Dalhousie Journal of Legal Studies

Volume 28 Article 36

1-1-2019

“Greening” the Charter: Section 7 and the Right to A Healthy Environment

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"GREENING" THE *CHARTER*: SECTION 7 AND THE RIGHT TO A HEALTHY ENVIRONMENT

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ABSTRACT

Canada is among one of the few remaining United Nations member states that does not have a constitutionally protected right to a healthy environment. Amid concerns about climate change and its impact on human health and well-being, the Constitution has become a focal point for advancing environmental justice in Canada. This paper explores three questions surrounding environmental rights and the Constitution. First, does the right to life, liberty, and security of the person, protected by section 7 of the *Canadian Charter of Rights and Freedoms*, protect a right to a healthy environment? If it does, would such a right strengthen Canada's framework for environmental protection? And lastly, what would a robust conception of the right to a healthy environment look like, given the emergence of international human rights in the environmental context?

To answer these questions, this paper analyzes the jurisprudence on section 7 of the *Charter* in the environmental context to determine whether a right to a healthy environment is protected under the right to life, liberty and security of the person. It draws on research from other countries with constitutionally protected environmental rights to assess what benefits such a right can provide and what challenges it poses. This paper also surveys best practices that have emerged from international human rights law to understand what the content of a robust right to a healthy environment might look like. The author argues that courts have implicitly accepted that a right to a healthy environment may be protected by section 7 of the *Charter*, and that courts should recognize such a right as it could help Canada strengthen its approach to environmental protection.

Citation: (2019) 28 Dal J Leg Stud 245

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INTRODUCTION

Despite the serious consequences of climate change on human health and well-being,[1] the international community has not adopted a freestanding right to a healthy environment. In response, international bodies have applied human rights law to environmental issues by "greening" existing human rights, including the rights to life and health.[2] Likewise, the Canadian government has not adopted a right to a healthy environment. Thus, whether Canada's laws can similarly be "greened" is an important question for Canadians seeking to hold governments responsible for the negative consequences of environmental harm.

As of 2018, 155 of the 193 United Nations member states have recognized a legally binding right to a healthy environment somewhere in law – if not constitutionally, then through court decisions, in statute, or via the ratification of environmentalist international agreements.[3] Many other countries have signed non-binding, soft law declarations that recognize the right to a healthy environment.[4] Canada, in contrast, is one of the few remaining states holding out against the meaningful implementation of an environmentalist legal regime.[5] Indeed, in almost every respect, Canada's framework for environmental protection falls short.[6] Despite Canada's wealth of freshwater resources, there is no national law that regulates drinking water quality.[7] Alberta's oil patch is one of the biggest industrial projects in the world, but federal laws fail to adequately regulate pollution from oil extraction.[8]

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[1] See e.g. Myles R Allen *et al*, "Special Report: Global Warming of 1.5°C: Summary for Policymakers" (Geneva, CH: Intergovernmental Panel on Climate Change, 2018) at 15, online: <www.ipcc.ch/site/assets/uploads/sites/2/2018/07/SR15_SPM_version_stand_alone_LR.pdf>.

[2] UNHRC, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 37th Sess, Annex, Agenda Item 3, UN Doc A/HRC/37/59 (2018) at para 12 [Framework Principles Report].

[3] UNGAOR, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 73rd Sess, Annex, Agenda Item 74(b), UN Doc A/73/188 (2018) at para 36 [Report of the Special Rapporteur].

[4] David R Boyd, "Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment" in John H Knox & Ramin Pejan, eds, *The Human Right to a Healthy Environment* (New York: Cambridge University Press, 2018) 17 at 18 [Boyd, "Catalyst"].

[5] David R Boyd, "The Constitutional Right to a Healthy Environment" (2012) 54:4 Environment: Science and Policy for Sustainable Development 3 [Boyd, "Right to a Healthy Environment"].

[6] Kimberly Shearon & Margot Venton, "The Right to a Healthy Environment: Canada's Time to Act" (Vancouver: Ecojustice, 2015) at 3, online: <https://ecojustice.ca/wp-content/uploads/2015/04/Right_to_a_healthy_environment_FINAL.pdf>.

[7] *Ibid.*

[8] *Ibid.*

Inconsistencies from jurisdiction to jurisdiction have created an ineffective patchwork of environmental laws and weak regulatory standards with major gaps that fail to adequately protect the environment.[9]

Canada's poor environmental record has led to substantial deficiencies in the country's healthcare delivery. For example, thousands of Canadians do not have access to clean running water, or are exposed to harmful levels of air pollution every day.[10] Indigenous groups in particular are disproportionately affected by such environmental degradation.[11] The Aamjiwnaang community, living on a First Nation reserve in "Chemical Valley" near Sarnia, Ontario, are one such group. Chemical Valley is one of Canada's largest concentrations of industry, and the reserve is surrounded by petrochemical, polymer, and chemical industrial plants.[12] Pollution released into the atmosphere from these plants has led to an increased risk of death from cardiovascular and respiratory diseases, lung cancer, diabetes, and heart attacks.[13] The presence of asthma in Aamjiwnaang children is over two times the national average rate. Learning or behavioural disabilities affect more than a quarter of children, which is over five times the national average rate. Forty percent of Aamjiwnaang women experience miscarriages or stillbirths.[14] The environmental degradation and resulting health effects in the Aamjiwnaang community are illustrative of the inadequacy of Canada's current approach to protecting environmental and human health.

This injustice underscores the need for Canada to take action to address environmental degradation. In recent years, the Constitution has been a focal point for achieving environmental justice in Canada.[15] Currently, there are no explicit provisions in Canada's Constitution that protect individuals' right to a healthy environment. However, two distinct approaches to environmental protection using

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[9] *Ibid* at 5.
[10] Margot Venton, Pierre Sadik & Kaitlyn Mitchell, "Right to a Healthy Environment" *Ecojustice* (2015), online: <www.ecojustice.ca/case/right-to-a-healthy-environment/>.
[11] Catherine Jean Archibald, "What Kind of Life? Why the Canadian Charter's Guarantees of Life and Security of the Person Should Include the Right to a Healthy Environment" (2013) 2 Tul J Intl & Comp L 1 at 3 [Archibald].
[12] Constanze A Mackenzie, Ada Lockridge & Margaret Keith, "Declining Sex Ratio in a First Nation Community" (2005) 113:10 Environmental Health Perspectives 1295 at 1295.
[13] Archibald, *supra* note 11 at 6.
[14] *Ibid.*
[15] Dayna Nadine Scott, "The Environment, Federalism, and the Charter" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook to the Canadian Constitution* (New York: Oxford University Press, 2017) 493 at 509 [Scott].

the Constitution have emerged from scholarship and practice: (1) the creation of an independent right to a healthy environment; and (2) the recognition that a right to a healthy environment is protected under our existing rights in the *Canadian Charter of Rights and Freedoms*.[16]

The first approach conceptualizes the right to a healthy environment as an independent, free-standing right that encompasses, but extends beyond, the content of existing rights.[17] This school of thought argues that because all existing human rights, such as the right to life, depend on a viable environment, viewing the emergence of environmental rights as an expansion of human rights is scientifically backward.[18] An analysis of this approach is beyond the scope of this paper, however, there exists robust empirical data demonstrating that the incorporation of an explicit constitutional right to a healthy environment leads to improved environmental protection, with associated human health benefits.[19]

The second approach grounds the right to a healthy environment within recognized human rights such as the rights to life, liberty, security of the person, equality, and health.[20] This approach recognizes that a certain level of environmental health is a necessary precondition to the enjoyment of all other rights.[21] Arguably, the most obvious "home" for the right to a healthy environment is section 7 of the *Charter*, which protects the right to life, liberty, and security of the person.[22]

This paper seeks to answer three questions. First, does section 7 of the *Charter* protect a right to a healthy environment? Second, would a constitutionally protected right to a healthy environment strengthen Canada's framework for environmental protection? And third, what would a robust conception of the right to a healthy environment look like, given the emergence of international human rights in the environmental context? To answer these questions, this paper first analyzes section 7

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[16] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; Lynda M Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) 71 SCLR 519 at 520 [Collins, "Safeguarding"].
[17] Collins, "Safeguarding", *supra* note 16 at 522.
[18] *Ibid.*
[19] See David R Boyd, "Constitutions, Human Rights, and the Environment: National Approaches" in Anna Grear & Louis J Kotzé, *Research Handbook on Human Rights and the Environment* (Massachusetts: Edward Elgar Publishing, 2015) 170 [Boyd, "Constitutions"]; David Richard Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2012).
[20] Collins, "Safeguarding", *supra* note 16 at 521.
[21] *Ibid* at 522.
[22] *Ibid* at 529; *Charter*, *supra* note 16, s 7.

of the *Charter* and Canadian jurisprudence on section 7 in the environmental context to determine whether a right to a healthy environment is protected under the right to life, liberty, and security of the person. Next, this paper draws on research from other countries with constitutionally protected environmental rights to assess what benefits such a right can provide and what challenges it poses. Finally, it surveys best practices that have emerged from international human rights law to understand what the content of a robust right to a healthy environment might look like. This paper demonstrates that although Canadian courts have not explicitly recognized the right to a healthy environment, they have implicitly accepted that such a right may exist within the right to life, liberty, and security of the person in section 7 of the *Charter*, and may be open to so finding in an appropriate case. Further, courts should explicitly recognize a right to a healthy environment in section 7 of the *Charter*, as a constitutionally protected right will help Canada strengthen its approach to environmental protection.

