

Linking Constitutional and Environmental Rights:  
Applying section 7 of the *Canadian Charter of Rights and Freedoms* to adverse  
environmental impacts

by

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### **Author's Declaration**

I hereby declare that I am the sole author of this thesis. This is a true copy of my thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

## Abstract

Many Canadians are currently exposed to adverse environmental impacts on a regular basis, often from activities that have received government authorization. There has been a recent push from mainstream and political actors to incorporate environmental rights into the Canadian legal system to address this issue. Two proposed methods include the enactment of an *Environmental Bill of Rights* and an amendment to the *Canadian Charter of Rights and Freedoms* (the *Charter*) to constitutionalize an explicit right to a healthy environment. However, there are limitations to both of these approaches. A statutory Bill of Rights does not have the teeth of constitutional rights, and an amendment to the *Constitution* is, due to the strict amendment requirements provided in subsection 38(1) of the *Constitution Act, 1982*, at best a long-term goal.

Section 7 of the *Charter* – 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 – is another option. The case law on section 7 indicates that serious health risks can cause physical deprivations of security of the person. However, there is legal uncertainty in relation to how specific environmental harms may intersect with the security of the person and how these deprivations would violate the principles of fundamental justice.

This thesis concludes that section 7 can apply when the substance of a claim relates to the environment. Specifically, the case law demonstrates that the best argument available for section 7 is that procedural fairness, as a principle of fundamental justice, requires governments to provide specific procedural protections when regulatory approvals pose substantial health risks that interfere with affected individuals' rights to security of the person. Such approval processes must meet the minimum requirements of procedural fairness when section 7 rights are at stake: notice, participation, and the provision of reasons. Further, the rule of law and the rule against arbitrariness require that final decisions about those projects be made rationally. Decisions must reflect the purpose of the legislation that grants power to the decision-makers, and take into account any factually sound evidence – including scientific evidence – that is presented.

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## **Dedication**

To: Travis, Meghann, Amy, Team Potluck (follow your heart) & the coffee shop in EV1.

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# Chapter 1: Introduction

## I: Environmental rights in Canada

Canadian constitutional law has not yet been interpreted in a way that recognizes a relationship between the environment and human rights. There is no legislated national right to a healthy, clean, or safe environment, nor a right to a certain degree of environmental protection. Numerous studies have shown that Canada lags behind most other wealthy nations in terms of environmental protection and performance, and that there is an “urgent need” to improve.<sup>1</sup> Decreased quality of air and fresh water, climate change, and the destruction of biodiversity are serious environmental issues that have been inadequately addressed by Canadian governments and, partly due to a lack of explicit environmental rights, the government is under no legal obligation to take action.<sup>2</sup> Recognizing environmental rights may be a way to impose such an obligation.

The idea of establishing environmental rights in Canada has recently caught political and mainstream attention. At the time of this paper, private member’s Bill C-634, *An Act to Establish a Canadian Environmental Bill of Rights*, had just passed its first reading at the House of Commons.<sup>3</sup> The effect of the Act would be to legally enshrine environmental rights for Canadians and impose a duty upon the federal government to take action to protect the environment. Citizens would be able to seek recourse in the Federal Court for an action against the Government of Canada for “violating the right to a

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<sup>1</sup> David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) at 4-9.

<sup>2</sup> Boyd, *supra* note 1.

<sup>3</sup> Bill C-634, *An Act to Establish and Environmental Bill of Rights*, 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament, 62-63 Elizabeth II, 2013-2014 [Bill C-634].

healthy and ecologically balanced environment.”<sup>4</sup> Nevertheless, even in the unlikely event that the bill passes, there are limitations. First, it is a federal bill, meaning it would only apply to actions within the power of the federal government. According to s. 91 of the *Constitution Act, 1867*,<sup>5</sup> this includes issues related to fisheries and oceans, cross-border pipelines, navigation and shipping, airports, and interprovincial transportation. Powers exclusively within the jurisdiction of the provinces, however, such as mining, forestry, electrical energy, non-renewable resources, property, and generally all matters of a local or private nature within the provinces would not be affected by the legislation.<sup>6</sup> Second, the rights within the bill would be statutory rights, not constitutional. In the words of David Boyd, the author of what is arguably the most substantial body of work on environmental rights in Canada, the difference between statutory rights and constitutional rights is like “lions and housecats – related, but with dramatically difference degrees of strength.”<sup>7</sup> Statutory rights may provide options to individuals whose rights have been violated, but do not guarantee a particular outcome. In contrast, the constitution is the “supreme law”<sup>8</sup> of Canada, and any law or government action that violates the rights protected within it will be found to be of no force or effect. In short, statutory rights may interfere, but only constitutional rights can bind the hands of government.

A final limitation of Bill C-634 is that it is unlikely that the rights contained within it would apply retroactively. Thus, while the bill may be useful for moving

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<sup>4</sup> Bill C-634, *supra* note 3 at ss. 17(c).

<sup>5</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, [*Constitution Act, 1867*].

<sup>6</sup> *Constitution Act, 1867*, *supra* note 5 at s. 92 & 92A(1).

<sup>7</sup> David Boyd, quoted in Megan Bradfield, “Making Sense of the Proposed Canadian Bill of Rights”, Ecojustice, October 30, 2014 (online at: <http://www.ecojustice.ca/blog/making-sense-of-the-proposed-canadian-environmental-bill-of-rights>).

<sup>8</sup> *Constitution Act 1867*, s 52(1).

forward, its protections may not be applicable to projects currently underway, or be available to individuals who have already suffered harm due to adverse environmental impacts.

There has been a recent renewed push from environmental activists to constitutionalize environmental rights, and it has been proposed that the *Canadian Charter of Rights and Freedoms* ought be applicable in the environmental context.<sup>9</sup> The *Charter* is part of the *Constitution* and provides the highest level of protection for human rights in Canada. The *Charter* supplies a set of “uniform national standards for the protection of [a set of] civil liberties [that are] regarded as so important that they should receive immunity, or at least special protection, from state action.”<sup>10</sup> Boyd identifies three potential methods for connecting the *Charter* to the environment. His first choice is through a direct constitutional amendment. The most prominent advocate for this approach is David Suzuki with his 2014 “Blue Dot Tour”, which was largely based on Boyd’s work. At the heart of the tour is an advocacy for a constitutional amendment to explicitly entrench environmental rights within the *Charter*. Suzuki explains that constitutionalization is necessary because “one-off victories against industrial projects, like Site C. Dam or Northern Gateway, will not stop the march of economics towards further environmental harms to our climate, water, and soil.”<sup>11</sup> If successful, Canadians would be able to challenge otherwise lawful government actions in the environmental

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<sup>9</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, [*Charter*].

<sup>10</sup> Peter W Hogg *Constitutional Law of Canada*, 5th ed Vol 2 (Scarborough, Ontario: Thomson Carswell Limited, 2007) at 29-30.

<sup>11</sup> David Suzuki, quoted by the Vancouver Observer (online at: [www.vancouverobserver.com/news/david-suzuki-launches-blue-dot-tour-hoping-alter-canadas-constitution](http://www.vancouverobserver.com/news/david-suzuki-launches-blue-dot-tour-hoping-alter-canadas-constitution)).

sector on the basis that the resulting environmental impacts violate their constitutionally protected rights.

There is a strong argument that amending the *Charter* to include environmental rights is unlikely for several reasons.<sup>12</sup> For one, *Charter* amendments require high levels of consensus among decision-makers.<sup>13</sup> Section 38 provides that in order for a general amendment to pass, the amendment must be authorized by “the Senate, the House of Commons, and a two-thirds majority of the provincial legislative assemblies that have, in the aggregate, at least fifty per cent of the population of all the provinces.”<sup>14</sup> This means that 7 of the 10 provinces must agree to the amendment, which is difficult threshold to meet. According to Andrew Gage, while entrenchment “can be expected to appeal to... idealists and environmental enthusiasts, it would be surprising if [it] were to be given majority support.”<sup>15</sup>

The second approach to constitutionalization identified by Boyd is through a judicial reference.<sup>16</sup> Judicial reference is done by “persuading either Ottawa or a provincial/territorial government to ask the courts whether Canada’s constitution already includes an implicit right to a healthy environment.”<sup>17</sup> While the courts are, as the name of the approach suggests, involved in this process, judicial reference is different from litigation in that the issue is not a direct challenge to a particular action. Rather, the courts

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<sup>12</sup> See: Boyd, *supra* note 1, at chapter 8; Dale Gibson, “Environmental Protection and Enhancement Under a New Canadian Constitution” in Stanley M Beck & Ivan Bernier, eds, *Canada and the New Constitution: The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983) 115, at 126; Colin P Stevenson “A New Perspective on Environmental Rights After the Charter” (1983) 21 Osgoode Hall LJ 390 at 420, states that the “political and economic climate is not conducive” to the enactment of a constitutional environmental right.

<sup>13</sup> Stevenson, *supra* note 12, at 401.

<sup>14</sup> *Charter*, *supra* note 9.

<sup>15</sup> Andrew Gage, “Public Health Hazards and Section 7 of the Charter” (2003) 13 J Env’tl L & Prac 1 at 126.

<sup>16</sup> Boyd, *supra* note 1 at 185.

<sup>17</sup> Boyd, *supra* note 1 at 171.

are asked to provide an opinion as to what the likely outcome would be if an issue came before them. However, there are problems with judicial reference as approach to constitutional environmental rights as well. Because they are not based on actual events, judicial references are, while highly persuasive, not binding. Also, like entrenchment, judicial reference is dependent on government initiative. Finally, the approach asks judges to read a very broadly conceived environmental right – into the *Constitution*. This risks a serious infringement of the separation of powers, an issue further discussed in Chapter 5.

A third option is through section 7 of the *Charter*. Unlike the second option above, the intent here is not to ask the courts to read into the *Charter* a broad, substantive right to a clean environment, but to extend the reach of section 7 to include environmental harms. According to Hamish Stewart, this provision is a “very powerful tool for the protection of rights through litigation rather than through legislative action.”<sup>18</sup> Section 7 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.” Its purpose is to limit government powers to prevent negative impacts on an individual’s “most basic interests”<sup>19</sup> – life, liberty, and security of the person – and to provide recourse for those whose rights have been infringed by government actions. Stewart notes that section 7 provides the strongest tool available in the Canadian legal system for challenging government action. It has, according to Stewart,

opened up grounds for challenging state action that would otherwise have been immune to review on [other] constitutional or administrative grounds. Some of

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<sup>18</sup> Hamish Stewart, *Fundamental Justice* (Toronto: Irwin Law, 2012), at 19.

<sup>19</sup> Stewart, *supra* note 18 at 18.

the Court's most dramatic interventions in Canadian law – its invalidation of the abortion prohibition in the *Criminal Code*, its constitutionalization of basic principles in criminal law, its foray into health care policy – were made possible by the power to review laws for compliance with the substantive principles of fundamental justice... Thus, perhaps more than any other section of the *Charter*, section 7 has increased the law-making power of the courts.<sup>20</sup>

There are four major parts to the section 7 legal framework. First, an impugned government action must be identified to trigger the *Charter* under subsection 32(1) and give rise to a claim. Second, the plaintiff must establish standing to bring a *Charter* claim, either as an individual or in the public interest. Third, there must be a deprivation of life, liberty, or security of the person. There are two requirements for this third step: 1) a negative impact on the right, and 2) a sufficient causal connection between the negative impact and the impugned government action. Fourth, the infringement of the interest must be done in a manner that violates the principles of fundamental justice.

A thorough analysis of how each of these parts of the section 7 analysis relates to the environment has not yet been done, neither in an academic nor in a courtroom setting. There have been suggestions regarding individual elements of the section 7 legal framework, but the pieces have not been put together into a complete argument.

## **II: Thesis purpose and research questions**

The purpose of this thesis is to provide an analysis of how the section 7 legal framework applies in an environmental context. Four primary questions are addressed: what kind of conduct in the environmental sector may trigger the *Charter*, what types of plaintiffs are likely candidates for successful section 7 environmental claims, what facts are required to demonstrate that there has been an infringement of security of the person, and how may the infringement violate the principles of fundamental justice.

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<sup>20</sup> Stewart, *supra* note 18 at 307-08.

The thesis contains a positivist (i.e., neutral) interpretation of environmental, administrative, and constitutional case law from all levels of Canadian courts to identify the elements of a section 7 claim, the accompanying legal tests, and the requirements for success at each step of the way. To be clear, the purpose of this work is to provide a descriptive legal option regarding the idea proposed by Boyd, Collins, and Gage: that individuals exposed to environmental harms may be able to bring a claim against the government through section 7. This piece is distinguishable from the works of Boyd Collins, and Gage as it not primarily a reformist or a prescriptive piece. The purpose here is not to advocate for a particular approach to interpreting section 7, or seek to influence public decision-makers.<sup>21</sup> This has already been done. Rather, this thesis explores the unaddressed issue of whether or not Canadian case law actually upholds the proposition that section 7 can have an environmental application and, if so, what type of evidence a plaintiff must adduce in order to be successful.

### **III: Research Method**

The research method followed in this work is a neutral (positive) legal analysis, with the purpose of providing an opinion regarding the likelihood of success if a question respecting the application of section 7 to environmental harms were to be argued before a court. This is done by analyzing the relevant sources of law, principally case law, and interpreting and applying the statements of law within those sources to hypothesized facts that raise the issue of section 7's application to environmental harm in order to reach a legal opinion. In this case, the most applicable sources of law include cases from the Supreme Court of Canada and other lower-level courts addressing section 7 of the

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<sup>21</sup> Edward L Rubin, "Law and' and the Methodology of Law" (1997) 521 Wis L Rev 521, at 547.

*Charter*, the need for environmental protection, and procedural fairness in both a constitutional and administrative law context. The analysis is supplemented with references to the legal literature on section 7. This research did not include a comparative law approach. While case law from other jurisdictions may provide insight into the interpretation of section 7, a full analysis of the approach to similar legal questions in other jurisdictions other is beyond the scope of this paper, which is intended to focus on the implications of Canadian section 7 jurisprudence for environmental rights.

International law is relevant insofar as it has been used to inform section 7 analysis by Canadian courts, but again this paper does not independently examine the international human rights rules surrounding environmental rights.

The general approach to legal research consists of three main phases: i) identifying the issue, ii) the library or research phase, and iii) application or analysis phase. These three steps and how they were employed for this thesis are discussed in greater detail in Appendix I.

#### **IV: Thesis outline**

There are six remaining chapters in this thesis. Chapter 2 provides the background information relevant to this discussion, including a review of relevant section 7 and environmental literature, as well as examples of relevant cases that have been brought before the courts in Canada. Chapter 3 contains an overview of case law containing judicial statements regarding the significance of environmental protection in Canada. Chapter 4 constitutes the bulk of this thesis, and sets out the legal framework for section 7 and how that framework relates to the environment. Chapter 5 provides a sample application of the argument to environmental regulatory approval processes. Chapter 6

addresses some of the primary challenges that future plaintiffs will likely face when developing their arguments, and elaborates on the relationship between administrative and constitutional law that is introduced in Chapter 4. Chapter 7 concludes and provides suggestions for further research.

Overall, it is concluded that section 7 *can* be successfully applied when the substance of a claim relates to the environment. Specifically, the case law demonstrates that the best argument available for section 7 is that procedural fairness, as a principle of fundamental justice, requires governments to provide certain procedural protections when regulatory approvals pose substantial health risks that interfere with affected individuals' rights to security of the person.<sup>22</sup> It appears likely that such approval processes require the minimum requirements of procedural fairness when section 7 rights are at stake: notice, participation, and the provision of reasons. Additionally, the rule of law and the rule against arbitrariness require that final decisions about those projects be made rationally. Decisions ought to reflect the purpose of the legislation that grants power to the decision-makers, and take into account any factually sound evidence – including scientific evidence – that is presented.

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<sup>22</sup> Security of the person is the most applicable interest to this context, given that liberty is generally associated with risk of incarceration, and a risk to life requires a much higher burden of proof than a risk to security of the person. See: Stewart, *supra* note 18.

## Chapter 2: Background

### Broaching section 7 and the environment

As stated, the idea of applying section 7 to the environment has not been given a large amount of attention and, somewhat surprisingly, there is little academic work directly related to the application of the *Charter* to an environmental context. To date, it appears that only three legal scholars have explicitly discussed the approach: David Boyd, Lynda M. Collins, and Andrew Gage. Works both citing, and cited by, these authors were consulted, and online searches including key search terms such as *Charter*, security of the person, fundamental justice, and environment were performed to determine whether or not other scholars had written on this topic. Other relevant works were not found, indicating that the application of section 7 to the environment had not yet been answered elsewhere.

Boyd proposes that the right to a healthy environment could be constitutionalized “through a lawsuit arguing that some specific form of ecological harm (such as air pollution) violates a right that is already explicitly protected by the *Canadian Charter of Rights and Freedoms*.”<sup>23</sup> Specifically, he suggests that there may be an “implicit constitutional right to a healthy environment, most likely vis-a-vis section 7,”<sup>24</sup> and that specific environmental harms ought to be capable of violating this right. For example, he argues that the “intrusive presence of harmful levels of toxic substances (such as mercury

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<sup>23</sup> Boyd, *supra* note 1 at 176.

