.7.[60] In *Ontario v. Canadian Pacific Ltd.,* Justice Cory held:

> Legislators must have considerable room to manoeuvre in the field of environmental regulation, and s. 7 must not be employed to hinder flexible and ambitious legislative approaches to environmental protection.[61]

The right to a healthy environment is inextricably linked to fulfilling the right to life, liberty, and security. Section 7 is a viable approach to holding the government accountable for actions or policies that jeopardise the environment's health and, consequently, human health, a fundamental right.

Section 15 of the Charter

The right to equality, s. 15 of the Charter is another contender for facilitating and upholding the right to a healthy environment. Granted, environmental harm and degradation disproportionately impact the lives of marginalised or vulnerable groups, and those actions responsible for such harm can be seen as breaches of

58. ibid.
59. Lynda Collins, *The Ecological Constitution: Reframing Environmental Law* (Routledge, 2021).
60. Colin Feasby, David deVlieger & Matthew Huys, 'Climate Change and the Right to a Healthy Environment in the Canadian Constitution' 58(2) *Alberta Law Review* 213.
61. Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031. See para 59.

the right to equality. In *La Rose v. Her Majesty the Queen*, a lawsuit was filed by Canadian youth against the government on the premise that it fails to treat youth now and in the future equally and fulfil their right to a healthy environment through its contributions to greenhouse gas emissions.[62] The case was dismissed by a federal court judge, not based on their interpretation of s.15 but for failing to state a reasonable cause of action. Such a case provides a glimpse of hope in using the Charter, particularly s.15, to hold the government accountable for environment-based human rights abuses. Further, it serves as precedence for the expansion of the scope of s.15.

Discussion and conclusion

Under the scope of my research objectives and the length of my study, I have left some significant auxiliary discussion areas out of this work, which I hope to see supported and explored in future research endeavours. Perhaps most ambitious is the potential of ecological constitutionalism in the context of international public law and the protection of all species inhabiting planet Earth, which could not adequately be investigated in this paper. A global approach to ecological constitutionalism asks states, independently and collectively, to address the gaps in international public law that enable the human race to fail the planet, its welfare, and one another. To many, such a world sounds fictitious, but fortunately, international documents such as *The Universal Declaration for the Rights of Mother Earth* (2010) and *The Global Pact for the Environment* (2017) are two inklings of 'ecological constitutionalism hope' and demonstrate that knocking down borders in the pursuit of global ecological protection is possible.[63] Future research can explore how these declarations will serve as transitional tools that can mobilise the beginning of global governance and ecological constitutionalism on an international scale.[64] As debated among the criticisms of ecological constitutionalism earlier on, there is much to be explored about protecting non-human entities through constitutional law that could not be directly addressed in this work. Nonetheless, it is true that should the human race adequately unlock the potential ecological constitutionalism presents for human rights, constitutions should be reimagined to better protect all aspects of life on Earth next. This is not to say non-human entities do not yet deserve environmental protection; they undoubtedly do. Unfortunately, it is most practicable in the climate crisis for humans to be the central focus of constitutional reform, granted the law has been built around their protection. Education and research that deeply illustrate the human-earth relationship will aid the transition from human-centric to earth-centric constitutions much sooner.

The main objective of this paper was to explore two key questions: how environmental law in Canada reflects international standards governing the right to a healthy environment and what ecological constitutionalism can contribute to environmental and human rights protection in the Canadian context. This academic investigation was inspired by the literature gaps surrounding ecological constitutionalism's applicability in the Canadian context and how Canada's approach to environmental protection is conducive to its commitment to international human rights obligations. After a comprehensive review of the literature, legal jurisprudence, and legislation available at this time, I am of the position that the SEPHCA, Canada's most recent legislative attempt at environmental management, falls short of holding the state accountable to the discourse of international human rights. Though it is sentimentally significant, the SEPHCA's lack of accountability measures, resemblance to the CEPA, and its susceptibility to change bring its potential as an act into question. Thus, I argue Canada, like other states around the world, should codify its pledge to environmental sustainability in its constitution via the Charter of Rights and Freedoms. This would align with the

62. La Rose v Her Majesty the Queen [2019].
63. Louis Kotzé, 'A Global Environmental Constitution for the Anthropocene?' (2019) 8(1) *Transnational Environmental Law* 11.
64. Louis Kotze, 'Arguing Global Environmental Constitutionalism' (2012) 1(1) *Transnational Environmental Law* 199.

emerging scholarship of ecological constitutionalism and the existing sustainable development goals Canada has failed to meet internationally. As my analysis demonstrates, not only is enshrining the right to a healthy environment into the constitution a practicable solution, but it has also been proven possible, effective, and sustainable. Ecological constitutionalism will be how Canada can holistically fulfil its citizens' right to a healthy environment and realise sustainable environmental protection measures. While international commitments are wonderful, domestic developments will nourish the state's relationships with the earth, resulting in the unity and strength necessary for international change.

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