DOES SECTION 7 OF THE *CHARTER* PROTECT A RIGHT TO A HEALTHY ENVIRONMENT

Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[23] This section will first discuss how a right to a healthy environment could fit within the section 7 framework, and then show that there are no doctrinal issues to using this section to protect the right to a healthy environment. Finally, an analysis of the jurisprudence on section 7 in the environmental context will show that the courts may be open to finding that the rights to life, liberty, and security of the person protect a right to a healthy environment.

Section 7 and a Right to a Healthy Environment

Section 7 is "rooted in a profound respect for the value of human life."[24] The right to life, at the very least, means that a person may not be deprived of their life,

[23] *Charter, supra* note 16, s 7.
[24] Carter v Canada (Attorney General), 2015 SCC 5 at para 63 [Carter].

nor face a significant risk of the loss of life, due to state action.[25] Liberty involves freedom from restraint and the personal autonomy to make decisions that are of fundamental personal importance.[26] Security of the person encompasses the freedom from state interference with bodily integrity and from serious, state-imposed risks to physical health and psychological integrity.[27]

A right to a healthy environment does not necessitate creating a new "environmental component" of the right to life, liberty, or security of the person. Rather, it entails the recognition that environmental degradation can cause the loss of life, liberty, or security of the person just as surely as other state action.[28] The following example illustrates how environmental harm can cause the same loss of life as other state action that is prohibited by section 7:

> If a citizen is asphyxiated by noxious gases emanating from a government-operated incinerator, she is equally as dead as if she had been shot or beaten by government agents. It would be irrational for human rights law to provide less protection in the latter scenario than it does in the former; this would, in a sense, create an environmental exemption from the right to life.[29]

Recognizing a right to a healthy environment acknowledges that environmental harm can cause the same deprivations of life, liberty, and security of the person that other state action causes.

The right would not guarantee a "pristine environment free from chemicals or pollution."[30] Instead, it would highlight the vital role that the environment plays in the realization of "human dignity and welfare."[31] Given that the recognition of a right to a healthy environment does not require the creation of new rights, it follows that the right to a healthy environment fits comfortably within the existing section 7 doctrine.

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[25] Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1 at para 45.
[26] Blencoe v British Columbia (Human Rights Commission), 2000 SCC 44 at para 54.
[27] *Carter*, *supra* note 24 at para 64.
[28] Lynda Margaret Collins, "Are We There Yet? The Right to Environment in International and European Law" (2007) 3:2 JSDLP 119 at 127.
[29] *Ibid.*
[30] Kaitlyn Mitchell & Zachary D'Onofrio, "Environmental Injustice and Racism in Canada" (2016) 29 J Envtl L & Prac 305 at 324 [Mitchell & D'Onofrio].
[31] *Ibid.*

No Doctrinal Issues

The right to life, liberty, and security of the person in the environmental context raises questions about whose rights are involved, and the requisite causation to establish a violation of these rights. Can state action that causes a public health hazard violate the right to life, liberty, or security of the person under section 7? "Must someone get sick and be able to conclusively prove the source of his or her illness before the courts will act?"[32] These questions do not pose a doctrinal problem for recognizing the right to a healthy environment under section 7 of the *Charter*.

A law requiring an individual to be involuntarily injected with a quantity of some harmful substance, such as arsenic, may clearly violate a person's section 7 rights.[33] In the environmental context, however, toxins are injected into the environment rather than directly into individuals. Thus, when a pollutant is emitted into the environment, we are often no longer dealing with the rights of an identifiable individual. Instead, we are concerned with the rights of an unidentifiable individual who may eventually get sick, or the rights of all members of the community not to have to risk becoming sick, or both.[34] In this context, evidence would inevitably depend on statistical materials demonstrating risk and probability of harm, rather than conclusive proof of causation and harm.[35]

If the *Charter* is to be an effective tool for protecting individuals from harm, the courts must be able to examine such risk before the harm occurs.[36] The mere fact that the public as a whole may be affected by a particular state action does not detract from the impact of the rights violation on individuals, whether those individuals are identified or not.[37] Likewise, the fact that the harm may occur in the future does not pose any doctrinal issues for finding a right to a healthy environment under section 7. A violation of life or security of the person can occur with the risk of harm, and not merely when an actual impact on the right occurs.[38]

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[32] Andrew Gage, "Public Health Hazards and Section 7 of the Charter" (2003) 13 J Envtl L & Prac 1 at 3.
[33] *Ibid* at 2.
[34] Ibid.
[35] Ibid.
[36] *Ibid* at 3.
[37] *Ibid.*
[38] *Ibid.*

The Supreme Court of Canada further dispensed of doctrinal challenges to this concept in *Canada (Attorney General) v Bedford*[39] when it confirmed that the rights to life, liberty, or security of the person can be infringed where there is a risk of harm to unidentified individuals. In *Bedford*, three applicants argued that laws that prohibited sex workers from taking measures to protect themselves from violence violated their rights under section 7 of the *Charter*. McLachlin CJ, writing for a unanimous Supreme Court, held that the impugned laws put sex workers at greater risk of violence, and thus violated sex workers' security of the person.[40] The section 7 claim was successful even though the claimants did not argue that they directly suffered the harms alleged as a result of the impugned laws.[41] The Court held that, provided a "sufficient causal connection"[42] can be demonstrated between the government action and the harm or risk of harm, section 7 will be available to protect the right to life, liberty, and security of the person even where there is a risk of harm to unidentified individuals. As such, the fact that a particular environmental threat only poses a risk of harm, or poses a risk to unidentified individuals, does not prohibit the application of section 7 to the environmental context.

Jurisprudence on Section 7 of the *Charter* in the Environmental Context

To date, the bulk of lawsuits related to environmental harms have been grounded in environmental statutes, treaties, and common law causes of action.[43] With the exception of a small number of lawsuits, plaintiffs have generally not looked to substantive rights in constitutional law, and section 7 of the *Charter* in particular, to advance their claims.[44] However, in its current state, the jurisprudence on section 7 provides a strong basis for challenging government-sanctioned activities that create risks to public health.[45]

The few Canadian cases wherein claimants relied on section 7 to challenge government-sanctioned environmental harm have been unsuccessful. However, these

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[39] 2013 SCC 72 [*Bedford*].
[40] *Ibid* at paras 85, 92.
[41] *Ibid* at paras 6, 164.
[42] *Ibid* at para 75.
[43] Avnish Nanda, "Heavy Oil Processing in Peace River, Alberta: a Case Study on the Scope of Section 7 of the Charter in the Environmental Realm" (2015) 27 J Envtl L & Prac 109 at 110 [Nanda].
[44] *Ibid.*
[45] *Ibid.*

claims failed due to procedural and factual deficiencies, and not because the courts reject the notion that section 7 protects a right to a healthy environment.[46] In fact, these cases illustrate that courts are open to accepting that a risk to public health from environmental harm may constitute a violation of section 7 of the *Charter*.

One of the earliest cases in which section 7 was argued to protect environmental health is *Manicom et al v County of Oxford et al*.[47] In *Manicom*, the plaintiffs challenged the proposed construction of a landfill, citing negative health effects.[48] Saunders J, writing for a majority of the Ontario Divisional Court, dismissed the plaintiffs' claim on the basis that they had failed to specifically plead health hazards.[49] The claim was not rejected on the basis of environmental health falling outside the scope of section 7.

In *Millership v British Columbia*[50] and *Locke v Calgary (City)*,[51] the Supreme Court of British Columbia and the Alberta Court of Queen's Bench, respectively, considered whether public health risks posed by the fluoridation of water by a municipality violated section 7 of the *Charter*. Both courts dismissed the claims, finding that fluoridation was not shown to have significant negative health risks.[52] However, the courts in both cases seem to accept the proposition that a risk to public health could constitute a violation of section 7.[53]

In *Energy Probe v Canada (Attorney General)*,[54] the plaintiffs sought to bring an application alleging a violation of section 7 of the *Charter* by a law that limited the financial liability of a nuclear plant operator in the case of a nuclear accident. The plaintiffs argued the law would encourage the development of nuclear power plants, which would increase the overall risk of nuclear accidents.[55] Although the plaintiffs had not alleged that a public health hazard did exist, but that the government's actions increased the likelihood of such a hazard, the plaintiffs were granted leave to bring the case. Carthy JA, writing for the Court, held that the plaintiffs' allegations, if proven, could "demonstrate a present risk to them and others and a threat, or

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[46] *Ibid* at 125.
[47] (1985), 52 OR (2d) 137 (t) [*Manicom*].
[48] *Ibid* at 141.
[49] *Ibid* at 154.
[50] 2003 BCSC 82 [*Millership*].
[51] (1993), 15 Alta LR (3d) 70 (QB).
[52] *Ibid* at paras 33, 37; *Millership*, *supra* note 50 at para 111.
[53] Gage, *supra* note 32 at 8.
[54] (1989), 58 DLR (4th) 513 (Ont CA).
[55] *Ibid* at 514–15.

perceived threat, to security of the person."[56] The case was later heard and dismissed by the General Division of the then-Ontario Court of Justice.[57] Wright J found that the plaintiffs had not proven a sufficient link between the impugned law and an increased risk to health.[58]

The Alberta Court of Appeal considered the applicability of section 7 in the oil and gas context in *Kelly v Alberta (Energy and Utilities Board)*[59] and *Domke v Alberta (Energy Resources Conservation Board)*.[60] In both cases, the applicants challenged the provincial energy regulator's decision to approve the drilling of sour oil wells, arguing that the approval violated section 7 by creating serious health hazards.[61] The regulator sought to have the claims dismissed in each case.[62] In *Kelly*, the Court granted leave to bring the application, finding that the applicants' section 7 argument raised a "serious arguable point" of law.[63] However, after leave was granted, the respondent withdrew the application for the wells and the case was subsequently dismissed as moot.[64] In *Domke*, the application for leave was dismissed because the drilling only posed minimal health and safety risks to the surrounding residents.[65] Although no section 7 violation was established in either case, implicit in the Court's analysis in both decisions is that section 7 may be a viable option for individuals seeking redress for environmental harms resulting from government action.