<sup>24</sup> Boyd, *supra* note 1 at 176.

or PCBs) in a person's body could... be considered a violation of the right to a bodily integrity and therefore a potential violation of section 7."<sup>25</sup>

Collins advances an approach called an "ecologically literate reading of human rights laws."<sup>26</sup> She defines ecological literacy as "the basic understanding of the functioning of ecosystems, including the role that human beings play in the natural world",<sup>27</sup> and argues that it should be practiced when interpreting and applying all existing laws. Collins proposes that the right to a safe environment may already be a free-standing human right under the Canadian common law, with one example being under section 7 of the *Charter*,<sup>28</sup> and argues that state-sponsored environmental harm resulting in an increase in the risk of illness or death to an individual or community is likely a *prima facie* violation of section 7. While she suggests that this common law right may eventually give rise to substantive, statute-recognized entitlements – an argument that is beyond the scope of both Collins' and this paper – she declares that "it is clear that, at a minimum, the right to environment should be used as an interpretive aid in construing existing provisions in Canadian constitutional... law."<sup>29</sup> Thus, her approach does not require any entrenchment of new rights through amendments or new legislation, but a broad recognition that existing rights, such as *Charter* rights, "may be violated through environmental harm, and must be protected from such harm."<sup>30</sup>

Gage looks at public rights under section 7 in his work. He contends that the scope of section 7 ought to extend to protecting members of the public against

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<sup>25</sup> Boyd, *supra* note 1 178.

<sup>26</sup> Lynda M Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26 Windsor Rev Legal Soc Issues 7 at 7.

<sup>27</sup> Collins, *supra* note 26 at 7.

<sup>28</sup> Collins, *supra* note 27 at 20.

<sup>29</sup> Collins, *supra* note 27 at 20.

<sup>30</sup> Collins, *supra* note 27 at 10.

government decisions that expose individuals to serious public health risks, such as a toxic environment.<sup>31</sup> He argues that section 7 is “sufficiently broad to protect against general threats to public health, notwithstanding the public nature of such a right.”<sup>32</sup>

While Boyd, Collins, and Gage each suggest there could be a positive role for section 7 in addressing environmental harms, none of their work contains a comprehensive legal analysis of the requirements for a section 7 claim or sets out precisely how such requirements might apply in an environmental context. The majority of Boyd’s work, for example, is in relation to the entrenchment of environmental rights into the *Charter*. Given that section 7 is not a large focus of his work, his analysis of the application of the provision to environmental rights is understandably incomplete. He provides a brief overview of the steps involved in a section 7 claim, but does not identify or apply the legal tests for each step. Significantly, his work lacks an analysis of the principles of fundamental justice, a major element of section 7. More substantially, it does not seem plausible that a favourable ruling for an environmental section 7 applicant can have the sort of far-reaching impact on environmental governance in Canada that he envisions throughout his work.

The pith of Gage’s work is the development of collective rights and a consideration of whether the application of the *Charter* extends beyond the individual and can be triggered by a risk to the public at large. The crux of his argument is not on bridging the gaps between section 7 and the environment, but on extending the scope of section 7 beyond the individual and into the realm of public health. There are also three elements missing from his analysis of section 7. First, like Boyd, he does not

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<sup>31</sup> Gage, *supra* note 15 at 1.

<sup>32</sup> Gage, *supra* note 15 at 2.

comprehensively identify nor apply the legal tests for establishing an infringement of section 7. Second, while he proposes that a prohibition against posing serious health risks to the public ought to be a principle of fundamental justice in itself, he provides no analysis of how the current state of the common law supports this proposition. Finally, he does not address the existing court-identified substantive principles of fundamental justice and, given that his work takes a public law focus, how they may apply in an environmental context.

Collins' work provides what is arguably the most complete work on section 7 in the environmental context. However, there are also elements missing from her analysis. Primarily, her discussion of triggering section 7 does not discuss the legal tests for establishing physical and psychological breaches of security of the person and the type of evidence might be required in order to fulfill the requirements of these tests. In addition, her discussion of the principles of fundamental justice does not mention two major substantive principles that have been identified by the Court: the rules against overbreadth and vagueness. While these principles are not necessarily the best avenues for success, they remain important components of section 7 jurisprudence and require attention.

A key topic that is lacking across the literature is a discussion of the law governing procedural fairness as a constituent part of section 7. It is unclear in the literature how the rules of administrative law, judicial review of administrative decision-making processes, and the common law tests regarding the content of the duty of fairness may assist in expanding section 7 to the environmental context. Given that most potential section 7 claims relating to the environment will be connected to some sort of

administrative decision-making process, the role of procedural fairness warrants a thorough exploration. Further, the issue of causation and how it might be established in the environmental context is not fully addressed, and discussions on the applicable principles of fundamental justice are sparse. The omission of these issues in the literature may be attributable to the fact that three leading section 7 cases – *Insite*, *Bedford*, and, most recently, *Carter* – containing in-depth descriptions of substantive principles of fundamental justice were released after the works of Boyd, Collins, and Gage had been written.<sup>33</sup> However, the SCC explicitly sets out a test for recognizing and establishing ‘new’ principles of fundamental justice in *Malmo-Levine*, to which Collins, Boyd and Gage make no reference.<sup>34</sup>

There is a final similar component among Collins’, Boyd’s, and Gage’s analyses that separate their work from the analysis in this thesis. Their works are each primarily reform pieces, actively promoting the idea of implementing constitutional protection against state-sponsored environmental harms. The authors do not provide a neutral legal opinion on whether or not the approaches advocated for will actually be successful in front of a court of law. Thus, while use of section 7 for environmental purposes has been thrice identified as a worthwhile goal, a clear roadmap to (potential) success has not yet been drawn..

### **Section 7 on the ground: types of cases going forward**

Outside of the literature, more and more individuals have demonstrated interests in pursuing section 7 claims of their own. Boyd provides an overview of the earlier unsuccessful cases where applicants sought to engage section 7 rights in furtherance of

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<sup>33</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5, [*Carter*].

<sup>34</sup> *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571, [*Malmo-Levine*].

environmental protection.<sup>35</sup> Despite the lack of success for these plaintiffs, a look these and other recent cases shows that the environmental legal landscape continues to push Canadians into bringing rights-based environmental claims.

Take, for instance, a case called *Kelly v. Alberta*.<sup>36</sup> The plaintiffs in *Kelly* are residents of a community situated within a few kilometers of proposed sour gas wells in Alberta. In 2008, the Alberta Energy and Utilities Board conditionally approved the construction of two wells in an area with a “higher than normal density of rural residential homes and farms,”<sup>37</sup> despite evidence demonstrating an above average risk of serious health effects to the nearby residents. The plaintiffs appealed the authorization to the Alberta Court of Appeal on the grounds that the Board “acted without jurisdiction and erred in law by requiring residents to voluntarily relocate or continue to live in their homes exposed to an unacceptable risk during the drilling and completion of the wells.”<sup>38</sup> Interestingly, the Court noted that the Board’s “finding of fact... gave rise to [a] section 7 argument... [and that] it is at least arguable that the Applicants should be entitled to mount an argument on appeal that section 7 may now be invoked and that an infringement be made out”.<sup>39</sup> The finding of fact was that the plaintiffs would be exposed to an “unacceptable” level of harm due to exposure to H<sub>2</sub>S, a gas which is life threatening at very low concentrations, and, should the gas escape and ignite, to SO<sub>2</sub>, which is also a hazardous substance, should the project move forward. Fortunately for the plaintiffs, the project was ultimately abandoned. However, there are inevitably many others facing circumstances similar to those the Kellys and their neighbours faced, and,

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<sup>35</sup> For a review of the full list of unsuccessful cases, see David Boyd, *supra* note 1 at Chapter 8.

<sup>36</sup> *Kelly v Alberta*, 2008 ABCA 52 (2008), 34 CELR (3d) 4, [*Kelly*].

<sup>37</sup> *Kelly*, *supra* note 36 at para 15.

<sup>38</sup> *Kelly*, *supra* note 36 at para 15.

<sup>39</sup> *Kelly*, *supra* note 36 at para 17.

because this case did not proceed, it is unclear how the section 7 argument would have played out.

The construction of wind turbine generation farms across Southern Ontario has been the source of anguish for many families living close to the structures.<sup>40</sup> Scotty and Jennifer Dixon, Scott and Tricia Drennan, and Ken and Sharon Kroeplin were concerned about the negative effects associated with industrial wind operations, including “sleep disturbance, stress, headaches, nausea, and tinnitus”.<sup>41</sup> The Director of the Ministry of the Environment issued renewable energy approvals to several wind turbines farms under the *Environmental Protection Act*.<sup>42</sup> The plaintiffs argued that the government’s authorization of the construction of the wind turbines essentially allowed the alleged health risks to “come into their neighbourhoods.”<sup>43</sup> The process for issuing the approvals did not require the Director to solicit public participation or consultation, meaning that the plaintiffs’ concerns were not heard or taken into consideration before the authorization was granted. The plaintiffs recently argued in front of the Ontario Superior Court of Justice that the approval process violated their section 7 rights in relation to how serious impacts to human health were considered. However, the plaintiffs faced fatal evidentiary problems as they were unable to adduce any expert evidence corroborating their personal claims of health risks, and thus the approval process was not found to expose the plaintiffs to an infringement of security of the person. The claim was ultimately unsuccessful, and wind turbines continue to pop up across the province.

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<sup>40</sup> See, for example, Health Canada, *Wind Turbine Noise and Health Study* [July 2012] Environmental And Workplace Health < <http://www.hc-sc.gc.ca/ewh-semt/noise-bruit/turbine-eoliennes/index-eng.php>>.

<sup>41</sup> *Dixon v Ontario (Director, Ministry of the Environment)*, 2014 ONSC 7404 at para 14, [*Dixon*].

<sup>42</sup> *Environmental Protection Act*, RSO 1990, c E-19 [*EPA*].

<sup>43</sup> *Dixon*, *supra* note 41.

An ongoing case involves Ronald Plain and Ada Lockridge of the Aamjiwnaag First Nation.<sup>44</sup> These individuals seek judicial review of a decision of the Ministry of the Environment to approve air pollutant releases “absent an assessment and minimization of the cumulative effects of pollution”<sup>45</sup> in Sarnia, Ontario. Sarnia is an industrial municipality. The municipality is better known as “Chemical Valley” due to the numerous “refineries, petrochemical facilities, and other heavy industries” present there, the emissions of which have left Sarnia with the worst air quality in Canada.<sup>46</sup> The reserve lands of the Aamjiwnaag people are located within several kilometers of Sarnia, and the applicants allege that the increase in air pollutants – including sulfur dioxide – resulting from the approval will contribute to the already-existing serious risks to their mental and physical health and well-being, and thus infringes their rights to life, liberty, and security of the person.<sup>47</sup> Specifically, the plaintiffs refer to health surveys that demonstrate that “residents of Aamjiwnaag are suffering numerous health impacts, including high rates of asthma (22% of children and 17% of adults, which is well above the Ontario and national average), birth defects, miscarriages and stillbirths, skin rashes, chronic headaches, high blood pressure, cancers, and skewed birth ratios.”<sup>48</sup> Not only are the locals suffering from these physical impacts, but they have also “lost a great deal of

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<sup>44</sup> Court file No. 528/10, Ontario Superior Court of Justice, between Ada Lockridge and Ronald Plain –and- Director, Ministry of the Environment, Her Majesty the Queen in Right of Ontario, (Amended) Notice of Application to Divisional Court for Judicial Review (January 10, 2012) [Lockridge and Plain]. See also: Collins 2013, *ibid* at 82, ref to P Hamilton, ‘Sarnia Takes Title for Worst Air in Canada’ [2011] Ecojustice <<http://www.ecojustice.ca/blog/sarnia-takes-title-for-worst-air-in-canada>> accessed 15 July 2012.

<sup>45</sup> Lockridge and Plain, *supra* note 44 at 4-5.

<sup>46</sup> Lynda M Collins, “Security of the person, peace of mind: a precautionary approach to environmental uncertainty” (2013) 4:1 *Journal of Human Rights and the Environment* 79 at 82 (Collins 2013).

<sup>47</sup> Lockridge and Plain, *supra* note 44 at 3.

<sup>48</sup> Lockridge and Plain, *supra* note 44 at 14.

personal autonomy and control over their health and well-being as a result of the pollution.”<sup>49</sup> At the time of this paper, the case had yet to be heard before a court.

In summary, the idea of applying section 7 to the environment is not a new one. In scholarship, section 7 has been proposed as a potential venue for pursuing substantive environmental rights, as a way for influencing the interpretation of human rights, and as a way to prevent public health risks. However, section 7 in an explicit environmental context has yet to be rigorously explored and no arguments in front of a court of law have been successful to date. Thus, the potential for section 7 for bringing change to the Canadian environmental legal landscape is unclear. The purpose of the remainder of this thesis is to provide clarity on this issue.

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<sup>49</sup> Lockridge and Plain, *supra* note 44 at 14.

## Chapter 3: Words from the judiciary on the environment

Judges have been turning their minds to the need for and value of environmental protection for several decades. Boyd points this out, noting that courts have

a strong track record in environmental cases [and have] explicitly referred to the right to a safe environment in several cases. [Also, they] frequently [rely] on international and comparative law... in interpreting the *Charter*, and both of these sources of law support recognition of an implicit right to a healthy environment. [Finally], the court describes the constitution as a “living tree” and emphasizes the need to interpret the document progressively over time to meet changing circumstances.<sup>50</sup>

Indeed, case law and literature demonstrate that policy arguments related to the merits of environmental protection have been taken into consideration by several courts across Canada and, not insignificantly, many of these comments have come from decisions of the Supreme Court of Canada. This chapter provides an overview of cases from the SCC that discuss the importance of environmental protection, as well as lower-level courts from other jurisdictions that have relied upon these statements in their own judgments. The cases selected for discussion in this section were either originally identified by Boyd or Collins as being important cases for the development of an environmental ethic among the courts, or were found by noting up those cases to find additional cases reflecting the sentiments of the SCC regarding the environment.

As early as 1978, the SCC took note of the harms associated with pollution. In *Sault Ste Marie*, the defendant – the City of Sault Ste Marie – was charged with polluting contrary to the *Ontario Water Resources Commission Act* by disposing of refuse from the city into a creek.<sup>51</sup> The Court held that when the issue is a public welfare offence, as was

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<sup>50</sup> Boyd, *supra* note 1 at 181.

<sup>51</sup> *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299, [*Sault Ste Marie*], ref to *Ontario Water Resources Commission Act*, RSO 1970, c 332.

the case here, the Crown should not have to demonstrate wrongful intention of the defendant in order to establish that the offence had been committed. As stated by Dickson J., “[the] prevention of pollution of lakes, rivers and streams... is of great public concern... Natural streams which formerly afforded “pure and healthy” water for drinking or swimming purposes become little more than cesspools when riparian factory owners and municipal corporations discharge into them filth of all descriptions.”<sup>52</sup> *Sault Ste Marie* established a new standard of criminal liability in order to deal with negligence of directors and officers, and has become a landmark in criminal negligence law. The fact that the need for adequate pollution control merited a fundamental shift to a prominent area of law speaks to the Court’s recognition of the importance of environmental protection.

Ten years later, in *Crown Zellerbach*, the SCC found that the control of marine pollution was a “matter of concern to Canada as a whole”,<sup>53</sup> and was important enough to trigger the constitutional doctrine of national concern. In this case, the challenge was in regards to a provision in the federal *Ocean Dumping Control Act* that prohibited the dumping of any substance at sea except in accordance with the terms and conditions of federally authorized permits.<sup>54</sup> The plaintiff charged with dumping argued that the provision was unconstitutional on the grounds that the prohibition permitted the federal government to act outside of its constitutionally imposed jurisdiction. The Court disagreed, explaining that the issue addressed by the legislation – marine protection – was

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<sup>52</sup> *Sault Ste Marie*, *supra* note 51.

<sup>53</sup> *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, [1988] SCJ No 23, at para 37.

<sup>54</sup> *Ocean Dumping Control Act*, SC 1974-75-76, c 55 at s 4(1).

important enough for the federal government to be able to interfere under the doctrine of peace, order, and good government as a matter of national concern.<sup>55</sup>

In *Sparrow*, a member of the Musqueam Indian Band was found to have an aboriginal right to fish with a drift net.<sup>56</sup> However, he was only able to exercise this right to fish to the extent that it did not interfere with conservation measures. The SCC ruled that environmental concerns in fisheries management must be given priority over constitutionally protected Aboriginal rights because, according to the Court, the “justification of conservation and resource management... is surely uncontroversial.”<sup>57</sup>

In the opening statement of *Oldman River*, La Forest J. states that “the protection of the environment has become one of the major challenges of our time.”<sup>58</sup> The appellant environmental group sought to compel the federal Minister of Fisheries and Oceans to require the province of Alberta to prepare and submit for federal review an environmental assessment for the construction of a dam on the Oldman River by the province of Alberta. The appellants argued that an environmental assessment was mandatory for compliance with the federal Environmental Assessment and Review Process Guidelines Order. Ultimately the Court’s decision came down to questions of jurisdiction regarding the Order, not the province’s environmental obligations and the Minister was not required to implement and comply with the Order. However, La Forest J. provides some helpful obiter, stating that, “surely the potential consequences for a community’s livelihood,

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<sup>55</sup> In *Attorney-General for Ontario v Canada Temperance Federation*, [1946] AC 193, Lord Watson explained that the national concern doctrine, as a branch of peace, order, and good government provided for in s. 91 of the *Constitution*, *supra* note 5 allows the federal government to interfere with matters that have, since the enactment of the *Constitution* in 1867 have ceased to be merely local or provincial, and have become matters of national concern.