This collective jurisprudence indicates that numerous courts have implicitly accepted the applicability of section 7 in the environmental context. None of the claims in these cases were rejected on the basis that section 7 does not protect a right to a healthy environment. Rather, these cases demonstrate the courts' willingness to consider the issue. Indeed, it is clear throughout that Canadian courts are open to finding that state action that results in environmental harm can cause public health hazards, and that such health hazards may violate section 7.

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[56] *Ibid* at 538.
[57] Energy Probe v Canada (Attorney General) (1994), 17 OR (3d) 717.
[58] *Ibid* at 732.
[59] 2008 ABCA 52 [*Kelly*].
[60] 2008 ABCA 232 [*Domke*].
[61] *Kelly*, *supra* note 59 at para 15; *Ibid* at para 6.
[62] *Kelly*, *supra* note 59 at paras 1, 9–10; *Domke*, *supra* note 60 at para 2.
[63] *Kelly*, s*upra* note 59 at paras 1, 19.
[64] Nanda, *supra* note 43 at 126.
[65] *Domke*, *supra* note 60 at paras 26–27.

Nevertheless, the courts have yet to explicitly recognize a right to a healthy environment under section 7 of the *Charter*.[66] However, the jurisprudence suggests that, provided a claim is procedurally sound and supported by a compelling factual record, there is no obstacle to applying section 7 to harm resulting from environmental degradation.[67] As such, section 7 of the *Charter* "should be an arrow in the quiver of any lawyer seeking to curb industrial development that creates serious health risks."[68]

Using section 7 to seek redress for health hazards resulting from environmental harm has gained traction in recent years. For example, in 2011, two members of the Aamjiwnaang community filed an application for judicial review of a decision to issue a permit to increase emissions from a refinery in Chemical Valley.[69] The applicants argued that the issuance of the permit without consideration for the cumulative effects from all industrial emissions in the area violated their section 7 rights because the exceedingly high levels of emissions posed health risks to members of the community.[70] The application was ultimately withdrawn in response to efforts from the provincial government to control pollution, but the case's demands for what the *Charter* should guarantee gained significant attention across the country.[71]

Another recent attempt to use section 7 to seek redress for health hazards caused by environmental harm indicates that the push for a right to a healthy environment is gaining traction. In September 2015, Grassy Narrows First Nation filed an application for judicial review of the Ontario government's approval of clearcut logging activities. The applicants argued that clearcut logging releases mercury into the environment causing serious health effects that violate their rights under section 7.[72] This case has not been heard to date, but the Ontario government has since committed $85 million to clean up mercury contamination on Grassy Narrows' homeland.[73] These cases are

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[66] Nanda, *supra* note 43 at 127.
[67] *Ibid* at 125.
[68] *Ibid* at 110.
[69] Scott, *supra* note 15 at 509.
[70] *Ibid* at 510.
[71] *Ibid* at 509.
[72] "Grassy Narrows Sues Ontario Over Mercury Health Threat from Clearcut Logging" *Free Grassy Narrows* [an activist group] (14 September 2015), online: <freegrassy.net/2015/09/14/grassy-narrows-sues-ontario-over-mercury-health-threat-from-clearcut-logging/>.
[73] David Bruser, Robert Benzie & Jayme Poisson, "Ontario Commits $85 Million to Clean Up 'Gross Neglect' at Grassy Narrows" *Toronto Star* (27 June 2017), online: <www.thestar.com/news/gta/2017/06/27/ontario-gives-85-million-to-clean-up-gross-neglect-at-grassy-narrows.html>.

paving the way for future claims for environmental rights under section 7 of the *Charter*.

WILL A CONSTITUTIONALLY PROTECTED RIGHT TO A HEALTHY ENVIRONMENT STRENGTHEN CANADA'S FRAMEWORK FOR ENVIRONMENTAL PROTECTION

There is great potential for a constitutionally protected right to a healthy environment under section 7 of the *Charter* to strengthen the Canadian approach to environmental protection. This is broadly evident in research from other countries which have enacted the constitutional right to a healthy environment. Such jurisdictions demonstrate that constitutionally protected environmental rights result in benefits including: the provision of alternative avenues for redress for environmental harm, the prevention of rollbacks on environmental standards, the strengthening of environmental laws, and the improvement of environmental performance. Other benefits may include entrenchment of the precautionary principle and encouraging the adoption of an explicit right to a healthy environment. These advantages will be discussed in turn before proceeding to a discussion of the challenges associated with a right to a healthy environment under section 7.

Advantages of a Constitutional Right to a Healthy Environment

Alternative Avenue for Redress

Perhaps one of the most noteworthy advantages of recognizing a right to a healthy environment under section 7 is that it provides an alternative avenue for redress for environmental harm that causes health issues. Current statutory and common law causes of action allow individuals to seek redress from private actors, but there are very few mechanisms for seeking government accountability. A claim under section 7 of the *Charter* recognizes the role and responsibility of the government in sanctioning activities that create damages to the environment and public health.[74]

In practice, this means that bringing a claim under section 7 can often be more advantageous than doing so under current statutory or common law causes of

[74] Nanda, *supra* note 43 at 136.

action.[75] The bulk of environmental legislation in Ontario is contained in the *Environmental Bill of Rights, 1993*.[76] This statute largely focuses on the right to participate in environmental decision-making in the province.[77] The preamble states that citizens of Ontario have the "right to a healthful environment"[78] but this language is not contained in an actual legislative provision anywhere in the statute. At the federal level, the *Canadian Environmental Protection Act, 1999*[79] focuses on public participation and provides for an environmental registry for matters that fall under the statute.[80] While these procedural rights are very important, there is no substantive dimension to environmental rights contained in these statutes, meaning that decisions ultimately remain entirely in the government's hands.[81] As such, these statutes provide little in the way of redress for government-approved action that creates environmental and health hazards.

Under the common law, tort law provides another traditional remedy. Claimants who have suffered negative health effects from environmental harms often rely on the doctrine of public nuisance where there has been an interference with public rights.[82] However, the standing rules often serve to limit public nuisance as an available remedy; one can sue in public nuisance only if one has suffered "special damages", or with the consent of the Attorney General.[83] Alternatively, claimants who have suffered physical injury or property damage will often sue in negligence. However, in the environmental context, it can be difficult to establish all the elements of negligence, and causation in particular.[84] In a negligence claim, the claimant must show that it is more likely than not that his or her particular injury flowed from the defendant's activities.[85] Such evidence can be difficult to obtain where environmental or health harms are involved.[86]

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[75] Ibid.
[76] SO 1993, c 28.
[77] Nanda, *supra* note 43 at 137.
[78] Environmental Bill of Rights, 1993, supra note 76.
[79] SC 1999, c 33.
[80] Nanda, *supra* note 43 at 137.
[81] Ibid.
[82] *Ibid* at 136.
[83] *Ibid* at 136–37.
[84] *Ibid* at 137.
[85] Ibid.
[86] Ibid.

Causation under section 7 of the *Charter* is different than causation in tort law, and as such, a right to a healthy environment can provide an alternative avenue for redress for health hazards that result from environmental harm. Unlike causation in the tort context, claimants of section 7 violations are not required to prove that they suffered harm directly.[87] Causation under section 7 does not require a claimant to establish that the government's action is the "only or the dominant cause of the prejudice suffered to the claimant."[88] Rather, proof of merely a "sufficient causal connection" is required.[89] This standard means that section 7 claims may be available where statutory or common law remedies would otherwise be unavailable.

In addition to providing an alternative cause of action for a health claim stemming from environmental harm, section 7 *Charter* challenges also provide a mechanism by which individuals can trigger the review of legislation by courts. This may be a particularly important tool for marginalized groups who often lack the political and monetary resources to affect change through law and policy making.[90]

Research from countries with a constitutionally protected right to a healthy environment shows that some politically and economically marginalized communities have enjoyed success in the courts in enforcing their right to a healthy environment.[91] In Argentina, litigation based on constitutional environmental rights resulted in a court-ordered clean up and restoration of the Matanza-Riachuelo watershed, which will lead to improved living conditions for millions of economically marginalized people.[92] Likewise, in Peru, residents of La Oroya were finally able to obtain medical treatment for their long-term exposure to lead emitted by a nearby smelter after litigation of their constitutional environmental rights.[93] Evidently, in Canada, a section 7 claim may be an important tool for those individuals and groups most affected by government-authorized environmental harm.

Entrenching the Precautionary Principle

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[87] *Ibid* at 139.
[88] *Bedford, supra* note 39 at para 76.
[89] *Ibid* at para 75.
[90] Archibald, *supra* note 11 at 4.
[91] Boyd, "Constitutions", *supra* note 19 at 194–95.
[92] *Ibid.*
[93] Boyd, "Catalyst", *supra* note 4 at 32.

A corollary that flows from the causation standard under section 7 is that it provides a basis to constitutionally entrench the precautionary principle.[94] This doctrine holds that where there are threats to human health and the environment, the fact that there is scientific uncertainty as to those threats should not be a reason for refusing to take action to prevent them.[95] The principle has been codified in several international treaties to which Canada is a signatory, however, its application in the domestic context is limited.[96]

Section 7 confers protections from potential harms that have not occurred and may never materialize. It places the onus on the government to justify activity that not only causes harm, but increases the risk of harm.[97] As such, section 7 is wholly consistent with the precautionary principle. While it "narrows the precautionary principle through the lens of individual rights protections," section 7 may provide a meaningful mechanism through which to constrain the government's ability to engage in activities that potentially cause environmental harms, even where there is scientific uncertainty as to the effects of those activities.[98]

Preventing Rollbacks

Another advantage flowing from a constitutional right to a healthy environment is that it may result in the application of the principle of non-regression, also known as the standstill principle, in the environmental law context.[99] This principle holds that existing environmental laws are to be treated as a baseline that can be strengthened, but not weakened.[100] It prevents the future weakening of environmental laws and policies, often referred to as rollbacks.[101]

The standstill principle takes on heightened significance in Canada where, in recent years, many key federal and provincial environmental laws have been rolled back.[102] For example, in 2012, the federal government gutted some of Canada's most

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[94] Nanda, *supra* note 43 at 138.
[95] See Canadian Environmental Law Association, "The Precautionary Principle" (2017) online: <www.cela.ca/collections/pollution/precautionary-principle>.
[96] *Ibid.*
[97] Nanda, *supra* note 43 at 138.
[98] *Ibid* at 139.
[99] Scott, *supra* note 15 at 513.
[100] Mitchell & D'Onofrio, *supra* note 30 at 335.
[101] Boyd, "Constitutions", *supra* note 19 at 189.
[102] Scott, *supra* note 15 at 513.

important environmental laws when it forced through its omnibus budgetary bills.[103] As such, the *National Energy Board Act*,[104] the governing legislation for the National Energy Board, is one law that is significantly weaker today than it was prior to 2012.[105] The federal government, as part of its efforts to fast-track the then-Kinder Morgan Trans Mountain Expansion pipeline project, rewrote several parts of the *Act*, sacrificing independent science and thorough review in the process.[106] The result is a "deeply flawed process" in which opportunities for public input have been restricted and the consideration of environmental and human health impacts of climate change and oil sands development associated with the pipeline has been excluded.[107]

Another example of a significant rollback is the *Canadian Environmental Assessment Act*,[108] which established environmental assessment processes intended to identify, evaluate, and mitigate adverse environmental effects that may result from the federal government's projects.[109] The *CEAA* was repealed and replaced by the *Canadian Environmental Assessment Act, 2012*.[110] The *CEAA, 2012* significantly decreased the scope of projects required to undergo an environmental assessment, expanded ministerial discretion, and considerably narrowed the nature of environmental assessment requirements.[111] The result is that the number of environmental assessments triggered under the *CEAA, 2012* has significantly decreased from the number triggered under the previous *CEAA*.[112] In particular, many medium or small projects, which may nevertheless cause direct, indirect, or cumulative environmental effects, are no longer subject to environmental assessment.[113]

The recognition that environmental harm causing health hazards can constitute a violation of section 7 of the *Charter* could force the government to consider the

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[103] Shearon & Venton, *supra* note 6 at 5.
[104] RSC 1985, c N-7.
[105] Shearon & Venton, *supra* note 6 at 5.
[106] *Ibid.*
[107] *Ibid.*
[108] SC 1992, c 37 [*CEAA*].
[109] See Canadian Environmental Law Association, "Canadian Environmental Assessment Act: Collection of Materials about CEAA and CEAA Reform", online: <www.cela.ca/collections/justice/canadian-environmental-assessment-act> [CELA, "Environmental Assessment"].
[110] SC 2012, c 19 [*CEAA, 2012*].
[111] CELA, "Environmental Assessment", *supra* note 109.
[112] Richard D Lindgren, "Going Back to the Future: How to Reset Federal Environmental Assessment Law" (Toronto: Canadian Environmental Law Association, 2016) at 6, online: <https://www.cela.ca/sites/cela.ca/files/1083-CELA%20Preliminary%20Submissions%20to%20the%20Expert%20Panel%20%28Nov%207%2C%202016%29.pdf>.
[113] *Ibid.*

health impacts from proposed environmental laws prior to enacting them. In this way, a constitutionally protected right to a healthy environment could prevent harmful rollbacks before they happen.[114] This advantage has been realized in some countries with a constitutionally protected right to a healthy environment. For example, Hungary's Constitutional Court rejected an attempt to privatize publicly owned forests because weaker environmental standards governed private lands.[115] Moreover, in Belgium, authorities rejected a proposal to accommodate motor racing by weakening standards for air and noise pollution because it would have violated Belgium's prohibition on rolling back environmental protections.[116] If the Canadian government adopted similar legislative mechanisms, this could be a significant step forward in strengthening Canada's legal framework for environmental protection.

Strengthening Environmental Laws

Beyond preventing rollbacks, constitutional recognition of a right to a healthy environment could strengthen environmental laws. Research shows that a constitutional right to a healthy environment can facilitate increased implementation and enforcement of environmental laws.[117] In at least 80 countries, environmental laws were strengthened after the right to a healthy environment was constitutionally entrenched.[118] In most cases, laws were amended to increase access to environmental information, increase access to justice, and enhance participation in environmental decision-making.[119] For example, the reform of Argentina's constitution in 1994 to include the right to a healthy environment sparked the passing of new laws setting out minimum standards for industrial waste and clean water and governing access to environmental information.[120] It also caused a cascade effect in which provincial constitutions were amended to incorporate the right, and provincial environmental laws were altered to be brought in line with the constitution.[121]

Further examples of stronger environmental laws following explicit constitutional recognition come from Costa Rica and the Philippines. In Costa Rica,

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[114] Shearon & Venton, *supra* note 6 at 6.
[115] Boyd, "Catalyst", *supra* note 4 at 32.
[116] Ibid.
[117] *Ibid* at 27.
[118] Boyd, "Constitutions" *supra* note 19 at 187.
[119] *Ibid.*
[120] *Ibid* at 187–88.
[121] *Ibid* at 188.

the constitutional recognition of the right to a healthy environment in 1994 contributed to a significant increase in the implementation and enforcement of environmental legislation.[122] Costa Rica's Constitutional Court has enforced environmental laws relating to solid waste, sewage treatment, air pollution, groundwater, and endangered species, holding that the right to a healthy environment includes the precautionary principle, the polluter pays principle, and intergenerational equity principles.[123] In the Philippines, constitutional recognition of the right to a healthy environment has also lead to the strengthening of environmental laws. Since constitutional recognition, the Philippines has developed special rules of procedure for environmental litigation, which are specifically intended to facilitate protection of the right to a healthy environment.[124]

In Brazil, the constitutional recognition of environmental rights in 1988 led to a dramatic increase in the enforcement of environmental laws.[125] This reform enabled the public and non-governmental organizations to report alleged violations of environmental rights to an independent body, the Ministerio Publico, which conducts investigations, civil actions, and prosecutions.[126] Between 1984 and 2004, in the state of Sao Paolo alone, the Ministerio Publico filed over 4,000 public civil actions in environmental cases, addressing issues ranging from deforestation to air pollution.[127]

These examples demonstrate the benefits of a constitutional right to a healthy environment. It is also interesting to note that the number of countries who experienced no discernable strengthening of environmental laws following constitutional recognition of environmental rights is very small.[128] Among these countries are nations where either: (a) the constitutional changes are very recent (e.g. Grenada's 2015 constitutional reform); or (b) civil war and other overriding social, economic, or political crises are present (e.g. the Democratic Republic of Congo).[129] This suggests that constitutional recognition of environmental rights generally leads

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[122] Report of the Special Rapporteur, *supra* note 3 at para 41.
[123] *Ibid.*
[124] *Ibid* at para 42.
[125] Boyd, "Catalyst", *supra* note 4 at 28.
[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid* at 26.
[129] *Ibid.*

to strengthening of environmental laws in a majority of countries that are not dealing with war or other crises.

Prefacing the Adoption of an Explicit Constitutional Right

As of 2018, 100 countries had an explicit constitutional right to a healthy environment.[130] Of these 100 countries, the courts in at least 8 found an implicit right to a healthy environment within existing constitutional provisions prior to the explicit right being incorporated into their respective constitutions.[131] The recognition of an implicit right to a healthy environment under section 7 of the *Charter* may therefore be the first step towards an explicit incorporation of environmental rights in Canada's Constitution.

It may be that the causal relationship works in the other direction, and nations that already have strong environmental policies are more likely to entrench constitutional environmental rights.[132] However, the case for entrenching environmental protection in national constitutions is compelling.[133] When the causal relationship is combined with evidence of stronger environmental legislation, enhanced opportunities for public participation in environmental decision-making, and increased enforcement of environmental laws, the benefits of explicit constitutional protection for environmental rights are persuasive.[134]

Improving Environmental Performance

Research has shown that the constitutional recognition of environmental rights provides persuasive, albeit not determinative, evidence of substantial environmental and health benefits.[135] One study concluded that nations with a constitutional right to a healthy environment have smaller ecological footprints, rank higher on comprehensive indices of environmental indicators, are more likely to ratify international environmental agreements, and have made faster progress in reducing emissions of harmful pollutants.[136] For example, between 1980 and 2005, wealthy

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[130] Boyd, "Right to a Healthy Environment", *supra* note 5.
[131] David R Boyd, "The Implicit Constitutional Right to Live in a Healthy Environment" (2011) 20:2 RECIEL 171 at 171.
[132] Boyd, "Constitutions", *supra* note 19 at 196.
[133] *Ibid.*
[134] *Ibid* at 197.
[135] *Ibid.*
[136] Boyd, "Catalyst", *supra* note 4 at 36.

industrialized nations with a right to a healthy environment reduced sulfur dioxide emissions by 84.8 percent.[137] In contrast, wealthy industrialized nations without recognized environmental rights reduced emissions by just 52.8 percent during the same period.[138] Another study found that a constitutional right to a healthy environment was positively related to increases in the proportion of populations with access to safe drinking water.[139] These studies demonstrate that the constitutional right to a healthy environment provides tangible benefits in terms of environmental health.