<sup>56</sup> *R v Sparrow*, [1990] 1 SCR 1075, [1990] SCJ No 49, (SCC) [*Sparrow*].

<sup>57</sup> *Sparrow*, *supra* note 56 para 73.

<sup>58</sup> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at para 95, [1992] SCJ No 1, (SCC), [*Oldman River*] at para 1.

health, and other social matters from environmental change are integral to a decision-making on matters affecting environmental quality.”<sup>59</sup> He takes note of the explicit connection between impacts to the environment and human health, a necessary component of an environmental application of section 7.

In 1995, the SCC released *Canadian Pacific*.<sup>60</sup> This case arguably contains some of the most influential judicial statements in support of environmental protection initiatives in Canada. Here, the respondent was charged under section s. 13(1)(a) of Ontario’s Environmental Protection Act, which prohibits pollution “of the natural environment for any use that can be made of it.” The respondent was responsible for uncontrolled burns, which resulted in dense smoke escaping onto his neighbours’ properties. The respondent appealed the charges, claiming that the prohibition was vague and overbroad and violated his rights to section 7. The majority of the Court upheld the impugned section of the Act, despite recognizing its potentially broad application, because “the objective of environmental protection is ambitious in scope [and the] legislature is justified in choosing equally ambitious means for achieving this objective.”<sup>61</sup> Gonthier J., quoting a statement by the Law Reform Commission of Canada, writes that “environmental protection has emerged as a fundamental value in Canadian society [and that the] right to a safe environment [is a] fundamental and widely shared value [that is] seriously contravened by some environmental pollution... It is increasingly understood that certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health.”<sup>62</sup>

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<sup>59</sup> *Oldman River*, *supra* note 58 at para 39.

<sup>60</sup> *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031, [1995] SCJ No 62 (SCC), [*Canadian Pacific*].

<sup>61</sup> *Canadian Pacific*, *supra* note 60 at para 55.

<sup>62</sup> *Ibid.*

Everyone, according to the Court, is “aware that individually and collectively, we are responsible for preserving the natural environment.”<sup>63</sup>

In *Hydro-Quebec*, the SCC held that environmental protection is of “superordinate importance.”<sup>64</sup> Similar to the issue in *Canadian Pacific*, the court ruled that the need for environmental protection was significant enough to support broadly worded legislation.<sup>65</sup> In this case, the accused had released polychlorinated biphenyls (PCBs) into a body of water and was charged under the *Canadian Environmental Protection Act* for releasing a toxic substance into the environment.<sup>66</sup> The accused claimed that the criminal prohibition was unconstitutionally broad, specifically the terms “toxic substance” and “environment”. Further, environmental matters were not, according to the defendant, criminal matters and thus the Act was ultra vires the criminal power of the federal government under s. 91 of the *Constitution*. La Forest J., speaking for the majority, disagreed. The Court upheld the provision and reasoned that the protection of the environment “constitutes a wholly legitimate public objective in the exercise of criminal power.” La Forest J. expressed concerns over allocating legislative power over the environment exclusively to the provinces in a manner that “prevented Parliament from exercising... its role in protecting the basic values of Canadians regarding the environment.”<sup>67</sup> Further, Lamer C.J., although writing in dissent, nonetheless shared La Forest J.’s concern for the protection of the environment and stated that environmental protection is “one of the major challenges of our time.”<sup>68</sup> Thus, while the 5-4 split in

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<sup>63</sup> *Ibid.*

<sup>64</sup> *R v Hydro-Quebec*, [1997] 3 SCR 213 at para 85, [1997] SCJ No 76, La Forest J, [*Hydro-Quebec*].

<sup>65</sup> *Hydro-Quebec*, *supra* note 64 at para 123.

<sup>66</sup> *Canadian Environmental Protection Act*, RSC 1985, c 16 (4<sup>th</sup> Supp), at s. 67.

<sup>67</sup> *Hydro-Quebec*, *supra* note 64 at para 154.

<sup>68</sup> *Hydro-Quebec*, *supra* note 64 at para 61, Lamer CJ.

*Hydro-Quebec* almost dismissed key provisions a leading piece of legislation providing for environmental protection in Canada, a concern noted by Boyd, both the majority and dissenting judgments actually reinforce the significance of effective environmental governance.

The Newfoundland Supreme Court – Court of Appeal has also commented on the urgency for improved environmental stewardship. In *Labrador Inuit Association*, the plaintiff Association appealed a decision of the Minister of Environment and Labour where a proposed road and airstrip were deemed to be separate undertakings from a proposed mining development for the purposes of environmental assessment.<sup>69</sup> Due to the relatively small size of these undertakings, this decision would relieve the development of both the road and airstrip from the environmental assessment process for the mining project altogether. The Court overturned the Minister’s decision, ruling that the road and airstrip were not separate works, but part of the overall mining project and were to be incorporated into the environmental assessment. In both the opening and closing sections of the judgment, the Court stressed that reconciliation of the use of resources with environmental protection and preservation is, quoting La Forest J., “one of the major challenges of our time.”<sup>70</sup> In recent years, according to the Court, society has been “left to grapple with the deleterious, and at times tragic, effects of unbridled development on the health and security of its residents and upon the environment”, and noted that as “the harmful effects of Amazonian deforestation; of damage to the ozone

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<sup>69</sup> *Labrador Inuit Assn v Newfoundland (Minister of Environment and Labour)*, [1997] NJ No 223 at paras 3 & 83, 152 DLR (4<sup>th</sup>) 50, 25 CELR (NS) 232 (NLCA), [*Labrador Inuit Association*].

<sup>70</sup> *Labrador Inuit Association*, *supra* note 69 at paras 3 & 83, ref to *Oldman River*, *supra* note 58 at 16-17.

lawyer; and, of acid rain become increasingly apparent, the urgency of controlling the destruction of the earth's environment is brought home.”<sup>71</sup>

In *Spraytech*, the plaintiffs challenged the Town of Hudson's jurisdiction to create regulations about the use of pesticides.<sup>72</sup> This case was sparked by citizens' concerns with alleged health risks caused by non-essential uses of pesticides within town limits. The SCC stated that “our common future, that of every Canadian community, depends on a healthy environment”.<sup>73</sup> The Court upheld the by-law, reasoning that environmental governance is complicated and the municipality was not acting outside of its powers. However, the merits of the municipality's actions and the effects of the pesticides on the environment and the health of Hudson's citizens were not related to the issue of jurisdiction, and thus it is unclear whether or not these considerations would be taken into account for a final decision had the issue been on point.

In *Canfor*, the SCC explains that the value of the environment extends beyond its “economic value,”<sup>74</sup> and asserts that environmental protection is a “fundamental value in Canadian society.”<sup>75</sup> In this case, the province of British Columbia sought damages from Canadian Forests for the valuation of trees that were burnt in a forest fire. Lebel J. stated that the trees had “intrinsic value at least equal to their commercial value, despite their non-commercial use.”<sup>76</sup> Crown counsel only plead that its entitlement was that of the landowner of a tract of forest, and thus the Court limited its analysis to those claims regarding compensation for commercial value. It is unclear, then, whether and how the

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<sup>71</sup> *Labrador Inuit Association*, *supra* note 69 at paras 5-6.

<sup>72</sup> *114957 Canada LtEe (Spraytech, Societe d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] SCJ No 42, [*Spraytech*].

<sup>73</sup> *Spraytech*, *supra* note 72 at para 1.

<sup>74</sup> *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38, [2004] 2 SCR 74, [*Canfor*], at paras 63-84.

<sup>75</sup> *Canfor*, *supra* note 74 at para 217.

<sup>76</sup> *Canfor*, *supra* note 74 at para 157.

Court would have granted damages aside from commercial value, and what a remedy related to the intrinsic value of the environment might look like. That said, what *is* clear from this case is that the Court was willing to hear and accept arguments related to the intrinsic value of the environment.

Each of these cases demonstrates that Canadian courts have not shied away from integrating environmental values into decision-making processes. Indeed, members of the judiciary across Canada have relied upon these values to expand upon levels of criminal liability; to defend the implementation of the constitutional doctrine of national concern; to define the limits of constitutionally protected Aboriginal rights; to connect environmental impacts to human health; to uphold broadly worded legislation from all levels of government, including provincial environmental protection legislation, federal criminal prohibitions, and municipal by-laws; to interfere with administrative decisions; and to recognize the intrinsic value of natural landscapes. Courts have explicitly stated that there is a connection between human rights and the environment, and that this connection ought to inform environmental decision-making processes. While language supporting this connection has yet to be used in a section 7 context, the ongoing expansion of section 7 into novel circumstances in order to address the “changing circumstances” of society and the increased use of the section 7 language – ‘fundamental’ – in the environmental context demonstrates that courts may, in appropriate circumstances, be willing to hold that environmental impacts can cause unconstitutional interferences with security of the person.

## Chapter 4: The section 7 legal framework

There are several reasons for why Boyd, Gage, and Collins have identified section 7 as the most suitable provision for connecting human rights to environmental harms. As explained by Stewart, section 7

has proved to be one of the most fertile, even protean, sections of the *Charter*, as its very general language has made it the source for numerous constitutional claims that might be difficult to assert under other sections of the *Charter*. ... Some of the Court's most dramatic interventions in Canadian law – its invalidation of the abortion prohibition in the *Criminal Code*, its constitutionalization of basic principles in criminal law, its foray into health care – were made possible by the power to review laws for compliance with [the] principles of fundamental justice. ... Perhaps more than any other section of the *Charter*, section 7 has increased the law-making power of the courts.<sup>77</sup>

Section 7, then, appears to be one of the most likely venues for substantially influencing the exercise of government authority when human rights are involved.

This chapter provides a comprehensive analysis of the section 7 legal framework in an environmental context. Again, a rigorous analysis of this type has not yet been done. In this thesis, all cases from the SCC discussing section 7 and/or the environment were considered. Completeness was ensured through reading treatises prepared by leading section 7 scholars in Canada, and by noting up all SCC section 7 cases on LexisNexis and CanLii to take note of any development of the law.

Because there are no analogous cases addressing both section 7 and the environment beyond the first three elements of the framework, several aspects of the legal opinion provided in this thesis rely on analogous reasoning. The overall likelihood of success of any argument will depend upon the specific circumstances of the case going forward.

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<sup>77</sup> Stewart, *supra* note 18 at 307.

The steps for a section 7 claim can be broken down into five parts. First, there must be a *Charter*-triggering government action. Second, a plaintiff must be able to establish standing. Third, there must be an infringement of the plaintiff's security of the person. Fourth, the infringement must violate the principles of fundamental justice. A plaintiff who can complete these first four steps will have successfully demonstrated a breach of section 7. The government defendant may then attempt to defend the infringement under s. 1 of the *Charter*.

### **Step 1: Section 32(1) – Matters within government authority**

Section 32(1) provides that the *Charter* applies “to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and... to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.” The effect of subsection 32(1) is that every action taken by a government body – whether federal, provincial, or municipal – is subject to the *Charter*. Case law demonstrates that a wide range of conduct associated with government can satisfy the test for governmentality and constitute a “matter” for the purpose of subsection 32(1). While the provision applies to the entirety of the *Charter*, there are types of government action that are more suited to section 7 than others. Therefore, the types of actions discussed in this Chapter are limited to those actions that are most likely to come up in the environmental sector.

For most of the 80's, section 7 as one of the “legal rights”<sup>78</sup> provided by the *Charter* was interpreted to apply only to government matters relating to the

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<sup>78</sup> Ss. 7 – 14 of Part 1 of the *Charter* fall under the heading “Legal Rights”.

administration of justice. The administration of justice refers to “the state’s conduct in the course of enforcing and securing compliance with the law”,<sup>79</sup> generally referring to criminal and quasi-criminal offences or procedures. Offences under the *Criminal Code of Canada* and criminal procedures were the most common matters to be challenged because, understandably, placing someone in prison has a serious impact on her or his personhood. An incarcerated individual has effectively been deprived of the right to liberty, and an individual subject to arrest in a public place, intense police interrogation, or a strip search suffers a violation of security of the person. Due to the risk of incarceration and the restrictions on liberty throughout the criminal process (even before a finding of guilt), both politicians and judges have long recognized that it is imperative that any such restrictions be done in a fair and transparent manner that is in compliance with the principles of fundamental justice.

Since these early *Charter* days, the scope of s.7 has been interpreted more broadly. In both *G(J)* and *Blencoe*, the SCC confirmed that section 7 now applies beyond the criminal context and into other areas where state or state-sponsored actions have the potential to infringe life, liberty, or security of the person.<sup>80</sup> Thus, if there has been a negative impact on a section 7 interest in a manner that is not in accordance with the principles of fundamental justice, the provision is triggered. It does not matter whether the breach occurred within criminal or quasi-criminal matters, the administration of justice, administrative proceedings, or otherwise. Given that most environmental

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<sup>79</sup> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 65, (available on CanLII), [*G(J)*].

<sup>80</sup> *G(J)*, *supra* note 80; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, [*Blencoe*].

challenges under section 7 are likely to arise outside the criminal context, the remainder of this section is devoted to identifying non-criminal *Charter*-triggering state conduct.

Legislation is among the clearer examples of government conduct. Pieces of legislation –i.e. statutes and regulations – are enacted by federal and provincial legislatures. By-laws are also included, as by-laws are created by municipalities that are granted law-making power under provincial legislation. The SCC has held that municipal bodies are governmental in nature and all of their activities are subject to *Charter* review.<sup>81</sup>

Case law demonstrates that various types of provisions in environmental legislation have been subject to attack. For example, in *Energy Probe*, a statutory limitation on personal liability for individuals involved in operations of nuclear plants under the Nuclear Liability Act triggered s. 32.<sup>82</sup> In *Locke* and *Millership*, the authorization of hydrofluorosilicic acid (fluoride) to a public water supply through a municipal by-law and a provision in provincial legislation, respectively, were lawfully challenged.<sup>83</sup>

While the scope of subsection 32(1) expands beyond what is contained in legislation, what actually constitutes a matter within government authority has not always been clear. La Forest J. addresses this issue in *Godbout*, and provides the test for identifying governmentality for the purposes of *Charter* application.<sup>84</sup> In this case, the plaintiff, Michele Godbout, challenged the terms of a contract between the City of

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<sup>81</sup> *Locke v Calgary*, [1993] AJ no 926 [QB] [*Locke*]; *Godbout v Longueuil (Ville)*, [1997] 3 SCR 844 at para 47, 152 DLR (4th) 577, CRR (2d) 1, [*Godbout*].

<sup>82</sup> *Energy Probe v AG Canada* [1994], 17 OR 93d0 717 (Ont Gen Div), (available on CanLII), [*Energy Probe*].

<sup>83</sup> *Locke*, *supra* note 81; *Millership et al v British Columbia et al*, 2003 BCSC 82, [*Millership*].

<sup>84</sup> *Godbout*, *supra* note 81 at para 47.

Longueuil and permanent employees of the City. The City had adopted a resolution that required all permanent employees to reside within city limits. If an employee were to move outside of city boundaries, that employee could be terminated immediately without notice. Godbout was offered a position as a radio operator for the city police force, and signed an agreement setting out the terms of employment, including the requirement to live within city limits. Her employment was terminated when she later moved to a neighbouring municipality and refused to move back to Longueuil. While the final decision of the SCC was rooted in s. 5 of the *Quebec Charter of Human Rights and Freedoms* as opposed to section 7, La Forest J. (speaking for 3 of 6 judges) nevertheless discusses the *Charter* and explains that

the ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments. [Furthermore], particular entities will be subject to Charter scrutiny in respect of certain governmental activities they perform, even if the entities themselves cannot accurately be described as ‘governmental’ per se... Rather, it is simply to say that where an entity can be accurately described as “governmental in nature”, it will be subject in its activities [including entering into private contracts] to Charter review.<sup>85</sup>

Other types of conduct that may form the basis of environmental claims, as identified by Collins and Boyd, occur when governments are directly in charge of running industrial operations, such as waste management plants.<sup>86</sup> Similarly, government may have made an investment in such a project, or authorized projects on Crown land.

Decisions by bodies established by statute to administer government programs trigger the *Charter*. In *Blencoe*, the plaintiff was accused of sexual harassment by a co-worker while serving as a minister in the Government of British Columbia.<sup>87</sup> The

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<sup>85</sup> *Godbout*, *supra* note 81 at para 47.