The advantages of recognizing a right to a healthy environment under section 7 of the *Charter* are compelling. The ability to hold the government accountable for actions that lead to environmental and health harms, to prevent new governments from rolling back protections put in place by previous governments, and to seek redress for future harms that have not occurred yet, particularly where scientific evidence may not be conclusive, are immensely important to building a stronger framework for environmental protection. However, there are well founded criticisms as to what a constitutionally protected right to a healthy environment will achieve in practice. Using section 7 to seek redress for environmental and health harms requires undertaking litigation, which poses access to justice issues. Further challenges include the fact that the *Charter* applies only to government action, and cannot address gaps in environmental protections where governments have failed to legislate. These challenges are addressed in turn.

Challenges of a Constitutional Right to a Healthy Environment

Access to Justice

A major shortcoming of a constitutional right to a healthy environment under section 7 of the *Charter* is that it is often difficult for communities most affected by environmental degradation to take advantage of their constitutional rights.[140] Litigation favours repeat players and parties with financial resources.[141] Other barriers

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[137] *Ibid.*
[138] Ibid.
[139] *Ibid* at 37, citing Christopher Jeffords, "On the Temporal Effects of Static Constitutional Environmental Rights Provisions on Access to Improved Sanitation Facilities and Water Sources" (2016) 7:1 J Human Rights & Environment 74.
[140] Boyd, "Constitutions", *supra* note 19 at 194.
[141] Scott, *supra* note 15 at 512.

such as limited awareness of rights and lack of access to legal assistance pose significant problems for many individuals who could stand to benefit from a right to a healthy environment.[142] Addressing these barriers to justice is a critical precondition to the realization of constitutional environmental rights for many individuals.

Section 7 Applies Only to Government Action

A second critique of a constitutional right to a healthy environment is that the *Charter* applies only to state action, and the majority of environmentally harmful activity is arguably conducted by private actors.[143] It is well established that the *Charter* does not apply to common law litigation between private parties.[144] The *Charter* will only apply to private action when there is a sufficient element of government action.[145] However, in the environmental context, governments may create serious environmental harm in several ways, attracting *Charter* application.[146]

The first way is that the Canadian government operates major facilities, such as sewage treatment facilities and power plants, that emit pollution into the natural environment. Such action could clearly trigger *Charter* application. Second, governments may create environmental harms capable of infringing constitutional rights by permitting pollution or other forms of environmental degradation.[147] For example, industrial polluters are subject to federal, provincial and municipal regulatory regimes requiring permits for polluting activities.[148] The issuance of a licence or permit by the government permitting a particular environmentally harmful emission or activity meets the requirement for state conduct, thereby attracting *Charter* application.[149]

The third way that governments may create environmental harms is by setting statutory and regulatory standards that allow for the emission of harmful levels of pollution.[150] While private activity is not subject to the *Charter*, laws that regulate

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[142] Boyd, "Constitutions", *supra* note 19 at 194.
[143] Collins, "Safeguarding", *supra* note 16 at 524.
[144] *Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573 at 603–04, 33 DLR (4th) 174.
[145] Gage, *supra* note 32 at 12.
[146] Collins, "Safeguarding", *supra* note 16 at 525.
[147] *Ibid* at 524.
[148] Ibid.
[149] Gage, *supra* note 32 at 12.
[150] Collins, "Safeguarding", *supra* note 16 at 524.

private activity are.[151] Governments pass a wide range of laws that regulate private actions that may result in public health hazards.[152] Where regulatory standards are out of date, or fail to protect environmental and human health, the *Charter* will be available to hold the government accountable.[153]

Thus, in effect, almost all private industrial activity that may lead to environmental harms is in some way regulated or controlled by state action. Many, if not most, environmental harms would not occur but for positive government action.[154] Where the government does not act directly in releasing harmful pollution into the environment, its actions in granting permits and setting regulatory standards enables *Charter* violations by private actors.[155] While environmental harms are caused by purely private actions in some instances, the wide scope of environmental laws and regulations means the *Charter* will be a viable tool for seeking redress in many cases, even where the immediate cause is a private actor.

Inability to Address Legislative Gaps

A further shortcoming of a right to a healthy environment under section 7 is its inability to address legislative gaps where governments have not regulated in particular spheres. The courts' interpretation of the *Charter* does not, of itself, require the state to act where it has not already legislated in respect of a certain area.[156] For example the Canadian government has no national water law, meaning that communities under federal jurisdiction, such as First Nations reservations, have no legal protection for their drinking water.[157] The result is a disproportionate prevalence of boil-water advisories and water-borne illness in First Nations communities.[158] Section 7 will not be of any assistance to these communities as the *Charter* cannot force the government to act where it has chosen not to legislate.

While the *Charter* cannot be used to fill legislative gaps, it does apply to "underinclusive" state action. Underinclusive state action refers to legislation that fails

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[151] *Vriend v Alberta*, [1998] 1 SCR 493 at para 66.
[152] Gage, *supra* note 32 at 12.
[153] Collins, "Safeguarding", *supra* note 15 at 524.
[154] Archibald, *supra* note 11 at 19.
[155] Ibid.
[156] Dunmore v Ontario (Attorney General), 2001 SCC 94 at para 29.
[157] Shearon & Venton, *supra* note 6 at 5.
[158] Collins, "Safeguarding", *supra* note 16 at 529.

to fully protect individuals' *Charter* rights.[159] Where the government decides to legislate in a particular area, it must do so in a manner that complies with the *Charter*.[160] For example, Canada's current laws regulating chemical emissions are outdated and inadequate for the protection of human health because they fail to take into account the pollutants already being emitted in any given area by other facilities before permits are issued.[161] Regulations set standards for specific concentrations of pollutions at a given point source, such as a smokestack or effluent pipe, but do not limit the total volume of emissions.[162] The result is that the government could issue a number of permits in a particular location that, on their own, satisfy standards set out by regulations, but cumulatively result in levels of pollution that are dangerous to human health.[163]

A right to a healthy environment under section 7 would require federal and provincial governments to update their legislation to adequately protect public health.[164] This may require the use of a modern scientific understanding of how cumulative pollution affects health to set appropriate standards for emissions, and refusing to issue new permits until it can be established that the cumulative effects of new permits would not pose a hazard to environmental and human health.[165] In this way, although a constitutional right to a healthy environment cannot fill legislative gaps, it is an important tool for bringing current legislation in line with *Charter* rights.

The challenges highlighted in this section pose very real barriers in some instances where section 7 is sought to protect environmental rights. Gaps in environmental legislation will continue to weaken environmental protection, and strong statutory frameworks are required to protect environmental health where the *Charter* does not apply. Moreover, access to justice continues to remain a significant barrier to many individuals and communities seeking redress for environmental harms. While these challenges must be addressed in order for Canada to fully realize its environmental protection goals, they should not be viewed as sufficient reasons to

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[159] Nanda, *supra* note 43 at 118.
[160] Ibid.
[161] Archibald, *supra* note 11 at 7.
[162] Collins, "Safeguarding", *supra* note 16 at 529.
[163] Archibald, *supra* note 11 at 7.
[164] *Ibid* at 8.
[165] *Ibid.*

disregard the importance of recognizing a right to a healthy environment under section 7 of the *Charter*.

Nor should the many criticisms levied by the opponents of a right to a healthy environment stand in the way of the recognition of such a right under section 7. While these critics cite the illegitimacy of judicial activism, unpredictable nature of vague laws,[166] and the threat of floods of frivolous litigation as reasons to reject a right to a healthy environment, few of these potential issues have materialized in practice.[167] There has been no flood of frivolous litigation; lawsuits based on the right to a healthy environment represent a small fraction of the total number of cases in any given country, and enjoy a high success rate.[168] The widespread reliance on the right to a healthy environment by the public, legislatures, and courts demonstrates that the right is neither too vague to be implemented nor merely duplicative of protections offered by existing human rights and environmental laws.[169] Finally, excessive judicial activism can pose a threat to democracy. For example, the Supreme Court of India has been accused of exceeding its reach in several high-profile cases.[170] However, the Court's action has been viewed as a response to the Indian government's persistent failure to implement and enforce its environmental laws in accordance with its constitution.[171] In general, excessive judicial activism is rare.[172] These criticisms have largely not come to fruition and as such, should not prohibit the recognition of a right to a healthy environment under section 7.

The advantages discussed above suggest that a constitutional environmental right could go a long way in helping Canada strengthen its framework for environmental protection. Research from countries with a constitutionally protected right to a healthy environment provides persuasive evidence of the tangible benefits of such a right. Addressing the challenges, and access to justice in particular, could go a long way in increasing the realization of the advantages of a right to a healthy environment.

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[166] See e.g. Asher Honickman, "The Case for a Constrained Approach to Section 7" *The Canadian Bar Association: Alberta Branch* [blog] (8 August 2016), online: <www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Summer-2016-Issue/The-Case-for-a-Constrained-Approach-to-Section-7>.
[167] Boyd, "Catalyst", *supra* note 4 at 37.
[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid* at 37–38.
[171] *Ibid* at 38.
[172] *Ibid.*

WHAT COULD THE CONTENT OF A RIGHT TO A HEALTHY ENVIRONMENT LOOK LIKE?