<sup>86</sup> Collins, *supra* note 27 at 17.

<sup>87</sup> *Blencoe*, *supra* note 80.

complaints were filed with the British Columbia Human Rights Commission who conducted an investigation into the complaints. The Commission was established by statute and, while performed its operations independent from government, the *Charter* applied to the Commission's investigatory process because its ultimate source of authority came from government under the Human Rights Code.

Similarly, administrative decision-makers derive their powers from statutes, and thus are governmental in nature. Administrative decision-makers are distinct from the types of program-administrating bodies discussed above, as they act more like trial-level courts than providers of public services. Boyd, Collins, and Gage all identify permitting, licensing, or certifying conduct of private parties as conduct that triggers the *Charter*. According to Collins, "[w]here a government agency issues a license, permit, or certificate of approval specifically permitting a particular environmentally harmful emission, discharge, or course of conduct, there is no doubt that government action has occurred and the s. 32 requirement is met."<sup>88</sup> In *Kuczerpa*, for example, the failure of the Minister of Agriculture to refuse a registration of chemicals and formulations for pesticide use, which allegedly caused irreversible neurological damage, triggered the *Charter*.<sup>89</sup> In *Wier*, the *Charter*-triggering conduct was a decision of the Environmental Appeal Board to issue a pesticide use permit to the Minister of Forests.<sup>90</sup> In circumstances where a third party actor is the direct cause of the harm, there may still be sufficient connection to government for the action to be caught. For example, in *Domke*

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<sup>88</sup> *Blencoe*, *supra* note 80 at 17.

<sup>89</sup> *Kuczerpa v The Queen* (1993), 48 FTR 274 (FCTD), 152 NR 207 (FCA), [*Kuczerpa*].

<sup>90</sup> *Wier v British Columbia (Environmental Appeal Board)*, 2003 BCSC 1441, [2003] BCJ No 2221, [*Wier*].

and *Kelly*, the plaintiffs challenged the Energy and Utilities Board for granting licenses to construct sour gas wells to contracting companies.<sup>91</sup>

*Red Chris* is a non-constitutional decision from the SCC, but nevertheless demonstrates a type of environmental administrative decision that could trigger the *Charter*. In this case, a mining company had submitted a project to the British Columbia Environmental Assessment Office regarding an open pit mining and milling operation.<sup>92</sup> As part of the project, the company also submitted to the Department of Fisheries and Oceans an application for dams required to create a tailings impoundment area, which was relevant to the mine and mill. The project was originally proposed by the proponent as to include the mine, mill, and tailings area, but the Department later re-scoped a project so as to exclude the mine and the mill. The re-scoping led to a significantly smaller environmental assessment process, as a comprehensive study was no longer required, and public comment was not sought. MiningWatch, the public interest plaintiff, filed an application for judicial review of the decision on the grounds that the responsible authority had failed to meet its obligations under the *Canadian Environmental Assessment Act*. Specifically, MiningWatch alleged that the defendant was required to undertake a comprehensive study. The SCC ruled in favour of MiningWatch, and held that responsible authorities for the purposes of environmental assessment cannot re-scope a project. Rather, the term “project” under the Act referred to the project as proposed by the proponent, not as scoped by the responsible authority. Therefore, the decision of the Department to re-scope the project violated the statutory requirements of Act.

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<sup>91</sup> *Domke v Alberta* (2008), 2008 ABCA 232, 432 AR 376 (CA), [*Domke*].

<sup>92</sup> *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6, [*RedChris*].

In addition to decisions, the conduct of administrative decision-makers regarding decision-making responsibilities can also trigger the *Charter*. For example, the issue in *Insite* was that the Minister of Health did not grant an exemption to Insite, a safe injection site, from a criminal prohibition against the possession of narcotics.<sup>93</sup> Interestingly, the Minister's action was not in the form of a formal refusal. Rather his failure to address the request for an exemption, coupled with public comments about *Insite*, indicated, according to the SCC, that a decision had effectively been made and that was sufficient to trigger subsection 32(1). In *Coalition of Citizens for a Charter Challenge*, an alleged demonstration of bias within a solid waste management process for the City of Halifax formed the basis of a *Charter* claim.<sup>94</sup>

#### *Distinguishing conduct of government vs. non-government actors*

What constitutes a matter within the authority of government for *Charter* purposes is not always clear. Sometimes there may be a governmental presence to an issue, yet the *Charter* may not apply.

Conduct purely of private parties is not subject to the *Charter*. For example, if the polluting activity of a company arises from the company's private conduct and not from government-sanctioned acts, then the *Charter* will not be triggered. In order for an entity to be subject to the *Charter*, there must be a "sufficient element of control"<sup>95</sup> by government. For example, statute-created tribunals, municipalities, and provincial and federal Ministries are examples of entities that are "governmental in nature" to which the

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<sup>93</sup> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 133, [2011] 3 SCR 134, [*Insite*].

<sup>94</sup> *Coalition of Citizens for a Charter Challenge v Metropolitan Authority* (1993), 10 CELR (NS) 257 (NSSC), reversed 108 DLR (4<sup>th</sup>) 145 (NSCA).

<sup>95</sup> Stewart, *supra* note 18 at 25.

*Charter* applies.<sup>96</sup> Every action taken by these types of entities is subject to review by the courts. In contrast, universities, hospitals, and other types of private bodies are not necessarily subject to the *Charter*, even if they receive government funding, provide public functions, and work “closely with the government to achieve [their] objectives.”<sup>97</sup>

Stewart explains that if the “‘routine or regular control’ of the institution does not lie in the government’s hands but in the hands of an independent board,”<sup>98</sup> then the *Charter* will not likely apply. That said, courts have held that these entities, although not governmental in nature, may perform certain governmental functions that *are* subject to the *Charter*. While the Charter may not catch all conduct, certain actions may be. Given that the government has, as identified by Collins, occupied the environmental field with numerous pieces of environmental legislation, it is likely that a significant range of environmental harms – aside from those purely related to conduct of private parties – may be linked to the requisite element of government control.

Stewart notes that it may be possible to initiate a *Charter* claim due to tortious state action.<sup>99</sup> For example, if the government violates a common law rule by engaging in negligent conduct, this would provide the necessary link to a matter within government authority that triggers the *Charter*. However, he also notes that most courts have kept tort issues separate from *Charter* issues, and thus have not accepted this argument to date. Thus, if an individual is subject to environmental harms caused by government negligence (or another common law cause of action), they are more likely to have a valid claim if the allegation is centered on a breach of tort as opposed to a *Charter* violation.

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<sup>96</sup> *Godbout*, *supra* note 81 at para 55.

<sup>97</sup> Stewart, *supra* note 18 at 26, ref to *Sagen v Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522, leave to appeal to SCC refused, [2009] SCCA no 459.

<sup>98</sup> Stewart, *supra* note 18 at 25.

<sup>99</sup> Stewart, *supra* note 18 at 39-40.

## Step 2: Standing

Once government conduct of some sort has been called into question, a plaintiff must achieve standing to be able to challenge the constitutionality of the conduct. Standing, defined broadly, is a requirement of all civil procedures and occurs when a plaintiff has an interest in a legal issue and is granted permission to bring that issue before the courts. There are two types of standing: individual (this refers to individuals as natural persons) and public interest. An individual plaintiff must demonstrate that they are directly affected by the conduct and that they have “some chance of proving”<sup>100</sup> the claim. For example, someone who personally suffers from or is at risk of suffering from the negative impacts associated with the alleged source of harm – e.g. a member of the families living near the gas wells in *Kelly* or the proposed wind turbine farms in *Dixon* – are strong candidates for individual standing.

Individual standing does not mean there can only be one individual involved. This was seen in both *Kelly* and *Dixon*, where multiple families were parties to the same claim. Similarly, individual standing can also be granted with class actions. Under the *Class Proceedings Act, 1992*, class actions are brought by a representative plaintiff on behalf of a group of individuals who take a collective action against a defendant.<sup>101</sup> According to section 2(1) of the Act, “one or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.” This was the case in *Smith v Inco*, where Ellen Smith was the representative plaintiff for 7,000 homeowners in a class action against Inco Limited, owner of a nickel refinery in Port

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<sup>100</sup> *Energy Probe*, *supra* note 82 at para 43.

<sup>101</sup> *Class Proceedings Act, 1992*, SO 1992, c 6.

Colborne, Ontario, for nickel particles that had settled on private properties.<sup>102</sup> *Smith v. Inco* was a tort claim as opposed to a *Charter* claims (and it eventually failed), but for current purposes it demonstrates that a collective group can bring a claim as individual plaintiffs in a single action. In these circumstances, all members of the class action must have been affected by a common issue and would be each be granted individual standing had they proceeded individually.

An entity bringing a claim on behalf of another individual or group of individuals when the entity itself is not part of the group will not likely be granted individual standing. This may arise when public interest groups, such as environmental non-governmental or non-profit organizations, initiate claims. In these circumstances, public interest standing should be sought. Public interest standing can be established even if the impugned matter has not yet had a direct impact on an individual.<sup>103</sup> In order to achieve public interest standing, three things must be considered: i) is there a serious issue raised as to the legal invalidity of the government action in question? ii) has it been established that the plaintiff is directly affected by the action, or, if not, does the plaintiff have a genuine interest in its validity? And iii), is there another reasonable and effective way to bring the issue before the Court?<sup>104</sup>

In regards to the first consideration, *Charter* challenges will likely be considered to be “serious” issues. However, the second and third considerations may pose challenges for public interest plaintiffs, especially environmental organizations, alleging section 7

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<sup>102</sup> *Smith v Inco Ltd*, 2013 ONCA 724.

<sup>103</sup> *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, [*Canadian Council of Churches*].

<sup>104</sup> This test was original set out by the SCC in *Boworski*, *ibid* recently referred to by the SCC in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] SCJ No 45, [2012] 2 SCR 524.

violations. It may be difficult to demonstrate that the entity bringing the claim has a direct or genuine interest in the claim, as this may require connecting security of the person directly to environmental impacts. As will be discussed in greater detail in the next section of this Chapter, section 7 claims must be rooted in impacts to individuals and not solely to the environment. Broad-based environmental impacts may arguably have an impact on general human security, but no existing precedent supports an argument that harms to an ecosystem or natural features – interests more suited to general public interest claims – are suitable for section 7. While not completely analogous (as it was not a section 7 case), the complications posed by the relationship between public interest plaintiffs and individual interests are demonstrated by MiningWatch’s approach in *Red Chris*. While MiningWatch successfully challenged the decision of the Department of Fisheries and Oceans, the relief granted was a declaration that the Department erred in failing to conduct a comprehensive study and no further relief was granted. This was a “strategic” move on behalf of MiningWatch, as they recognized that, as a public interest plaintiff, they had no direct interest (in this case, proprietary or pecuniary) in the outcome of the case and would not likely be granted a substantive outcome.<sup>105</sup> However, there was still a benefit to be reaped from the court’s declaration – even though the decision itself was not overturned - as it provides guidance for future decisions where the same provisions of environmental assessment legislation are engaged. However, if a substantive decision is the desired outcome, which is assumed to be the case for section 7 litigants, then a public interest approach may not be a desirable strategy.

In regards to the third consideration of other reasonable and effective ways to bring the issue before a court, given that the purpose of section 7 is to protect individual

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<sup>105</sup> *Red Chris*, *supra* note 92.

interests to life, liberty, and security of the person, it is likely that there will potential plaintiffs eligible for individual standing to initiate constitutional challenges to secure their own *Charter* rights. This was the case in *Canadian Council of Churches*, where the Court held that the right of individual claimants to challenge an action demonstrated that there were “other reasonable methods of bringing the matter before the Court.”<sup>106</sup> In this case, there was evidence of individual refugee claimants who had previously challenged the impugned legislation. The Court explains that “the basic purpose for allowing public interest standing is to ensure that [government actions are] not immunized from challenge.” On this ground, the Court ruled that the Council should not be granted public interest standing. While public interest standing may be denied merely on the grounds that individuals are better suited to a claim, the chance of denial is even greater if individual litigants have already commenced similar actions.

It appears, then, that section 7 challenges to environmental matters are best suited to individual plaintiffs. However, the court has repeatedly stated that the threshold for establishing standing of either type is intentionally low in order to prevent valid claims from being struck out prematurely. Thus, while the concerns outlined above in regards to public interest plaintiffs should be taken into consideration, there may be a benefit to public interest plaintiffs making the argument that they, despite being a non-natural entity, still have a genuine interest in security of the person at large. If it is a novel claim addressing a broad environmental concern, such as climate change, a public interest claim may be seen as the most reasonable and effective venue for challenging a type of government conduct. This may be a difficult argument, but the possibility may be there.

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<sup>106</sup> *Canadian Council of Churches*, *supra* note 103 at 255.

### Step 3: The two components of section 7

Once a plaintiff, either as an individual or in the public interest, has addressed the preliminary steps of identifying the impugned conduct and demonstrating standing, the analysis moves into the section 7 legal framework itself. The legal tests for each element of this framework are outlined below.

#### A) Step One: Establishing an infringement of the right to security of the person

First, a plaintiff must establish that there has been a deprivation of life, liberty, and/or security of the person. Courts have framed this in several ways, as either a deprivation, an infringement, or simply as a negative impact. Regardless of the terminology used, the tests are the same. This thesis focuses on security of the person. Collins, Boyd, and Gage each argue that if environmental harms can constitute a breach of a section 7 interest, that interest will most likely be security of the person, and the case law also demonstrates that life and liberty arguments are less ideal. Engaging the liberty interest requires a direct interference with the “right to make fundamental personal choices free from state interference.”<sup>107</sup> Demonstrating a direct interference with liberty is a high threshold, and it is primarily engaged in criminal contexts. This is because criminal prohibitions “expose [individuals] to the threat of being imprisoned.”<sup>108</sup>

Engaging the life interest appears to require a similar, yet higher, threshold than security of the person. The SCC recently articulated that the right to life focuses on “profound respect for the value of human life” and is engaged when “the law or state action imposes death or an increased risk of death on a person, either directly or

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<sup>107</sup> *Carter*, *supra* note 33 at para 64; *Blencoe*, *supra* note 80 at para 54.

<sup>108</sup> *Insite*, *supra* note 93 at para 87.

indirectly.”<sup>109</sup> For example, in *Insite*, the Court found that preventing drug users from access life-saving medical aid infringed the right to life.<sup>110</sup> Similarly, in *Carter*, the prohibition against assisted suicide led to the premature death of some individuals suffering of chronic diseases, as the prohibition had the effect of “forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable.”<sup>111</sup> These two cases are of the very few instances where an infringement of the right to life was successfully made out.

Security of the person, in contrast, appears to protect against a broader range of harm than the right to life. It addresses concerns about “autonomy and quality of life,”<sup>112</sup> and is triggered by impacts to physical or psychological integrity. A risk of death or a complete inability to make personal choices is not required. There are two requirements for establishing an infringement of the right to security of the person: i) a deprivation of or negative impact on the right; and ii) a sufficient causal connection between the impugned state conduct and the deprivation of the right.

#### *i) A negative impact on security of the person*

Courts have held on multiple occasions that security of the person contains both physical and psychological components.<sup>113</sup> As was recently reiterated by the Ontario Superior Court of Justice in *Dixon*, the negative impact on security of the person can occur when

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<sup>109</sup> *Carter*, *supra* note 33 at paras 62-3.

<sup>110</sup> *Insite*, *supra* note 93 at para 92.

<sup>111</sup> *Carter*, *supra* note 33 at para 57-8.

<sup>112</sup> *Carter*, *supra* note 33 at para 62.

<sup>113</sup> *R v Morgentaler*, [1988] 1 SCR 30 at para 56, [1988] SCJ No 1, [*Morgentaler*]; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 (SCC) at para 598, [*Rodriguez*]; *Blencoe*, *supra* note 80 at para 55.

there is a “serious and profound effect on a person’s physical or psychological integrity.”<sup>114</sup>

Physical deprivations of security of the person arise when the government action is linked to physical harms to a plaintiff. As noted above, courts have explained that physical harms must reach the level of “serious”. What exactly amounts to serious harm is slightly ambiguous (with some examples of accepted arguments provided below), but it is a high standard that requires more than a level of annoyance. In *Dixon*, for example, the Court held that symptoms such as loss of sleep due to light flicker, nausea, and slightly elevated blood pressure did not constitute serious harm.<sup>115</sup> Similarly, in *Millership*, “small, opaque, white areas scattered irregularly over the teeth”, a rare side effect of fluoridation, had no legal effect on security of the person.

A serious harm amounting to a physical deprivation of security of the person can be established both through an *actual* deprivation of the right – where the harm has already arisen – as well as through the imposition of a *risk* of harm.<sup>116</sup> There are several examples of physical deprivations caused by risk of harm in the case law. In *Bedford*,<sup>117</sup> the Court held that laws that create potentially dangerous conditions are capable of violating security of the person. *Bedford* is a criminal case regarding prostitution laws. McLachlin C.J. held that prohibitions against keeping a bawdy house, living off the avails of prostitution, and communicating for the purpose of engaging in prostitution in a public place “imposed *dangerous* conditions” on prostitutes engaging in a “risky – but legal –

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<sup>114</sup> *Dixon*, *supra* note 41 at 64.