The recognition of a right to a healthy environment under section 7 of the *Charter* does not require creating new rights. It merely requires effective legal argumentation and judicial recognition that environmental harms can cause the same deprivations of life, liberty, and security of the person as any other state action that is prohibited by section 7. And while section 3 of this paper demonstrates that the advantages of a constitutionally protected right to a healthy environment are significant, it is worth looking to other conceptions of environmental rights to assess what role a right to a healthy environment under section 7 could play if courts were to give a more robust interpretation to this right.

In answering this question, courts can find guidance from international human rights laws. As in Canada, the international community has not explicitly recognized a free-standing right to a healthy environment in a binding universal declaration.[173] However, international bodies have applied already-recognized human rights laws, such as the right to life and health, to the environmental context, thereby "greening" existing human rights.[174] If a court engages in a similar "greening" of section 7, looking to international law can provide a helpful framework as to the content of such a right.

Lessons from the "Greening" of International Human Rights

Canada is signatory to numerous international agreements pertaining to human rights. While these international obligations are not legally binding until they are enacted into domestic legislation,[175] they can serve as guidance for the interpretation of Canada's Constitution.[176] Sources of international human rights law, such as declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, and customary norms, are relevant and persuasive sources for

[173] John H Knox & Ramin Pejan, "Introduction" in John H Knox & Ramin Pejan, ed, *The Human Right to a Healthy Environment* (New York: Cambridge University Press, 2018) 1 at 1–2.
[174] *Ibid* at 2; Framework Principles Report, *supra* note 2 at para 12.
[175] Arrow River & Tributaries Slide & Boom Co Ltd v Pigeon Timber Co Ltd, [1932] SCR 495, [1932] 2 DLR 250.
[176] Margot Young, "The Other Section 7" (2013) 62 SCLR (2d) 3 at 9.

interpreting the *Charter*'s provisions.[177] In *Slaight Communications v Davidson*,[178] Dickson CJC, writing for the majority of the Supreme Court of Canada, held that the *Charter* is presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.[179] As such, looking to international human rights obligations can provide valuable insight into the content of a robust right to a healthy environment under section 7 of the *Charter*.

In his mandate as Special Rapporteur to the United Nations Human Rights Council, John H. Knox studied the existing body of international human rights law to assess the state of international human rights obligations as they relate to the environment. From this study, the Special Rapporteur identified numerous legal statements that together create a body of human rights norms relating to the environment.[180] Despite the diversity of sources from which they arise, the Special Rapporteur noted that these statements are "remarkably coherent."[181] As a whole, they provide strong evidence of converging trends towards greater uniformity and certainty in human rights obligations as they relate to the environment.[182]

To help facilitate the practical implementation of these obligations, the Special Rapporteur distilled the existing human rights obligations relating to the environment into 16 "Framework Principles" on human rights and the environment.[183] The Framework Principles set out basic obligations of states under human rights law as they relate to the enjoyment of a safe, clean, healthy, and sustainable environment.[184] They do not create new obligations; rather, they reflect the application of existing human rights obligations to the environmental context.[185] As a whole, the Framework

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[177] *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 348, Dickson CJC, dissenting [*Alberta Reference*]. The Supreme Court of Canada affirmed this point in *Slaight Communications v Davidson*, [1989] 1 SCR 1038 at 1056–57 [*Slaight Communications*].

[178] Slaight Communications, supra note 177.

[179] *Ibid* at 1056, citing *Alberta Reference*, *supra* note 177 at 349, Dickson CJC, dissenting.

[180] John H. Knox, UNHRCOR, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 25th Sess, Annex, Agenda Item 3, UN Doc A/HRC/25/53 (2013) at para 26 [Mapping Report].

[181] *Ibid* at para 27.

[182] Ibid.

[183] Framework Principles Report, *supra* note 2 at para 10.

[184] *Ibid* at para 8.

[185] *Ibid.*

Principles represent a set of best practices for environmental rights based on current human rights obligations.[186]

As Canadian courts grapple with the content question of a right to a healthy environment, the Framework Principles can provide useful guidance. These Principles, and the underlying body of international human rights obligations that they are based on, recognize that the obligations of states in relation to the right to a healthy environment consist of three main components: (1) procedural obligations, (2) substantive obligations, and (3) obligations towards vulnerable groups.[187] Each of these obligations are discussed in turn.

Procedural Obligations

The Special Rapporteur's review of the existing body of human rights law revealed that international law imposes certain procedural obligations on states in relation to environmental protection.[188] These procedural obligations include a duty to: (1) assess environmental impacts and make environmental information public, (2) facilitate public participation in environmental decision-making, and (3) provide access to remedies for harm.[189] These duties are reflected in the Framework Principles.

Duty to Asses Environmental Impacts and Make Environmental Information Public

The first procedural obligation existing under current international human rights obligations is the duty to assess environmental impacts and to make environmental information public. This obligation is found in sources such as the Rio Declaration. Principle 17 of the Rio Declaration states that: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent authority."[190] Principle 10 of the Declaration requires that individuals have access to information concerning the environment and that states facilitate public awareness by making information widely available.[191]

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[186] Mapping Report, *supra* note 180 at para 28.
[187] Report of the Special Rapporteur, *supra* note 3 at para 3.
[188] Mapping Report, *supra* note 180 at para 29.
[189] *Ibid.*
[190] UNESCO, *Rio Declaration on Environment and Development*, Annex 1, A/CONF.151/26 (Vol. I) (1992).
[191] *Ibid.*

This procedural obligation is reflected in Framework Principles 7 and 8. Principle 7 holds that: "States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request."[192] This Principle notes that access to environmental information has two dimensions. First, states have an obligation to collect, update, and disseminate information about environmental matters, such as air and water quality, and the presence of hazardous substances.[193] Second, states should provide "affordable, effective, and timely access" to environmental information held by public authorities upon request without the need to show a legal or other interest in the information.[194]

Framework Principle 8 holds that: "To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights."[195] Environmental assessments should: occur early on in the decision-making process; provide meaningful opportunities for public participation; consider alternatives to the proposed activity; and address all potential environmental impacts, including transboundary effects.[196] Written reports should be issued that clearly describe the impacts, and decisions should be subject to review by an independent body.[197]

Framework Principle 8 also notes that businesses have obligations to conduct human rights impact assessments.[198] It holds that such assessments should be conducted in accordance with the Guiding Principles on Businesses and Human Rights.[199] The Guiding Principles provide that businesses should: identify any actual or potential adverse human rights impacts that may result from the business' activities; undertake meaningful consultation with potentially affected groups; and integrate the

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[192] Framework Principles Report, *supra* note 2, annex.
[193] Ibid.
[194] *Ibid.*
[195] Ibid.
[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] Ibid.

findings from the assessment across relevant internal functions and processes and take appropriate action.[200]

Duty to Facilitate Public Participation in Environmental Decision-Making

A second procedural obligation is the duty of states to facilitate public participation in environmental decision-making. This obligation is set out in several international instruments. The Universal Declaration of Human Rights recognizes the right of individuals to take part in the government of their country.[201] The International Covenant on Civil and Political Rights recognizes the right of individuals to take part in the conduct of public affairs.[202] Human rights bodies have built upon these basic rights to public participation by outlining a duty to facilitate public participation in environmental decision-making.[203]

The duty to facilitate public participation in environmental decision-making is set out in Framework Principle 9, which holds that: "States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process."[204] Such decision-making includes the development of laws, policies, regulations, projects, and activities.[205] This duty requires states to provide all members of the public with adequate opportunity to express their views.[206] States may be required to take additional steps to facilitate the participation of members of marginalized communities.[207]

Duty to Provide Access to Legal Remedies

The third procedural obligation set out in international human rights obligations is the duty of states to provide access to legal remedies. The Universal Declaration of Human Rights and subsequent human rights agreements have established the

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[200] John Ruggie, UNHRC, Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 17th Sess, Annex, Agenda Item 3, A/HRC/17/31 (2011), principles 18–19 [Guiding Principles on Businesses and Human Rights].
[201] UNGA, *Universal Declaration of Human Rights*, GA Res 217A (III), 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 21.
[202] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 25 (entered into force 23 March 1976, accession by Canada 19 May 1976).
[203] Mapping Report, *supra* note 180 at para 36.
[204] Framework Principles Report, *supra* note 2, annex.
[205] *Ibid.*
[206] *Ibid.*
[207] *Ibid.*

principle that states should provide for remedies for violations of protected rights.[208] Many international instruments have applied this principle to human rights that have been infringed by environmental harm.[209]

The duty to provide access to legal remedies is set out in Framework Principle 10, which holds that: "States should provide for access to effective legal remedies for violations of human rights and domestic laws relating to the environment."[210] To accomplish this, states should ensure that individuals have access to judicial and administrative procedures that: (1) are impartial, independent, affordable, transparent, and fair; (2) review claims in a timely manner; (3) have the requisite expertise and adequate resources; (4) provide for a right of appeal to a reviewing body; and (5) issue binding decisions for interim measures, compensation, restitution, and reparation.[211] States should provide the public with information about how to access remedies and should help the public overcome barriers to access such as expense and distance.[212]

The three duties outlined above describe the main procedural obligations existing among best practices at international human rights law. Some of these procedural duties already exist in Canadian law. For example, the *CEAA, 2012* requires environmental assessments for certain designated projects.[213] However, environmental assessment under the *CEAA, 2012* has been criticized as being little more than a "post-planning regulatory hoop"[214] that does not adequately address the interests of all parties affected by a project, including Indigenous peoples. Indigenous peoples across Canada have expressed a lack of trust in the environmental assessment process.[215] Environmental assessment is viewed as being based on flawed planning, a misunderstanding of Indigenous knowledge and Aboriginal and treaty rights, and opaque decision-making.[216] A robust conception of section 7 of the *Charter* informed by procedural duties set out in the Framework Principles could help fill some gaps in existing Canadian law.