<sup>115</sup> *Dixon*, *supra* note 41.

<sup>116</sup> *Operation Dismantle Inc v The Queen*, [1985] 1 SCR 441 at para 15, [*Operation Dismantle*].

<sup>117</sup> *Canada (Attorney General) v Bedford*, 2013 SCC 72, [*Bedford*].

activity”<sup>118</sup> by preventing them from taking steps to protect themselves from risk.<sup>119</sup> The evidence showed that prostitutes unable to control the circumstances surrounding their work by taking clients to a designated safe space, hiring body guards, or clearly setting limits for clients were at a greater risk of abuse by johns and pimps, and/or more prone to disease. The facts in *Bedford* are not completely analogous with environmental harms, as the evidence showed that some women had in fact already been harmed due to these laws, but the court’s emphasis on the dangerous conditions that could lead to harm demonstrates the preventative function of section 7 as opposed to a purely reactive role. By the same token, in *Insite*, the Court held that the Minister’s decision to prevent drug users from accessing the health-protecting services provided by the safe-injection site substantially increased the risk of serious harm, which constituted a negative impact on the users’ rights to security of the person. In *Chaoulli*, three judges held that state-interference with obtaining health care in a reasonable manner infringed security of the person.<sup>120</sup> Here, the prohibition against private health care insurance increased the risk of health complications and death, thus engaging the right.

The preventative function of section 7 is especially significant for environmental applicants concerned with environmental-triggered illness or health issues, as actual harm to the plaintiff may not yet have materialized. This was seen in *Kelly*, as the evidence accepted by the Board demonstrated that the exposure to sour gas could cause serious health risks.<sup>121</sup> The wells had not yet been dug, nor could it be established that the gas

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<sup>118</sup> *Bedford*, *supra* note 117.

<sup>119</sup> *Bedford*, *supra* note 117.

<sup>120</sup> *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791. There were seven justices present at *Chaoulli*, and between them, three judgments were delivered. The first was from Deschamps J., who found that there has been a violation of section 7. The second was delivered by McLachlin C.J., and Major and Bastarache JJ.. The dissent was delivered by Binnie, LeBel, and Fish JJ.

<sup>121</sup> *Kelly*, *supra* note 36.

would actually affect each individual, yet the Alberta Court of Appeal noted that the potential risk could likely violate the rights of all those living within high-risk areas.

A potentially complicating factor for environmental purposes is that, often, evidence of risk of harm arising from a project may not be able to be adduced. In all *Charter* claims, the onus is on the plaintiff to satisfy the court that an *actual* risk physical harm exists, not on the government to demonstrate lack of risk of harm. In the case of environmental harms, the scientific evidence required to discharge that burden may not exist. Fortunately in *Kelly*, the health hazards associated with sour gas wells were already well documented. In contrast, in *Dixon*, where the applicants challenged decisions of the Director of the Ministry of the Environment to authorize the “construction and operation of three wind turbine generation farms”<sup>122</sup> in Ontario, the risk of harm was not clear. The appellants lived close to these farms, and claimed that the noise caused by the wind turbines could cause “adverse health effects”, such as severe headaches, tinnitus, insomnia, nausea, and inner ear problems.<sup>123</sup> However, as noted above, the plaintiffs were unable to adduce any expert evidence at trial showing that the turbines actual increased their risk of such harms and the claim was dismissed.

Moreover, not only were the plaintiffs in *Dixon* unable to discharge their burden of proof, the defendant Minister adduced testimony from several medical experts discounting the claims of the plaintiffs. Multiple studies had shown that there is no discernable link between wind turbines and impacts to human health above low-level annoyance. While this type of counter evidence demonstrating a lack of harm is not required of government, this expert evidence of the Minister discredited any evidence the

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<sup>122</sup> *Dixon*, *supra* note 41 at 1.

<sup>123</sup> *Dixon*, *supra* note 41 at 21.

plaintiffs had adduced from personal testimonies and contributed to the Ontario Superior Court of Justice’s decision to uphold the Director’s authorization. This case is an extreme example of fatal evidence, as not only was there no evidence to corroborate their claim, but there was also evidence to the contrary.

When evidence of physical harm or risk of harm is unavailable, it may be tempting to frame a claim as a psychological deprivation. For example, some may wish to claim that the stresses associated with ecosystem degradation, species loss, or contributions to climate change constitute infringements with security of the person. However, the case law demonstrates that these types of psychological claims are less likely to be successful than claims of physical harm.

The SCC recognized psychological elements of security of the person in *Rodriguez*. According to the Court, security of the person encompasses “notions of personal autonomy (at least with respect to the right to make choices concerning one’s own body), control over one’s... psychological integrity which is free from state interference, and basic human dignity.”<sup>124</sup> In this case, the plaintiff, Sue Rodriguez, suffered from amyotrophic lateral sclerosis. Her condition would eventually leave her “extremely” physically disabled and completely dependent on others. Meanwhile, she would remain mentally competent and “able to appreciate all that is happening to her”, ultimately leaving her in a “situation of utter dependence and loss of dignity.”<sup>125</sup> The Court held that a criminal prohibition against assisted suicide that prevented her from taking her own life before her condition rendered her in such a state infringed the psychological component of her security of the person. Her claim ultimately failed as

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<sup>124</sup> *Rodriguez*, *supra* note 113 at para 520.

<sup>125</sup> *Rodriguez*, *supra* note 113 at para 137.

there was no infringement of the principles of fundamental justice. However, the significance of *Rodriguez* for current purposes is the Court's articulation of the requirements of a psychological infringement of security of the person.

The test for psychological interferences with security of the person is high and must be assessed “objectively, with a view to [the] impact on the psychological integrity of a person of reasonable sensibility.”<sup>126</sup> In *G(J)*, the SCC clarifies that the interference must impose *severe* psychological harm that is “greater than ordinary stress or anxiety” and results in a “serious and profound effect on the psychological integrity of a person of reasonable sensibility.”<sup>127</sup> The issue in *G(J)* is in regards to the custody of a child. The SCC held that “state removal of a child from parental custody” results in a “gross intrusion into a private and intimate sphere”<sup>128</sup> that infringes the psychological component of security of the person. The infringement was due to the stigma that allegedly attaches to an ‘unfit’ parent who loses custody. According to the Court, an individual’s status as a parent is “fundamental to personal identity”, and interference with parental status is serious enough to constitute a psychological deprivation of security of the person. However, the Court also clarifies that a strong emotional response, or “significant stress and anxiety” associated with the state action is insufficient. Many instances of interference with child-parent relationships – such as jail sentences or even when the child is negligently shot and killed by a police officer – would not constitute infringements of security of the person on their own.<sup>129</sup>

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<sup>126</sup> *G(J)*, *supra* note 79 at para 60.

<sup>127</sup> *G(J)*, *supra* note 79 at paras 59 & 60.

<sup>128</sup> *G(J)*, *supra* note 79 at para 61.

<sup>129</sup> *G(J)*, *supra* note 79 at 63.

The strict requirements for psychological interferences with security of the person imposes potentially significant limitations the environmental section 7 claims. For example, the stresses associated with strictly external events, such as impacts to the environment, may not be seen to cause more mental distress than the death of a child. Similarly, stress caused by risk of harm to family, friends, or future generations, as Boyd suggests ought to be protected by environmental rights, will not likely pass the test. What is required is a “direct... interfere[ence] with the psychological *integrity*”<sup>130</sup> or autonomy – akin to interferences with parental status in *G(J)* or life-shattering losses of dignity in *Rodriguez* – of a plaintiff.

The SCC’s recent split-decision in *Chaoulli* provides some further clarification of what might constitute interference with psychological integrity. The matter in this Quebec case was a prohibition against obtaining insurance for private health care, effectively limiting the health-care options of most Quebeckers, aside from the exceptionally wealthy, to what was available through the public system. The evidence showed that there tended to be significant wait times for even emergency medical procedures, and that the majority of patients with serious illnesses who had to wait for treatment suffered worry, anxiety or stress as a result. Three judges (out of seven – the 3/3/1 split means that there is no majority decision coming from this case, affecting its strength as precedence) held that this “adverse psychological impact can have a serious and profound effect on a person’s psychological integrity, and is a violation of security of the person.”<sup>131</sup> The psychological impact was caused not by any sort of physical harm itself (the harm was directly caused by the various illnesses and ailments of the

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<sup>130</sup> *G(J)*, *supra* note 79 at 63, ref to *Augustus v Gosset*, [1996] 3 SCR 268.

<sup>131</sup> *Chaoulli*, *supra* note 120 at para 117.

plaintiffs), but from a state interference with the plaintiff's ability to remedy the harm by seeking effective health care. The resulting "loss of control by an individual over [their] own health"<sup>132</sup> was considered to be above normal stress and anxiety, and into the realm of interference with physical integrity or autonomy.

*Chaoulli* demonstrates that it may be possible to argue that interferences with the ability to exercise control over livelihood may constitute a psychological deprivation of security of the person. For example, while the public welfare issue in *Gosselin* demonstrates that the government is not required to uphold a certain level of financial stability, a direct interference with the ability of individuals to obtain financial security themselves might suffice.<sup>133</sup> Take, for example, fishers. If a project results in discharge of a contaminant into a body of water and destroys a fishery, individuals dependent on that fishery to earn a livelihood may be able to claim that the interference interferes with their personal autonomy in a manner that violates their security of the person. This type of claim may be especially applicable for individuals in isolated communities that are entirely dependent on a particular resource. In addition, the Court's comments in *Kelly* demonstrate that while individuals may theoretically have the option to relocate and avoid the harm, this may not be a meaningful choice due to finances or family obligations.

However, a claim related to loss of control over livelihood may be a difficult argument. There is no specific precedent supporting the proposition that an interference with livelihood constitutes an interference with security of the person, and the most on-point case, *Chaoulli*, does not constitute a majority decision. Also, for reasons discussed

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<sup>132</sup> *Chaoulli*, *supra* note 120.

<sup>133</sup> *Gosselin v Quebec (Attorney General)*, 2000 SCC 84 at para 76, [2002] 4 SCR 429, [*Gosselin*].

below, courts have been hesitant to interpret section 7 in a way that requires them to make rulings related to economic or property interests.

Given the stricter and higher test for demonstrating a psychological interference, plaintiffs will likely have greater chances of success by alleging physical deprivations of security of the person. Moreover, if the alleged stress is caused by physical risks of harm associated with living in a toxic environment, then the plaintiff will have already demonstrated a physical interference with security of the person and will not need to make a psychological argument.

### *ii) Sufficient causation*

There is a second part to demonstrating an infringement of security of the person. In addition to proving a negative impact on the right, a plaintiff must establish a causal connection between the impact and the impugned government action. Specifically, the plaintiff must demonstrate, on a balance of probabilities, that there is a “sufficient causal connection” between the government conduct and the negative impact.<sup>134</sup> This test “does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities.”<sup>135</sup> The SCC has held that the standard for a causal connection is flexible, allowing for the circumstances of each case to be taken into consideration, and not “too high” to prevent dismissing meritorious claims.<sup>136</sup> Thus, while the interference must be real and not purely speculative, the test does not demand absolute proof of causation.

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<sup>134</sup> *Bedford, supra* note 117 at para 75.

<sup>135</sup> *Bedford, supra* note 117 at para 76; ref to *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 at para 21.

<sup>136</sup> *Bedford, supra* note 117 at para 78.

For physical interferences with security of the person, the government conduct need not be the direct cause of the negative impact. Indirect interferences were seen in both *Insite* and *Bedford*. In *Insite*, the direct source of harm to Insite's clients – individuals using street drugs – was unsafe injection conditions. However, the court held that the Minister of Health's interference with access to Insite's life-saving services sufficiently caused the drug users to be subject to the direct source of harm. In *Bedford*, the direct source of harm to prostitutes was abusive johns and pimps. Again, the Court held that there was sufficient causal connection between the laws interfering with access to protection measures (in this case, by prohibiting prostitutes from implementing safety measures into their practices) and the abuse. In the environmental context, it is likely that the government conduct need not be the direct source of the environmental harm. The direct source may stem from projects of third parties, demonstrating that if the government has played an enabling role – such as authorizing the drilling operations causing the release of sour gas close to the Kellys' property – there may be sufficient causation.

Boyd, Collins, and Gage all anticipate that a primary challenge that environmental section 7 claimants will face is proving that the deprivation or risk of deprivation of life, liberty, or security of the person is actually caused by the impugned government conduct, due to the inherent uncertainty related to the relationship between environmental impacts and harms to individuals. In *Bedford* and *Insite*, there was concrete evidence of the connection between the source of harm and the harm suffered. It is more difficult to draw a conclusive connection between environmental harms – such as industrial fumes, sour gas, excessive noise, and certain contaminants – and specific health concerns because

there will often be a lack of scientific certainty to corroborate those claims. Indeed, all previous section 7 plaintiffs who have based their claim in environmental-based harms have had fatal difficulties with this step. No applicant has successfully demonstrated a negative impact on security of the person that was sufficiently caused by government conduct, demonstrating the inherent difficulties of connecting environmental harms to actual health risks. In *Operation Dismantle*, the applicants claimed that cruise missile testing violated their section 7 rights by rendering Canada a more likely target for nuclear attack. The SCC dismissed the applicant on the grounds that the applicants did not demonstrate that the government's approval for testing caused an actual increase in the risk of nuclear war. In another example, in *Energy Probe (1994)*, a group of plaintiffs challenged a provision of the Nuclear Liability Act that provided an absolute liability of \$75 million for operators of nuclear facilities for all claims relating to a nuclear accident. The Ontario Court (General Division) held that the limitations on recovery did not cause an increased risk of a nuclear accident, and thus did not cause a negative impact to security of the person.<sup>137</sup>

In both *Locke* and *Millership*, the plaintiffs alleged that the addition of fluoride to public drinking water infringed their security of the person.<sup>138</sup> However, the reasons that their claims failed are fairly clear. Mr. Locke failed to provide any evidence of adverse health effects or emotional distress. Mr. Millership claimed that his security of the person was infringed by injuries he believed he suffered through a mild case of fluorosis that “may cause him psychological stress”.<sup>139</sup> The British Columbia Supreme Court held that the fluoridation of public water *did* intrude on Millership's general security of the person;

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<sup>137</sup> *Energy Probe*, *supra* note 82 at 16.

<sup>138</sup> *Millership*, *supra* note 83; *Locke*, *supra* note 81.

<sup>139</sup> *Millership*, *supra* note 83 at para 111.

however, it was a trivial, or “minimal intrusion” that did not engage his right to security of the person.<sup>140</sup>

As explained by Collins, there may not be evidence to demonstrate “how synthetic chemicals and other environmental contaminants interact with and affect natural systems, including the human body [due to] the complexity of natural systems, the (ethical) impossibility of testing industrial chemicals on humans, the extreme novelty of synthetic chemicals in evolutionary history, the sheer number of synthetic chemicals in existence, and the paucity of data on the health and environmental effects of such chemicals.”<sup>141</sup> It may often be difficult, or even impossible, to “delineate with any precision the real-world consequences of releasing chemical pollutants into the environment.”<sup>142</sup> Thus, as noted by Gage, “the evidence would inevitably depend on statistical materials relating to risk and probable harm, rather than the conclusive proof of causation and harm that the courts have generally preferred.”<sup>143</sup> Indeed, the cases above show that demonstrating an environmental deprivation of the right to security of the person will likely require a compelling set of facts before the *Charter* can interfere. The evidence need not be 100% conclusive, but in order to discharge their burden of proof, plaintiffs must demonstrate that, on a balance of probabilities, the risk of harm is actually caused, at least in part, by the alleged source. In neither *Locke*, *Millership*, nor *Dixon* were the plaintiffs able to bring forth evidence of risk of harm or a connection between that harm and fluoride or wind turbines beyond their own testimonies. In contrast, had the

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<sup>140</sup> *Millership*, *supra* note 83 at para 12.

<sup>141</sup> Collins (2013), *supra* note 46 at 84-5.

<sup>142</sup> Collins (2013), *supra* note 46 at 85.

<sup>143</sup> Gage, *supra* note 15 at 2.

plaintiffs in these cases adduced medical or scientific expert evidence or peer-reviewed studies, the results may have been otherwise.

*Kelly*, however, demonstrates that it *is* possible to demonstrate a causal connection between risks of adverse physical impacts, such as specific health damages, on an identifiable person or group of people and identifiable sources of environmental harm, such as sour gas. However, moving beyond these smaller claims and into the realm of broader environmental concerns, such as climate change, is likely a difficult leap for section 7 at this point. While an analysis of the causes and effects of climate change is well beyond the scope of this paper, it is assumed that identifying the specific causes and facilitators of climate change (and identifying which government actions or authorizations were at play) and linking those sources of harm to the actual impacts suffered by individuals alleging a claim requires a higher level of certainty than is currently available in order to support a section 7 claim.