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[208] Mapping Report, *supra* note 180 at para 41.
[209] *Ibid.*
[210] Framework Principles Report, *supra* note 2, annex.
[211] *Ibid.*
[212] *Ibid.*
[213] *Supra* note 110, s 6.
[214] Robert B Gibson, "In Full Retreat: the Canadian Government's New Environmental Assessment Law Undoes Decades of Progress" (2012) 30:3 Impact Assessment & Project Appraisals 179 at 183.
[215] Canada, Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa: Environment and Climate Change Canada, 2017) at 26–27.
[216] *Ibid* at 27.

Substantive Obligations

The Special Rapporteur's review of the existing body of international human rights law revealed that states have obligations to protect against environmental harm that interferes with the enjoyment of human rights.[217] Although the content of specific environmental obligations are evolving, two primary duties have become clear: (1) the duty to implement legal frameworks to protect against environmental harm that may infringe human rights, and (2) the duty to regulate private actors to protect against environmental harm.[218]

Duty to Implement Legal Frameworks to Protect Against Environmental Harm

States have obligations to adopt legal and institutional frameworks to protect against environmental harm that can or does interfere with the enjoyment of human rights.[219] These obligations arise from several human rights sources. For example, article 12(2)(b) of the International Covenant on Economic, Social and Cultural Rights provides that states shall take steps to provide for the full realization of rights that include the improvement of all aspects of environmental and industrial hygiene.[220] States therefore have an obligation to adopt measures to protect against environmental harm.

The duty to implement legal frameworks to protect against environmental harm is reflected in Framework Principle 11, which holds that: "States should establish and maintain substantive environmental standards that are non-discretionary, non-retrogressive and otherwise respect, protect and fulfil human rights."[221] These substantive environmental standards should regulate things such as "air quality, the global climate, freshwater quality, marine pollution, waste, toxic substances, protected areas, conservation and biological diversity."[222]

Principle 11 sets out a list of factors to consider in determining whether a state's environmental standards respect, protect, and fulfil human rights. First, standards should be developed via procedures that comply with human rights obligations, including those relating to freedom of expression, information, participation, and

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[217] Mapping Report, *supra* note 180 at para 44.
[218] *Ibid* at para 46.
[219] *Ibid* at para 47.
[220] *Ibid* at para 49.
[221] Framework Principles Report, *supra* note 2, annex.
[222] *Ibid.*

remedy.[223] Second, standards should be consistent with all relevant international environmental, health, and safety standards, such as those set out by the World Health Organization.[224] Third, while standards should take into account the best available science, a lack of full scientific certainty does not justify postponing effective and proportionate measures to prevent environmental harm.[225] Fourth, standards must comply with all relevant human rights obligations.[226] Finally, standards should not strike an unreasonable balance between environmental protection and other social goals given the effect of environmental protection on the full enjoyment of human rights.[227] These factors provide a benchmark against which states' environmental standards can be assessed to determine whether they comply with the obligation to implement a legal framework that respects, protects, and fulfils human rights.

Duty to Regulate Private Actors to Protect Against Environmental Harm

The second substantive obligation of states is to regulate private actors to protect against environmental harm that may infringe human rights. This obligation is found in sources such as the Guiding Principles on Businesses and Human Rights, which requires states to protect against human rights abuses by third parties, including business enterprises, by "taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."[228] The Guiding Principles also states that corporations themselves have responsibilities to protect human rights.[229]

The duty to regulate private actors is set out in Framework Principle 12, which holds that: "States should ensure the effective enforcement of their environmental standards against public and private actors."[230] States should monitor and enforce compliance with standards by investigating and punishing violations of standards by private and public actors.[231] Principle 12 also notes that, in accordance with the Guiding Principles of Businesses and Human Rights, business enterprises have a

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[223] Ibid.
[224] Ibid.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Guiding Principles on Businesses and Human Rights, *supra* note 200, Principle 1.
[229] Mapping Report, *supra* note 180 at para 59.
[230] Framework Principles Report, *supra* note 2, annex.
[231] *Ibid.*

responsibility to respect human rights.[232] This includes a duty to avoid causing adverse human rights impacts through environmental harm, to address such impacts when they occur, and to mitigate adverse impacts that are directly related to their operations.[233]

The duty to implement legal frameworks and to regulate private actors to protect against public harm are two of the main substantive obligations identified by the Special Rapporteur as existing among current international human rights law. As with procedural duties, these substantive duties exist to some extent in Canadian law. However, we need not look any further than to the serious health consequences experienced by members of Aamjiwnaang First Nation living near Chemical Valley for evidence of how existing substantive duties are inadequate to protect the health and well-being of many Canadians. A Canadian court grappling with the question of what a robust conception of the right to a healthy environment under section 7 could entail could look to the Framework Principles for answers as to the substantive content of the right.

Obligations Towards Vulnerable Groups

The third component of international best practices on human rights in the environmental context identified by the Special Rapporteur is obligations towards vulnerable groups. The Human Rights Council has recognized that environmental harm is felt most acutely by vulnerable segments of the population.[234] Children, for example, are less resistant to many types of environmental harm.[235] Of the 5.9 million deaths of children under the age of 5 in 2015, the World Health Organization estimates that more than 1.5 million deaths could have been prevented through the reduction of environmental risks.[236] In addition to health risks, environmental threats like climate change exacerbate existing social and economic inequalities that prohibit the well-being of children.[237] One example of this is that climate change-induced food

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[232] *Ibid.*
[233] *Ibid.*
[234] UNHRC, 16th Sess, 46th Mtg, UN Doc A/HRC/RES/16/11 (2011) at 2.
[235] Framework Principles Report, *supra* note 2, annex.
[236] UNHRC, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 37th Sess, Annex, Agenda Item 3, UN Doc A/HRC/37/58 (2018) at para 15 [Report on Children's Rights].
[237] UNHRC, Analytical Study on the Relationship Between Climate Change and the Full and Effective Enjoyment of the Rights Of The Child, 35th Sess, Annex, Agenda Items 2–3, UN Doc A/HRC/35/13 (2017) at para 50.

insecurity has increased the number of marriages of female children, who are pressured to marry to reduce burdens on their families.[238] Other groups such as women, persons living in poverty, Indigenous peoples and members of traditional communities, the elderly, persons with disabilities, displaced persons, and ethnic, racial, or other minorities are also often at greater risk from environmental harm.[239]

Many human rights instruments, including the Universal Declaration of Human Rights, provide for the right to equal protection under the law, including equal protection under environmental law.[240] As such, states have additional obligations with respect to groups that are particularly vulnerable to environmental harm.[241] These obligations are set out in Framework Principles 3, 14, and 15.

Framework Principle 3 requires the non-discriminatory application of states' obligations. It holds that: "States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment."[242] States must provide for equal access to environmental benefits and ensure that their actions are not discriminatory.[243]

Framework Principle 14 holds that: "States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities."[244] In developing laws and policies, states should consider the ways that some groups are more susceptible to environmental harm.[245] They should also take into account the barriers that some groups face to exercising their human rights.[246] Environmental assessments of proposed projects and policies should include an examination of the impacts on the most vulnerable segments of the population.[247]

Framework Principle 15 recognizes that Indigenous peoples are often particularly vulnerable to environmental harm because of their close relationship with

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[238] Report on Children's Rights, *supra* note 236 at para 26, citing Gethin Chamberlain, "Why Climate Change Is Creating A New Generation of Child Brides" *The Guardian* (26 November 2017), online: <www.theguardian.com/society/2017/nov/26/climate-change-creating-generation-of-child-brides-in-africa>.
[239] Framework Principles Report, *supra* note 2, annex.
[240] Universal Declaration of Human Rights, *supra* note 201, art 7; Mapping Report, *supra* note 180 at para 69.
[241] Mapping Report, *supra* note 180 at para 69.
[242] Framework Principles Report, *supra* note 2, annex.
[243] *Ibid.*
[244] *Ibid.*
[245] *Ibid.*
[246] *Ibid.*
[247] *Ibid.*

the natural environment.[248] Principle 15 requires states to ensure they comply with their obligations to Indigenous peoples and members of traditional communities, including by: (1) recognizing and protecting their rights to land; (2) consulting with Indigenous peoples and obtaining their free, prior, and informed consent; (3) respecting and protecting their traditional knowledge; and (4) ensuring they fairly and equitably share any benefits.[249]

The Special Rapporteur's review of international human rights obligations shows that, despite the lack of a universal declaration recognizing the right to a healthy environment, the existing body of human rights already imposes many duties on states relating to environmental protection. This "greening" of international human rights law has led to several identifiable procedural and substantive obligations, as well as additional obligations towards vulnerable groups. The Framework Principles codify these obligations, providing a strong outline to help states facilitate their practical implementation. As Canadian courts grapple with the question of whether section 7 of the *Charter* protects a right to a healthy environment, the Framework Principles provide a useful guideline for what the content of a robust right might entail.

Importing some of the duties outlined in the Framework Principles into the section 7 analysis could go a long way to addressing some of the challenges outlined in section 3 of this paper. For example, the substantive obligation to create legal frameworks to protect environmental health could address many of the gaps in Canada's environmental regulatory regime. Obligations towards vulnerable groups and procedural obligations like providing access to remedies could help address access to justice issues. While importing the obligations in the Framework Principles into section 7 of the *Charter* would represent a significant expansion of the provision, the section 7 jurisprudence indicates, as the next section demonstrates, that the courts are moving incrementally towards a more robust understanding of section 7.