Demonstrating a psychological interference with security of the person appears to require an even closer connection between the source of the harm and its negative effect. The case law suggests that the state action may need to be the direct cause of the limitation, as opposed to the indirect connection allowed for physical harms. In both *Rodriguez* and *Chaoulli*, the impugned laws directly prohibited the plaintiffs from making a particular choice – committing assisted suicide or accessing health care – thus interfering with the plaintiffs’ autonomy over their own persons. Interferences with personal autonomy are psychological in nature, meaning that it was the impugned laws in these cases that directly caused the resulting psychological deprivation of security of the person. In contrast, the SCC in *Blencoe* held that the respondent’s stress and anxiety

“resulted from... publicity surrounding [sexual assault allegations] coupled with the political fall-out which ensued rather than... the human rights proceedings [themselves]”.<sup>144</sup> In this case, the plaintiff was unable to demonstrate direct causation (when, arguably, there was an indirect connection between the proceedings and the stress) and the claim was dismissed.

This stricter test for psychological causation coupled with the stricter test for a psychological negative impact is another reason why environmental litigants would be wise to frame their claims in terms of physical rather than psychological harms. While environmental impacts might bring about unfavourable conditions, it is unlikely that the government will have sufficiently interfered with an individual’s ability to take their own initiatives to avoid the harm.

## **B) Step Two: Demonstrating a Violation of The Principles of Fundamental Justice**

Once a claimant has demonstrated an infringement of their security of the person, they must then demonstrate that the infringement did not comply with the principles of fundamental justice. The principles of fundamental justice are the “values that are sufficiently fundamental to restrain the exercise of state power when the subject’s most vital interests – life, liberty, and security of the person – are at stake.”<sup>145</sup> In *Reference re: Motor Vehicle Act*, Lamer C.J. explains that the principles of fundamental justice are found “in the basic tenets of the legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice

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<sup>144</sup> *Blencoe*, *supra* note 80 at para 65.

<sup>145</sup> *Stewart*, *supra* note 18 at 103-4.

system,”<sup>146</sup> and provide “the minimum requirements”<sup>147</sup> that an action that negatively impacts the rights to life, liberty, or security of the person must meet. The provision itself does not “catalogue the principles of fundamental justice to which it refers, [but the SCC] has worked to define the minimum constitutional requirements that a law that trenches of life, liberty, or security of the person must met.”<sup>148</sup>

Stewart explains that it can be helpful to conceptualize the principles of fundamental justice that have been identified by courts to date as either substantive or procedural in nature.<sup>149</sup> Substantive principles are those that can be clearly defined and identified, and can be loosely grouped into two categories. (Note: This categorization is done for simplicity’s sake when providing an overview of the principles of fundamental justice. Stewart notes that these categories are not likely exhaustive or mutually exclusive.) The first substantive category consists of principles of fundamental justice that can be applied generally to any government action, which are sometimes framed as rules. Such principles include the rules against arbitrary, overbroad, grossly disproportionate, and vague laws.<sup>150</sup> These rules involve a comparison of the object of the law with its effect, and work to address failures of instrumental rationality or precision. The second category of substantive principles identified by Stewart demand specific outcomes from or qualities of state actions. For example, it has been argued that the ruling in *Suresh* provides a principle of fundamental justice that explicitly protects individuals against deportation when faced with a substantial risk of torture.<sup>151</sup> This

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<sup>146</sup> *Reference re: s 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486 at page 503, (available on CanLII), [*MVA Reference*].

<sup>147</sup> *Bedford*, *supra* note 117 at 94.

<sup>148</sup> *Carter*, *supra* note 33 at para 72.

<sup>149</sup> *Stewart*, *supra* note 18.

<sup>150</sup> *Carter*, *supra* note 33 at para 72.

<sup>151</sup> *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] SCJ No 3, [*Suresh*].

substantive principle does not address a specific piece of irrational legislation, but requires governments to protect potential deportees from the consequences at all times.

Principles of fundamental justice related to procedural rights inform the content of procedural requirements for decisions affecting section 7 interests.<sup>152</sup> When analyzing whether or not there has been a violation of the principles based on a failure to uphold procedural fairness, courts will ask “whether the procedural protection provided in particular circumstances was adequate.”<sup>153</sup> Thus, procedural fairness does not work to provide a substantive outcome, as the substantive rules discussed above do, but to ensure that the process through which an outcome is reached was made in a procedurally sound manner.

In *Carter*, the SCC provides a “general comment” to be considered before determining whether a deprivation of security of the person is in accordance with the principles of fundamental justice. Mainly, the Court cautions that judges are not to be

concerned with competing social interests or public benefits conferred by the impugned law. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s. 1 of the *Charter*... In some cases, the government, for practical reasons, may only be able to meet an objective by means of a law that has some fundamental flaw. But this does not concern us when considering whether section 7... has been breached.<sup>154</sup>

The following section provides an analysis of the principles of fundamental justice that may apply in an environmental context.

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<sup>152</sup> Stewart, *supra* note 18.

<sup>153</sup> Grant Huscroft, “From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review” (ch 5) in Colleen M Flood & Lorne Sossin, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013) at 162.

<sup>154</sup> *Carter*, *supra* note 33 at para 79 & 82.

### *i) Substantive principles of fundamental justice*

#### Arbitrariness

The rule against arbitrariness stipulates that there must always be a rational connection between the purpose or object of a government action and its effect (i.e., the negative impact identified in step one). In *Insite*, McLachlin C.J. clarifies that there must be a “real connection on the facts” between the public good that is the law’s objective and the action taken to further that objective.

The SCC has identified two approaches to arbitrariness: the “unnecessary” approach and the “inconsistent” approach, with the first being the less onerous on the plaintiff. Which of these two approaches ought to prevail, however, is unclear, as the successful arbitrariness claims arising since the identification of both of these approaches have met the test for both.<sup>155</sup> Under the unnecessary approach, an applicant may only need to demonstrate that the effect of an action was unnecessary to achieve a desired purpose. In *Chaoulli*, McLachlin C. J. found that a restriction on obtaining insurance for private health care was not necessary to further the alleged purpose of the restriction, which was to strengthen the public health care system. The government of Quebec reasoned that if too many individuals opted for private health care, the public health care system would eventually suffer. However, due to the fact that the public health system was overloaded, and the restriction prevented individuals from accessing timely health care (which McLachlin C. J. found to infringe their security of the person while doing nothing actually to enhance the public system) the restriction was unnecessary for achieving the desired purpose and was arbitrary.

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<sup>155</sup> McLachlin C.J., in *Bedford*, *supra* note 117.

The inconsistent approach to arbitrariness is stricter. Under the test for inconsistency, the plaintiff must demonstrate that the effect of a law is inconsistent with its purpose. An example of an inconsistent action was seen in *Insite*. In this case, a decision of the Minister of Health to refuse to grant an exemption from drug possession prohibitions to Insite increased the risk of death and disease to Insite's clients. This effect was contrary, or inconsistent, to the purpose of the *Controlled Drugs and Substances Act*<sup>156</sup> – under which the Minister derived his power to grant exemptions – to protect public health and safety. Because the effect of the decision undermined the very purpose of the *Act*, the Court held that the decision violated the rule against arbitrariness and the Minister was required to grant the exemption. Similarly, in *Morgentaler*, a provision under the *Criminal Code*<sup>157</sup> requiring all abortions to be approved by a therapeutic abortion committee of an accredited or approved hospital caused significant delays, which were often detrimental to the health of women seeking abortions. This negative impact on health was inconsistent with the purpose of the requirement, which was to allegedly protect women's health, rendering the requirement arbitrary. In contrast, the restriction on obtaining private health care in *Chaoulli* was not inconsistent with the legislative scheme, but was simply unnecessary in order to achieve the desired outcome of improved public health care.

It remains largely unclear which approach to arbitrariness ought to apply in a given circumstance,<sup>158</sup> and thus it is difficult to anticipate what standard an alleged arbitrary environmental action must meet. Ideally, the unnecessary approach will prevail, as demonstrating that there is no connection between actions relating to environmental

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<sup>156</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19, [CDSA].

<sup>157</sup> *Criminal Code*, RS C 1985, c C-46, [CCC].

<sup>158</sup> *Bedford*, *supra* note 117 at para 98.

decisions and their resulting outcomes will likely be challenging. As noted above, section 7 claims related to environmental harms must be rooted in a negative impact to the physical or psychological wellbeing of the *individual*, and environmental legislation may not be focused on harms to individuals. The argument in *Insite* was successful because the Minister’s decision caused the opposite effect of what the legislation explicitly intended – to promote public health and safety. In *Bedford*, the prohibitions were designed to protect prostitutes from harm and exploitation, but in fact achieved the opposite by increasing the chances that the women would be exposed to the harm. In both of these cases, the governing legislation was designed to protect individuals. The effects complained of in environmental claims, in contrast, are less likely to be rooted in legislation designed to protect individuals, rendering the “no connection” argument inapplicable.

### Overbreadth

Another way of framing the unnecessary approach to arbitrariness is through the rule against overly broad actions, also known as overbreadth. This principle addresses laws that are arbitrary in part, and, while it exists as a stand-alone principle, it is strikingly similar to the “unnecessary” approach to arbitrariness. According to the SCC, an action is overbroad when it goes “too far”,<sup>159</sup> or there is “no rational connection between the purposes... and *some* but not all, of its impacts”.<sup>160</sup> The most recent application of the overbreadth principle is *Carter*. In this case, the court explains its application of overbreadth and concluded that a

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<sup>159</sup> *Carter*, *supra* note 33 at para 85.

<sup>160</sup> *R v Heywood*, [1994] 3 SCR 761, at para 112 [1994] SCJ No 101 (SCC), [*Heywood*].

prohibition on assisted dying is overbroad. The object of the law... is to protect vulnerable persons from being induced to commit suicide at a moment of weakness [and] the law catches people outside of this class. [The Crown conceded that it] is recognized that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives... It follows that the limitation on their rights is at least in some cases not connected to the objective of protecting *vulnerable* persons.”<sup>161</sup>

The Court held that the blanket prohibition against assisted suicide caught conduct that was unrelated to the law’s objective and was overbroad.

An earlier example of overbreadth is seen in *Heywood*.<sup>162</sup> Here, the Court held that a law prohibiting all individuals convicted of sex offences from entering all parks was overbroad. The purpose of the prohibition was to prevent individuals convicted of child-related offences from accessing children’s playgrounds. However, the effect of this law was that it also prevented other non-dangerous offenders, such as an 18-year old convicted of statutory rape with an otherwise consenting partner, from ever being able to go for a hike in any park. One potential impact of the law – incarcerating 18-year old hikers – was not rationally connected to the purpose of protecting children from pedophiles. Because of this single potential effect, the law was deemed to be unconstitutional and was struck down.

An enticing asset to the overbreadth doctrine is that it allows for the reasonable use of hypotheticals. This is in contrast to arbitrariness, which requires an irrational connection on the facts in order to strike down a law or overturn an action. In *Heywood*, the accused actually *had* previously been convicted of sexual crimes against children, and was then being charged for taking photographs of children in playgrounds. But, because he was able to provide a ‘reasonable’ hypothetical situation where the law was overbroad,

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<sup>161</sup> *Carter, supra* note 33 at para 86.

<sup>162</sup> *Heywood, supra* note 160.

the provision was struck down. It may seem that using hypotheticals would assist in an environmental context, in particular if actual harm or risk of harm has not yet arisen or cannot be proven. However, the benefit of hypotheticals will not likely be able to be capitalized on due to the general circumstances of environmental claims. Overbreadth has mainly been applied in a criminal context, where the liberty interest is automatically engaged. In criminal law, an accused will not face the challenge of demonstrating an initial violation of section 7 interests because the risk of incarceration associated with criminal law by default violates the right to liberty and meets that standard. In contrast, one of the main challenges faced by environmental applicants alleging a breach of security of the person is demonstrating causation through evidence of harm.

Environmental applicants will have already been required to demonstrate an actual situation causing harm in step one, meaning they will not be able to benefit from the potential use of a hypothetical situation that comes with overbreadth. Thus, in general, it appears that the benefits of an overbreadth argument (over arbitrariness) are only available to violations of section 7 where the right to liberty is engaged in a criminal context, not security of the person.

Therefore, there appears to be no practical difference between basing an environmental argument in arbitrariness or overbreadth. The primary importance of emphasizing the Court's recent reference to the existence of the overbreadth doctrine is that it implies that the less-strict version of arbitrariness – the unnecessary approach – may still be applicable to situations where the strength of the connection between the cause and effect is less clear.

## Other substantive principles of fundamental justice

There are several other substantive principles of fundamental justice that have been identified in the literature as being potentially useful in an environmental context: the rules against grossly disproportionate laws and vagueness. However, there are limitations inherent in each rule that renders them less effective than the rules against arbitrariness or overbreadth when the environment is involved.

### *Gross Disproportionality*

The rule against grossly disproportionate laws protects against “state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest.”<sup>163</sup> The connection between the purpose and effect of a grossly disproportionate law may be rational, but the negative impact imposed on the applicant far outweighs any derived benefit.

Environmental applicants would be wise to avoid gross disproportionality. By claiming gross disproportionality, the applicant must demonstrate that the harm to themselves when compared to any benefits to society not just tips the scale (i.e., on a balance of probabilities), but creates a landslide in their favour that is more comparable to the criminal standard of proof of beyond a reasonable doubt. As McLachlin C.J. explains in *Bedford*, “the rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure... The connection between the ... impact of the [government action] and its objective must be entirely outside the norms accepted in our free and democratic

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<sup>163</sup> *Insite*, *supra* note 93, in ref to *Malmö-Levine*, *supra* note 34 at para 143.

society.”<sup>164</sup> Further, while generally the Court has stated that the interests of society are not to be balanced with the interests of the individual in a section 7 analysis, gross disproportionality explicitly invites those considerations to the analysis. Given the political emphasis on economic growth, which will likely be associated with actions leading to adverse environmental effects, demonstrating gross disproportionality will likely be a difficult standard to meet.

### *Vagueness*

A law that infringes security of the person cannot be overly vague. In *Nova Scotia Pharmaceutical Society*, Gonthier J. explains that this means that all laws “irrespective of whether they are civil, criminal, administrative or other” must be precise enough “to give sufficient guidance for legal debate.”<sup>165</sup> There are two ways that a law can be vague: 1) by failing to give those who might come within the ambit of the provision fair notice of the consequences of their conduct; or (2) by failing to adequately limit law enforcement discretion.<sup>166</sup> The rule against vagueness does not demand that a law provide absolute certainty, only *reasonable* certainty. As explained by Stewart, there will almost always be uncertainty within laws, and demanding absolute certainty would prevent the legal system from being able to operate efficiently.<sup>167</sup> Thus, laws may leave room for debate, such how they will apply to a particular set of facts. As noted by Stewart, “the fact that there can be an intelligible debate about the boundaries of the law’s application itself indicates that the law is sufficiently precise.”<sup>168</sup>

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<sup>164</sup> *Bedford*, *supra* note 117 at para 120.

<sup>165</sup> *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at paras 639 & 642, 74 CCC (3d) 289, [*Nova Scotia Pharmaceutical*].

<sup>166</sup> *Nova Scotia Pharmaceutical*, *supra* note 165.

<sup>167</sup> *Canadian Pacific*, *supra* note 60 at para 49.

<sup>168</sup> Stewart, *supra* note 18 at 128.

There has been only one successful section 7 case where vagueness was argued. In *O'Neill v Canada*, a police officer searched a reporter's home on allegations that the reporter had committed offences under the *Security of Information Act*.<sup>169</sup> The reporter argued that the sections of the Act that he allegedly violated contained terms – “secret official” and “official” – that were unconstitutionally vague. The Ontario Superior Court of Justice found that these terms were not defined in the statute, and “could not be interpreted so as to define a zone of risk that could guide the conduct of individuals and structure law enforcement discretion.”<sup>170</sup> This rendered the offence in question “unconstitutionally vague for not sufficiently delineating the risk zone for criminal sanction.”<sup>171</sup>

For environmental purposes, the vagueness doctrine may be most applicable for challenging administrative laws and procedures that do not adequately limit the discretionary power of administrative decision-makers when section 7 rights are engaged. However, it is currently unclear what would constitute an unduly vague provision of administrative discretion. An unlimited range of options for a final decision, or a failure to identify any factors to be taken into consideration when making a decision may render a law overly vague; however, it appears that any sort of guidance to decision makers may suffice.<sup>172</sup> In *Canadian Pacific*, the SCC upheld the constitutionality of a provision that was arguably vague.<sup>173</sup> The Court stated that due to the complex nature of environmental protection, broadly worded provisions are often necessary. Stewart explains that “[e]ven

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<sup>169</sup> *O'Neill v Canada (AG)* (2006), 213 CCC (3d) 389 (Ont SJ), [*O'Neill*]; *Security of Information Act*, RSB 1985, c O-5.

<sup>170</sup> Stewart, *supra* note 18 at 132, ref to *O'Neill*, *supra* note 169 at para 71.

<sup>171</sup> *O'Neill*, *supra* note 169 at para 72.

<sup>172</sup> *R v Morales*, [1992] 2 SCR 711, [*Morales*]; *R v Hall*, 2002 SCC 64, [*Hall*].

<sup>173</sup> *Canadian Pacific*, *supra* note 60.

where statutes incorporate relatively imprecise concepts such as ‘reasonableness’ or ‘undueness,’ Canadian courts provide those concepts with more determinate content through the process of statutory interpretation and application to specific fact situations; therefore, courts have been generally unwilling to find them unconstitutionally vague.”<sup>174</sup>

*A new principle of fundamental justice?*

A plaintiff may allege that an infringement of their security of the person violates a principle of fundamental justice that has been previously unrecognized by the court. The SCC has acknowledged that the principles of fundamental justice “cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of section 7.”<sup>175</sup> The evolution of the principles is seen most clearly in the realm of criminal law, where a multitude of principles that apply when a person is criminally liable for their conduct have been recognized over time.<sup>176</sup> For example, protection against self-incrimination is a principle of fundamental justice, meaning that an individual is to be protected from the “use and derivative use of compelled statements in subsequent proceedings.”<sup>177</sup> Other principles that have been created to address specific violations of section 7 include protection against deportation when the refugee faces a substantial risk of torture, and protection against extradition to face criminal charges for which they may receive the death penalty.<sup>178</sup>

In *Carter*, the appellants asked the Court to consider a new principle of parity, which would “require that offenders committing acts of comparable blameworthiness

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<sup>174</sup> Stewart, *supra* note 18 at 128-9.

<sup>175</sup> *MVA Reference*, *supra* note 146 at page 503.

<sup>176</sup> See Stewart, *supra* note 18 at Chapter 4, sections C-G.

<sup>177</sup> Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms* 5<sup>th</sup> ed (Toronto: Irwin Law Inc, 2013) at 285.

<sup>178</sup> *Suresh*, *supra* note 151 at para 58; *United States v Burns*, 2001 SCC 7.

receive sanctions of like severity.”<sup>179</sup> Given that the Court had already found that the offence against assisted suicide violated the principle of overbreadth, the Court did not consider this argument. However, it demonstrates that alleging a new principle is an available, though not yet demonstrably successful, strategy for section 7 litigants.

An explicit environmental principle of fundamental justice does not currently exist. However, it may be possible to argue that a government action violates a ‘new’ substantive principle of fundamental justice, a question that has been largely unexplored in the literature. In *Malmo-Levine*, the SCC provides a three-part test for identifying principles of fundamental justice. First, it must be a legal principle. Second, there must be significant societal consensus that the new principle is fundamental to the way in which the legal system ought fairly to operate. Third, the principle must be capable of being identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.<sup>180</sup> In *Malmo-Levine*, the accused proposed that the “harm principle” – which provides that the “absence of demonstrated harm to others deprives Parliament of the power to impose criminal liability” – was a principle of fundamental justice.<sup>181</sup> The principle failed the third part of the test as “harm” could not be identified with sufficient precision.

This section outlines the requirements for applying the *Malmo-Levine* test to a context involving the environment. The first step is to identify an appropriate legal principle or rule that could constitute a principle of fundamental justice.<sup>182</sup> Collins briefly

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<sup>179</sup> *Carter*, *supra* note 33 at para 91.

<sup>180</sup> *Malmo-Levine*, *supra* note 34 at para 113.

<sup>181</sup> *Malmo-Levine*, *supra* note 34 at para 103.

<sup>182</sup> The polluter-pays principle stands for the notion that whoever is responsible for pollution is responsible for the costs of its clean up. According to the SCC in *Imperial Oil*, this principle has been firmly entrenched into Canadian environmental law.

identifies several potential principles: respect for human life, the requirement that government act in compliance with the law (including other sections of the *Charter*),<sup>183</sup> and prevention of trade-offs that are “grossly disproportionate” to the government’s legitimate interest.<sup>184</sup> These three proposed principles are not discussed in this section, but are included to illustrate what form general environmental principles may take.

The precautionary principle, on the other hand, is one that has been given a significant amount of attention, and while it has not yet been applied to the *Malmo-Levine* test, was proposed to be a principle of fundamental justice by Gage, Collins, and the plaintiffs in *Dixon*.<sup>185</sup> There are several approaches to applying “precaution” to decision-making processes. For example, while Government of Canada recognizes that precaution includes three “basic tenets: the need for a decision, a risk of serious or irreversible harm and a lack of full scientific certainty”,<sup>186</sup> a report on the application of precaution in science-based decision making about risks acknowledges that Canada’s application of precaution is “flexible and responsive to particular circumstances.”<sup>187</sup> For the purposes of providing an example application of the *Malmo-Levine* test, the version of the precautionary principles as provided in Principle 15 of the Rio Declaration is used. Given that the first part of the *Malmo-Levine* test requires the identification of an explicit legal principle, it is helpful to consider a version of the precautionary principle that has been clearly defined and widely referenced. The Rio Declaration provides that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall

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<sup>183</sup> For example, Collins, *supra* note 27 at 30, states that “serious state-sponsored harm that disproportionately affects an enumerated or analogous group [such as indigenous peoples] under s.15 of the *Charter*” will likely also be in violation of the principles of fundamental justice.

<sup>184</sup> Collins, *supra* note 27 at 27 – 30.

<sup>185</sup> See: Gage, *supra* note 15 at 23; *Dixon*, *supra* note 41 at para 52; Collins, *supra* note 27 at 45.

<sup>186</sup> Government of Canada, *A Framework for the Application of Precaution in Science-Based Decision Making About Risk* (National Library of Canada: 2003) at 2.

<sup>187</sup> Government of Canada, *supra* note 186, at 3.

not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>188</sup>

A second environmental principle that is analyzed in this section is an environmental harm principle. Gage suggests that environmental harm may give rise to a substantive principle of fundamental justice if the government conduct “represent[s] such a serious and imminent threat... that its authorization under any circumstances violates the principles of fundamental justice.” This “environmental harm” principle is one that may have been applicable to three of the case studies discussed so far – *Kelly*, *Dixon*, and Chemical Valley. The precautionary principle and Gage’s environmental harm principle are applied to the remainder of the *Malmo-Levine* test.

Next, a plaintiff must demonstrate that there is significant societal consensus that the principle is fundamental to the way in which the legal system ought to operate.<sup>189</sup> For example in *Rodriguez*, the Court held that committing suicide did not reflect the fundamental values of society, and thus would not have general acceptance among reasonable people.<sup>190</sup> (However, this issue was later revisited in *Carter*, where the same provision was found to violate the principles of fundamental justice on the grounds that it was overly broad.) This step is likely the least challenging for a plaintiff alleging the environmental harm principle, particularly when human health is on the line. As outlined above, the Court has repeatedly recognized that environmental protection is a “fundamental value” to Canadian citizens.<sup>191</sup> The precautionary principle, however, may

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<sup>188</sup> 1992 *Rio Declaration on Environment and Development*, 14 June 1992, UN Doc A/CONF 151/26 (vol 1), 31 ILM 874 [*Rio Declaration*], at Principle 15.

<sup>189</sup> *Malmo-Levine*, *supra* note 34 at para 113.

<sup>190</sup> *Rodriguez*, *supra* note 113 at para 90.

<sup>191</sup> See: *Canadian Pacific*, *supra* note 60 *Spraytech*, *supra* note 72; *Canfor*, *supra* note 74; *Hydro-Quebec*, *supra* note 64.

face difficulties here. On the one hand, the principle has been cited in case law and various pieces of legislation as an important component of environmental decision-making. For example, in *Spraytech*, the SCC discusses the precautionary principles and notes that “[s]cholars have documented the precautionary principle’s inclusion in ‘virtually every adopted treaty and policy document related to the protection and preservation of the environment.’ ... As a result, there may be ‘currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law.’”<sup>192</sup> Further, several pieces of environmental legislation in Canada make reference to the precautionary principle, including the Oceans Act and *CEAA 2012*.<sup>193</sup> However, even this repeated legal reference to the precautionary principle may not be sufficient to establish that it has been accepted widely enough to constitute a principle of fundamental justice. While in *R v Hape* the SCC held that customary international law is directly incorporated into Canadian law, it may be difficult to conclude that international treatment of the precautionary principle will be directly binding on Canadian courts, given its uncertain status as customary law.<sup>194</sup> Further, the precautionary principle has been subject to significant debate, rendering it arguably less ‘fundamental’ than the *Malmo-Levine* test requires.<sup>195</sup> Furthermore, the version of the precautionary principle in the Rio Declaration contains the potentially fatal economic component, as courts must be convinced of their role to require the government to implement cost-effective measures.

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<sup>192</sup> *Spraytech*, *supra* note 72 at para 32.

<sup>193</sup> *Oceans Act*, SC 1996 c 31 at s 31; *Canadian Environmental Protection Act, 2012*, SC 2012, c 19, s 52 at s. 4(1)(b) & (g).

<sup>194</sup> *R v Hape*, 2007 SCC 27. For additional comments on international law and/or the precautionary principle in Canadian law, see *Suresh*, *supra* note 151 and *Spraytech*, *supra* note 72 at para 30.

<sup>195</sup> See, for example, some of the concerns addressed by Andrew Stirling in “Risk, precaution and science: moving towards a more constructive policy debate. Talking point on the precautionary principle”, (Apr 2007) 8(4) EMBO Rep 309-315.

Third, the principle must be capable of being identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.<sup>196</sup> Thus, it is critical that the principle itself not be overly broad or vague. For example, the original harm principle in *Malmo-Levine* was rejected, as it was not a manageable standard. According to the Court, harm “can take a multitude of forms, including economic, physical and social”.<sup>197</sup> What constitutes “environmental harm” may be reminiscent of the harm principle in *Malmo-Levine*, and be considered to be too vague to yield a manageable standard. A “serious and imminent threat” is potentially too ambiguous; the parameters of a proposed environmental harm principle must be clearly contained. Elements of the precautionary principle, on the other hand, arguably provide more specific guidance. The evidence will demonstrate whether or not there is a lack of full scientific certainty, and, ideally, it should be clear from government’s actions whether or not this lack of certainty was relied upon when rendering a decision. These are questions that a court could come to a reasonable conclusion on based on the facts before them. Still, the economic component poses problems here, as courts may be hesitant to dictate whether or not a preventative measure is “cost-effective.”

When proposing a new principle of fundamental justice, applicants must be very careful to frame the principle as one that is *clearly fundamental to Canadian society and its legal system*. Otherwise, it risks becoming a policy argument or a “reflect[ion] of the Court’s opinion on a particular social issue,”<sup>198</sup> violating the separation of powers.

McLachlin C.J.’s introductory comment in *Chaoulli* that in “failing to provide public

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<sup>196</sup> *Malmo-Levine*, *supra* note 34 at para 113.

<sup>197</sup> *Malmo-Levine*, *supra* note 34 at para 128.

<sup>198</sup> Gage, *supra* note 15 at 16.

health care of a reasonable standard within a reasonable time,”<sup>199</sup> the government triggered section 7 has been interpreted as implying that access to reasonable health care within a reasonable time constitutes a principle of fundamental justice.<sup>200</sup> The issue of private health care had been subject to serious political debate over several years – much like the need for environmental protection – and Binnie and LeBel J.J., in their dissenting judgment, criticize McLachlin’s finding that the provision of “reasonable health services at a reasonable time” is a principle of fundamental justice. Not only was this principle too political in nature, but also, according to the dissent, it was also too vague to be applied aptly by courts. It is not the duty of the courts, they argue, to determine what constitutes “reasonable” health services. That, according to Binnie and LeBel, should be left to the legislatures and democratically-elected officials. Similarly, asking the courts to determine what is cost-effective or what constitutes an unacceptable level of environmental harm would likely receive the same negative treatment.

Moreover, it is also arguable that McLachlin’s judgment does *not* propose the introduction of a new principle of fundamental justice explicitly providing reasonable health care. In her ruling, she held that the impugned legislative scheme, on the facts, violated the rule against arbitrariness, not a free-standing principle regarding health care. McLachlin based her finding of unconstitutionality not a failure to provide reasonable health care, but because she found that the evidence showed, on the facts, an arbitrary link between the stated purpose of the prohibition and its effects. Furthermore, at no point did the Chief Justice apply the *Malmo-Levine* test for recognizing a new principle. For environmental purposes, what is significant is that McLachlin’s decision does *not* appear

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<sup>199</sup> *Chaoulli*, *supra* note 120 at para 105.

<sup>200</sup> *Boyd*, *supra* note 1; *Collins*, *supra* note 27.

to stand for a new, substantive right to reasonable health care, and thus does support the development of other rights related to public policy. Applying this interpretation of the *Chaoulli* decision, section 7 has not yet been interpreted in a manner that grants a substantive right to an otherwise political matter.

Thus, while courts are willing to recognize new principles of fundamental justice under the *Malmo-Levine* test, they must act within their jurisdiction, which is another strike against implementing the precautionary principle as a principle of fundamental justice. The precautionary principle risks crossing the line by calling for an explicit type of action – to not postpone cost-effective measures – in the face of risk of harm. What constitutes a ‘cost-effective’ approach will likely depend upon a variety of political as well as economic factors, ranging from the allocation of funds in a federal budget to dictating contractual terms. Determining what is cost-effective more resembles a policy goal, not a way in which the Canadian society ought to operate in order to uphold the most basic rights to life, liberty, and security of the person. A better role for the precautionary principle, then, may be to argue that it ought to inform the content of procedural fairness.

#### *ii) Procedural fairness as a principle of fundamental justice*

Procedural fairness is a principle of fundamental justice that, as its name suggests, requires all administrative decisions that may have a negative impact on an individual’s right to life, liberty, or security of the person to be procedurally fair. Grant Huscroft explains that procedural fairness, which can also be framed as a duty of fairness,

promotes sound public administration and the accountability of public decision-makers by ensuring that decisions are made with input from those affected by them; well-informed decisions are likely better decisions, and decisions made pursuant to transparent, participatory processes promote important rule-of-law

values. Fairness is, in this sense, a means to an end ... [and] ensures that people are allowed to participate meaningfully in decision-making processes that affect them.”<sup>201</sup>

Procedural fairness is the “organizing principle” of administrative law, and “applies across the spectrum of decisions that public authorities may make.”<sup>202</sup> While most of the case law developing the content of procedural fairness occurred outside of a constitutional context, Stewart explains that the “the considerations relevant to determining the content of the duty of fairness are the same [when there is] a constitutionally-protected interest at stake.”<sup>203</sup>

In the early days of the *Charter*, Colin P. Stevenson recognized that section 7 could promote the development of an “environmental ethic” in Canada, particularly for upholding procedural safeguards when it comes to government-sponsored environmental impacts.<sup>204</sup> While he idealized a “radical approach” to interpreting section 7 in a manner that results in substantive environmental rights, he conceded that the enforcement of procedural safeguards is likely the most realistic expectation. However, Stevenson cautioned against underestimating the value of these procedures, noting that, at the end of the day, procedural rights may be “just as effective as any substantive [environmental] right”<sup>205</sup> for providing protection against adverse environmental impacts. While it is difficult to quantify and compare the effectiveness of substantive environmental rights under section 7 with procedural safeguards, the case law upholds Stevenson’s projection that procedural fairness could play a valuable role.

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<sup>201</sup> Huscroft, *supra* note 153 at 150-1.

<sup>202</sup> Huscroft, *supra* note 153 at 150.

<sup>203</sup> Stewart, *supra* note 18 at 226. Additionally, he notes that the constitutional duty of fairness cannot be ousted by express statutory language, whereas the common law duty of fairness can be.

<sup>204</sup> Stevenson, *supra* note 12 at 397.

<sup>205</sup> Stevenson, *supra* note 12 at 420.

## Determining the content of procedural fairness

While the purpose of the duty of fairness is to ensure a fair process, it is often difficult to anticipate what a fair process will actually look like. L’Heureux-Dube J. explains that “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness.”<sup>206</sup> However, the case law provides some general guidance. The brief answer is that there is a minimum level of procedures required when section 7 is engaged: notice, participation, and reasons. However, there are several factors that can be considered to determine whether or not more procedures ought to be provided. Finally, even if the overall framework of the procedures was “correct”, there can still be a breach of the duty of fairness if the decision-maker demonstrates a reasonable apprehension of bias.

When analyzing whether procedural fairness has been upheld, there are two broad questions that can be asked. First, whether the correct *considerations* were taken into account by the administrative decision-maker when determining the content of procedural fairness, and, second, whether the *actual content* of the process itself – i.e., the particular procedures provided- were sufficient. *Baker* is the leading case regarding the first question, and discusses several factors that may be taken into consideration by decision-makers when determining what procedures to implement in particular circumstances.<sup>207</sup>

*Baker* is an immigration case. Mavis Baker, the plaintiff, was an illegal immigrant originally from Jamaica who had lived and worked in Canada for 11 years as a live-in

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<sup>206</sup> *Baker v Canada (Ministry of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21, 174 DLR (4<sup>th</sup>) 193, [*Baker*], ref to *Knight v Indian Head School Division No 19*, 1990 CanLII 138 (SCC), [1990] 1 SCR 653 at 682.