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[248] *Ibid.*
[249] *Ibid.*

Canadian Jurisprudence Recognizes the Foundations of the Framework Principles

Charter jurisprudence indicates that courts are moving towards a more robust and meaningful role for section 7 and a fuller capacity for the protections of life, liberty, and security of the person.[250] Many of the fundamental principles underlying the Framework Principles have already been adopted into the section 7 analysis. Courts have articulated that section 7 contains both procedural and substantive obligations, and that it requires respect for vulnerable groups. As such, the basic foundations for the importation of the Framework Principles already exist within the section 7 jurisprudence.

Procedural and Substantive Obligations

Canadian courts have held that section 7 of the *Charter* comprises both procedural and substantive obligations. In *Re BC Motor Vehicle Act*,[251] the Supreme Court of Canada held that the phrase "principles of fundamental justice" in section 7 contains procedural and substantive obligations.[252] In that case, British Columbia's *Motor Vehicle Act* created an absolute liability offence for driving while one's driver's licence was suspended. Because the *Act* imposed a penalty of imprisonment for violating the provincial regulatory provision, it was an inappropriate (and therefore unconstitutional) depravation of liberty.[253] At issue was whether the principles of fundamental justice in section 7 include only procedural rights, or whether they also include substantive rights. Lamer J, writing for the majority, held that the principles of fundamental justice were breached by the imposition of imprisonment for an offence that lacked *mens rea*.[254] Lamer J did not characterize this as a procedural issue; the absence of *mens rea* as an element of the offence was a substantive issue.[255] Section 7 was held to prohibit both substantive and procedural injustice.[256]

Obligations Towards Vulnerable Groups

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[250] Young, *supra* note 176 at 5.
[251] [1985] 2 SCR 486, 24 DLR (4th) 536.
[252] *Ibid* at 513.
[253] *Ibid* at 517–18.
[254] *Ibid* at 515.
[255] Peter W Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 SCLR 195 at 198.
[256] *Ibid.*

The jurisprudence has also recognized the need to consider equality issues and how the section 7 analysis affects vulnerable groups. The Supreme Court of Canada has noted that the section 7 analysis should be informed by equality concerns under section 15 of the *Charter*.[257] Section 15(1) of the *Charter* states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[258]

In *New Brunswick (Minister of Health and Community Services) v G(J)*,[259] L'Heureux-Dubé J in a concurring opinion highlighted the importance of equality interests in section 7 issues that disproportionately affect women living in poverty and members of racialized and other disadvantaged groups.[260] L'Heureux-Dubé J stated that:

> in considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.[261]

These statements demonstrate that the section 7 jurisprudence has already adopted the basic principle of non-discrimination that underlies the Framework Principles' calls for the protection of vulnerable groups.

The section 15 jurisprudence also supports an interpretation of section 7 that considers equality interests. In *Andrews v Law Society of British Columbia*,[262] the Supreme

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[257] Young, *supra* note 176 at 12, citing *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, L'Heureux-Dubé J, dissenting; *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 124 [*G(J)*].
[258] *Charter*, *supra* note 16, s 15(1).
[259] *Supra* note 257.
[260] Young, *supra* note 176 at 12.
[261] *G(J)*, *supra* note 257 at para 115.
[262] [1989] 1 SCR 143.

Court held that section 15 is the broadest of all the *Charter* rights.[263] Section 15 "applies to and supports all other rights guaranteed by the *Charter*."[264] As such, section 15 equality interests may be used in interpreting section 7 obligations more broadly to demand state response to the material and social needs of marginalized individuals.[265]

The courts' jurisprudence demonstrates that section 7 contains both procedural and substantive obligations, as well as obligations to consider equality interests of vulnerable groups. These are the basic principles underlying the Framework Principles. A court looking to articulate the content of a right to a healthy environment under section 7 thus has jurisprudential basis for importing some of the duties outlined in the Framework Principles. This is not to say, however, that courts can easily adopt the Framework Principles wholesale into section 7 of the *Charter*. As critics will note, there may be some doctrinal issues in adopting the Framework Principles. These are discussed in the following section.

A Barrier to Implementation: The Positive Rights Debate

One challenge to using the Framework Principles as a guideline for the content of a right to a healthy environment under section 7 is the ongoing debate over whether the *Charter* protects positive rights. Critics of an expansive reading of section 7 argue that the *Charter* only protects negative rights, i.e., the right to be free from state interference.[266] They argue that positive rights (i.e., rights that require the state to take particular action) are not protected by the *Charter*. Many of the duties outlined by the Framework Principles contain positive obligations, such as requiring states to implement legal frameworks, provide information, and regulate private actors. As such, courts looking to the Framework Principles for guidance on the content of a right to a healthy environment under section 7 will likely have to address this issue.

Questions about the existence of positive rights under section 7 should not prohibit the adoption of a robust right to a healthy environment or the use of the Framework Principles as guidance for the content of such a right. This is because the

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[263] *Ibid* at 185, McIntrye J, dissenting but not on this point.
[264] *Ibid*.
[265] Young, *supra* note 176 at 12.
[266] See e.g. Honickman, *supra* note 166.

distinction between positive and negative rights is not always clear-cut. As scholar Margot Young notes, "any tidy scheme whereby judicially protected rights are limited to negative obligations is logically and practically impossible."[267] Some negative rights contain certain positive aspects, such that they cannot clearly be classified as solely negative or positive rights.

For example, the right to be tried within a reasonable time requires governments to spend money to establish efficient judicial institutions.[268] In *Schachter v Canada*,[269] Lamer CJC, writing for a majority of the Supreme Court of Canada, stated:

> Other rights will be more in the nature of "negative" rights, which merely restrict the government. However, even in those cases, the rights may have certain positive aspects. For instance, the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the "fundamental principles of justice" may provide a basis for characterizing s. 7 as a positive right in some circumstances.[270]

Given that positive and negative rights cannot always be distinguished, and that the *Charter* already protects some positive rights, critics' arguments for the protection of negative rights only should not impose a barrier to the recognition of a robust right to a healthy environment under section 7 and the use of the Framework Principles as guidance for its content.

Courts grappling with the question of the content of a right to a healthy environment can find useful guidance in the Framework Principles. The Framework Principles set out procedural and substantive obligations, as well as obligations towards vulnerable groups, that already exist in international human rights laws. The section 7 jurisprudence shows that courts have interpreted section 7 to include many of the fundamental principles underlying the Framework Principles. Thus, while implementing some of the duties outlined in the Framework Principles represents an expansion of section 7 rights, it is not a radical change in course given the courts' existing jurisprudence. Looking to the Framework Principles to articulate a robust

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[267] Young, *supra* note 176 at 43–44.
[268] *Gosselin*, *supra* note 257 at para 218, Bastarache J, dissenting.
[269] [1992] 2 SCR 679, 93 DLR (4th) 1.
[270] *Ibid* at 721.

conception of the right to a healthy environment could take Canada a long way in its journey to strengthen environmental protection.

CONCLUSION

The recognition of a right to a healthy environment under section 7 of the *Charter* would entail the recognition that government action that leads to environmental degradation can cause deprivations of life, liberty, or security of the person just as surely as other forms of state action. Canadian courts have not yet recognized environmental rights under section 7, however, there are no doctrinal issues barring such a finding. The jurisprudence to date supports the conclusion that the courts are open to holding that such a right exists, and may do so in an appropriate case.

The recognition of a right to a healthy environment under section 7 is important because it can strengthen Canada's approach to environmental protection. Research from other countries with constitutionally protected environmental rights is compelling; advantages such as providing an alternative route to access remedies, preventing the rollback of environmental standards, and strengthening environmental laws are tangible benefits that can contribute to improved environmental performance. While a number of challenges may limit the usefulness of section 7 in certain instances, they are not so widespread as to render section 7 a useless tool in the environmental context. Further, implementing some of the Framework Principles, such as substantive obligations to implement legal frameworks and duties towards vulnerable groups could address challenges like gaps in legal protections and access to justice issues. A constitutional environmental right is thus an important tool for addressing environmental harms.

Despite the usefulness of a right to a healthy environment under section 7 of the *Charter*, much remains to be done to clarify and implement the right to a healthy environment.[271] Future work will need to clarify how environmental rights apply to particular issues, such as issues of gender and other types of discrimination, the responsibilities of businesses to protect the environment, and the obligations of states and corporations relating to transboundary environmental harm.[272] At the local level,

[271] Framework Principles Report, *supra* note 2 at para 17.
[272] *Ibid* at para 18.

more work is required to institutionalize support for capacity-building, such as initiatives to support education for environmental decision-makers and to strengthen accountability mechanisms for violations of environmental standards.[273] Questions about the rights of future generations or intrinsic "rights of nature" will need to be addressed.[274] A right to a healthy environment under section 7 of the *Charter* is thus just the beginning of the work to be done to address pressing environmental issues that can no longer be ignored.

In his first report to the General Assembly of the United Nations, Special Rapporteur John H. Knox stated: "Given the importance of clean air, safe water, healthy ecosystems and a stable climate to the ability of both current and future generations to lead healthy and fulfilling lives, global recognition of the right to a safe, clean, healthy and sustainable environment should be regarded as an urgent moral imperative."[275] Canada must do its part. Recognition of a right to a healthy environment under section 7 of the *Charter* is Canada's first step in beginning to rectify its poor record of weak environmental protections.

[273] *Ibid* at para 19.
[274] Knox & Pejan, *supra* note 173 at 5.
[275] Report of the Special Rapporteur, *supra* note 3 at para 59.