<sup>207</sup> *Baker*, *supra* note 206.

domestic worker. During these 11 years she had four children, all of whom were Canadian citizens. In 1992, the Minister of Citizenship and Immigration ordered her to be deported. Under the *Immigration Regulations*,<sup>208</sup> all applicants seeking permanent residence were required to apply from outside Canada. In Mrs. Baker's case, she was required to leave Canada and apply from Jamaica. This would result in her leaving her children for an extended period of time and have a serious impact on her financial stability. She applied for an exemption provided for in the Regulations, arguing that the Minister ought to exempt her on "compassionate or humanitarian" grounds and allow her to remain in Canada while submitting her application. She was denied.

Baker sought judicial review of this decision and argued that the duty of fairness owed towards her had not been fulfilled. She alleged that several specific procedures were required under her circumstances: an oral interview before the decision-maker, notice to her children and other parent of the interview, a right for the children and the other parent to make submissions at that interview, notice to the other parent of the interview and of that person's right to have counsel present, and for the provision of reasons.<sup>209</sup> An immigration officer had provided a written memorandum to another officer that was riddled with comments about her lifestyle-choices, mental illness, her children, and bias statements towards immigrants in general, which she argued were not the type of reasons required by procedural fairness. The SCC held that officer had taken the correct considerations into account in regards to the procedures afforded to Baker. Because of this, the Court did not interfere with the types of procedures provided. Specifically, she was not entitled to an oral hearing nor many of the types of notice she

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<sup>208</sup> *Immigration Regulations, 1978*, SOR/78-172, as am by SOR 93/44.

<sup>209</sup> *Baker*, *supra* note 206 at para 18.

requested, and that she *had* been provided with reasons. The memo, despite its unprofessional tone, clear bias, and poor organization, provided the ‘reasons’ owed to Baker. (The Court did, however, ultimately hold that the duty of fairness had not been upheld due to the apprehension of bias present within the reasons. This is further discussed below.)

The significance of this case lies not in its facts or outcome, but in the Court’s articulation of the law governing the considerations to be taken into account when determining the content of the duty of fairness in a given situation. Justice L’Heureux-Dube prescribed five non-exhaustive criteria.<sup>210</sup> The first is the nature of the decision being made and the process followed in making it. L’Heureux-Dube explains that the more the process resembles “judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.”<sup>211</sup> Trials provide plaintiffs with significant procedural rights, including the right to an oral trial, the right to provide evidence, the right to reasons (in the form of a judgment). The second factor is the nature of the statutory scheme and the terms of the statute pursuant to which the body operates. For example, this could include whether or not an appeal process is provided for by the statute. Huscroft explains that “[e]nhanced procedural protection may be required if a second level of proceedings is envisaged, in order to allow for meaningful participation in those proceedings. For example, the existence of a right of appeal is an important consideration in deciding whether and to what extent reasons for a first-level decision are required.”<sup>212</sup> A right to appeal may also indicate a higher level of participation in order to ensure that all of the relevant facts are

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<sup>210</sup> *Baker*, *supra* note 206 at paras 23-27.

<sup>211</sup> *Baker*, *supra* note 206 at 23.

<sup>212</sup> Huscroft, *supra* note 153 at 168.

submitted to the original trier of fact. The third is the importance of the decision to the individual or individuals affected. The content of the duty of fairness increases in proportion to the importance of the particular decision to the person it affects – the “more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.”<sup>213</sup> Infringements of a constitutionally protected right are highly significant.

Fourth, the legitimate expectations of the person challenging the decision may also influence the duty of fairness. If an individual has a “legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness.”<sup>214</sup> Huscroft explains that these legitimate expectations could arise out of conduct such as “representations, promises, or undertakings of past practice or current policy of a decision-maker.”<sup>215</sup> Public comments, political promises, or past practices about environmental undertakings would be relevant. Fifth and finally, the choices of procedure made by the decision-maker itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the decision maker has specific expertise in determining what procedures are appropriate in the circumstances should also be taken into account. This fifth factor most likely cause the greatest difficulties for section 7 plaintiffs, as it “calls for a measure of deference to the [administrative decision-maker’s] choice of procedure.”<sup>216</sup> Courts and applicants must

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<sup>213</sup> *Baker, supra* note 206 at 25.

<sup>214</sup> *Baker, supra* note 206 at 26.

<sup>215</sup> Huscroft, *supra* note 153 at 169.

<sup>216</sup> Evan Fox-Decent & Alexander Pless, “Chapter 12 - The Charter and Administrative Law: Cross-Fertilization or Inconstancy?” in Flood & Sossin, *supra* note 153 at 413.

respect the fact that decisions may need to be made “within a reasonable time frame and at a reasonable cost.”<sup>217</sup>

There are several implications arising from the *Baker* test. As noted above, the Court has repeatedly held that what is required by the duty of fairness will always “be decided in the context of the statute involved and the rights affected.”<sup>218</sup> Given that the impact(s) of a given decision and the type of procedures necessary will vary from case to case and plaintiff to plaintiff, it is difficult to establish a ‘benchmark’ against which the level of procedures granted in a single case can be weighed. Moreover, the Court has been clear that the *Baker* approach “should not be seen as reducing the level of deference given to decisions of a highly discretionary nature’ and... that any ministerial obligation to consider certain factors ‘gives the applicant no right to a particular outcome or the application of a particular legal test.’”<sup>219</sup> Generally, if the Court determines that a decision maker has considered the appropriate factors, then the substantive decision is more likely to be upheld even if the Court would have “weighed the factors differently and arrived at a different conclusion.”<sup>220</sup>

That said, the (albeit limited) case law where the *Baker* criteria were applied to section 7 in a non-criminal context demonstrates the significance of the third criterion – the importance of the decision to the individual(s) affected – when life, liberty, or security of the person is on the line. When security of the person is engaged, courts may be more likely to interfere with an administrative decision-maker’s implementation of the criteria and choice of procedures. The leading case is *Suresh*, a deportation case

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<sup>217</sup> Huscroft, *supra* note 153 at 171.

<sup>218</sup> *Baker*, *supra* note 206 at para 21.

<sup>219</sup> *Suresh*, *supra* note 151 at para 36.

<sup>220</sup> *Suresh*, *supra* note 151 at para 38.

addressing torture. In this case, the SCC held that the Minister of Citizenship and Immigration had not considered the proper *Baker* factors in determining the level of procedural fairness owed to Suresh and quashed the decision to deport. The Court then prescribed an explicit list of procedures required under Suresh's circumstances: to provide all of the relevant information and advice to be relied upon to the affected individual in coming to a decision, provide the individual with the opportunity to address the evidence in writing, and, after considering the evidence, provide written reasons.<sup>221</sup>

This prescriptive decision shows a significant departure from the general treatment of administrative decisions. Generally, following a finding that the duty of fairness has been breached, courts will send decisions back to the original administrative decision-makers and allow them to re-consider the case. However, the ruling in *Suresh* demonstrates that when a decision has the potential to negatively impact life, liberty, or security of the person – e.g.: through risk of imprisonment, deportation to torture, or, assumingly, by imposing serious health risks - and procedural fairness is not upheld, courts may be more willing to substantially interfere and explicitly identify the minimum required procedures: the right to information, the right to participate, and the right to reasons. Interestingly, as noted by Stewart, none of these procedures was required by statute in *Suresh*. Rather, these 'core' procedural elements were court-imposed to ensure the principles of fundamental justice were upheld.

A word of caution: while it may be tempting to conclude from this case that courts will place greater emphasis on the third *Baker* factor – the importance of the decision to the individual affected – it should not be assumed that this is so. As noted by

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<sup>221</sup> *Suresh*, *supra* note 151 at para 127.

Huscroft, “none of the *Baker* criteria is, in theory, more important than any other.”<sup>222</sup>

Purely because a constitutional interest is at stake does not necessarily mean that this criterion will be afforded the most weight, and will likely rely upon the strength of the evidence of actual risk of harm and the impact it will have.

It is important to note that the Court in *Suresh* did not overrule the Minister’s decision, but held that Suresh was entitled to a new deportation hearing. While courts require decisions about the duty of fairness to be made correctly and will quash substantive decisions, the decision will usually be remitted to be remade in accordance with the appropriate procedures.”<sup>223</sup> This is significant for applicants to note – a successful challenge on the basis of a breach of procedural fairness will *not* necessarily prevent a decision leading to environmental harms from being made. However, Huscroft argues that, once a decision has been sent back and more procedures are required,

it may be difficult for a decision-maker to reach the same substantive decision on a rehearing. Fair procedures may make it easier to argue in support of particular substantive outcomes on a rehearing... Thus, success on an application for judicial review on fairness grounds may have the indirect effect of helping an applicant to secure a preferred substantive outcome. At the very least, it will give the applicant another chance to obtain that outcome, and ensures that the substantive decision will be made on a well-informed basis”.<sup>224</sup>

#### A reasonable apprehension of bias

Another important component of procedural fairness that is described in *Baker* is the requirement that decisions be made free from a reasonable apprehension of bias. After the Court’s discussion of the five factors, the L’Heureux-Dube J. states that procedural fairness “also requires that decisions be made free from a reasonable apprehension of bias

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<sup>222</sup> Huscroft, *supra* note 153 at 167.

<sup>223</sup> Huscroft, *supra* note 153 at 153.

<sup>224</sup> Huscroft, *supra* note 153 at 153.

by an impartial decision-maker.” Despite the Court’s finding that the proper procedures had taken place, Mavis Baker had, the court held, been denied procedural fairness because of the clear bias held against the plaintiff in officer’s memo. The Court held that the officer demonstrated a “reasonable apprehension of bias”, in that a “reasonable and well-informed member of the community would [not] conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer.”<sup>225</sup> This bias demonstrated in the officer’s memo led the court to conclude that the decision was unreasonable and was sent back. From this, it can be concluded that a reasonable apprehension of bias by a decision maker would violate the principles of fundamental justice.

#### Moving beyond the minimum requirements

Collins asserts that that “since content of the principles of the principles of fundamental justice is context-specific, it is reasonable to assume that the case of state-sponsored environmental harm may implicate a unique set of procedural protections.”<sup>226</sup> Reading *Baker* and *Suresh* together, plaintiffs are able to advocate for additional procedures beyond the minimum related to administrative decisions, or for specific ways in which notice, participation, and reasons can be provided. The SCC provided extra procedures in *G(J)*. In this child-custody case, Lamer C.J. held that “in some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel.”<sup>227</sup> This ruling may be relied upon to argue that environmental

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<sup>225</sup> *Baker*, *supra* note 206 at para 48.

<sup>226</sup> Collins, *supra* note 27 at 26.

<sup>227</sup> *G(J)*, *supra* note 79 at para 2.

applicants who have had their section 7 rights engaged, either through actual harm or the risk of harm, may be owed certain procedures in order to uphold the principles of fundamental justice.

Gage provides a list of suggested procedures that he argues ought to apply in the context of public health risks, which may, as noted by Collins, also apply individuals affected by projects subject to regulatory approval.<sup>228</sup> Indeed, Collins suggests that the plaintiffs in *Kelly* ought to argue for the procedures below should they proceed with a section 7 claim.<sup>229</sup> Most are related to notice, information, and participation, but Gage also provides examples of ways that those procedures might be provided. These suggestions are reiterated here, with additional examples of how those procedures could apply to a regulatory decision:

1. Notice and information – Depending on the severity of the impact, this could occur at one or both of these points in time: prior to a decision likely to cause a negative impact, and after the decision has been made so that preventative or mitigative actions may be taken;
2. Participation in appropriate decision-making processes – Consultation may include the ability to provide written or oral submissions, the right to call evidence,<sup>230</sup> or a chance to respond to the facts that an administrative decision-maker may rely upon to come to a decision through a “designated period when the proposed decision will be available for review and comment”;<sup>231</sup>
3. Exercise precaution – administrative decision-makers may be required to implement the precautionary principle when making a decision;
4. Informed assessment of risks – Communicate the connection between the decision and its potential impact on individuals; and
5. An unbiased decision-maker – Ensure safeguards are in place to prevent a decision-maker from deriving any personal benefit for a particular decision to “ensure that institutions exercise their powers in a fair and unbiased manner.”<sup>232</sup>

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<sup>228</sup> Gage, *supra* note 15 goes into greater detail about what each of these procedures might look like in the context of public health hazards at 21 – 26.

<sup>229</sup> Collins, *supra* note 26 at 27.

<sup>230</sup> Huscroft, *supra* note 153 at 175.

<sup>231</sup> Gage, *supra* note 15 at 22.

<sup>232</sup> Gage, *supra* note 15 at 26.

## Referring to societal values to inform procedural fairness

The SCC has made some strong comments regarding the duty of fairness in an environmental context, which may be an additional consideration outside of the *Baker* factors. This was demonstrated in *Canadian Pacific*, a section 7 case where the Court implied that societal values – in particular, that the protection of the environment is fundamental to Canadian values – should inform fair procedures. In this case, the accused was charged with releasing toxic substances into the environment contrary to a prohibition against the release of pollution “of the natural environment for any use that can be made of it” under the *Environmental Protection Act*.<sup>233</sup> He claimed that the regime provided by the legislation was procedurally unfair in that it was overly broad and did not provide fair notice to citizens of prohibited conduct. The Court disagreed, ruling that the protection of the environment is a “well-known societal value”, and that the accused was required to read this value into the legislative scheme. Had he done so, he would have understood that fumes and damage resulting from an uncontrolled burn would reasonably have triggered the offence.

While *Canadian Pacific* is distinguishable from the application of section 7 discussed in this thesis in that the content of the procedures was interpreted to benefit the government as opposed to the individual (i.e., the Court was interpreting legislation already concerned with environmental protection, not reading a need for environmental protection into a decision-making process), the case nevertheless demonstrates that broader societal values are a factor to be considered in determining the content of fair procedures. Moreover, the SCC recognizes that *environmental protection is such a value*. If the average citizen is expected to turn to societal values to be adequately informed

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<sup>233</sup> *EPA*, *supra* note 42, s 1(1)(a).

about the content of procedural fairness, then it is arguable that government decision makers, particularly those in the environmental sector, ought to be held to the same standard. While it may be difficult to demonstrate that a government decision maker did not take environmental protection into account in a given situation or to quantify how *Canadian Pacific* builds upon the duty of fairness in government decision-making, the case could not be used to support the argument that any reasons rendered for a decision must reflect a consideration of the environment.

In summary, it appears that the most likely role for section 7 in an environmental context is a procedural one. All actions taken by administrative decision makers involved in regulatory approval processes are matters within the authority of government and are subject to the *Charter*, and individuals directly affected by those processes should be able to challenge any unconstitutional behavior. To be unconstitutional under section 7, the decision must be connected to a potential infringement of the right to security of the person. These circumstances may be limited, and will most likely occur if there are serious risks to human health. While this is not an impossibly high threshold, there still must be a level of scientific certainty demonstrating that the harm does, in fact, exist and that the infliction of the harm is related to the approval process. This connection will establish an infringement of the right to security of the person.

The most probable manner that an administrative decision can infringe the principles of fundamental justice is by failing to provide procedural fairness. When an infringement of security of the person is present, the affected individuals must be notified of the risk, allowed to participate in the decision-making process, and be provided with rational reasons regarding any final decision. Additional procedural protections may also

be argued for, such as the implementation of the precautionary principle, even if the legislative scheme in question does not require it. However, whatever additional procedures provided beyond the minimum requirements of notice, participation, and reasons will vary case by case and, due to the repeated emphasis by the courts that the content of procedural fairness is case specific, cannot be anticipated in advance.

The above conclusion does not necessarily mean that approvals connected to environmental harm will not be still granted or that broader environmental protection methods will be put in place. However, additional procedural safeguards can help ensure that any decision made is a responsible one, taking the needs of individuals into consideration. Without section 7, such procedural protections could be lawfully bypassed.

#### **Step 4: After section 7**

##### **i) Section 1 – Justifying infringement of environmental protection**

A *Charter* analysis does not end once a claimant has established an infringement of their protected right. Section 1, which provides that the rights and freedoms set out in the *Charter* are guaranteed “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society,” grants the government a chance to defend their impugned action. In *Oakes*, the SCC set out a four-part test for government defendants seeking to defend their rights-infringing action.<sup>234</sup> This test applies to all *Charter* rights, including section 7. On a balance of probabilities, the government must demonstrate that the impugned action satisfies four criteria. First, there must be a sufficiently important objective to justify limiting a Charter right. Second, there must be a rational connection between the law or action and the objective. Third, the right

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<sup>234</sup> *R v Oakes*, [1986] 1 SCR 103, [*Oakes*].

must not be impaired any more than is necessary to accomplish the objective. Fourth, the law or action must not have a disproportionately severe effect on the persons to whom it applies.<sup>235</sup>

Case law coming out of the courts generally asserts that s. 1 should not present a serious obstacle for section 7 litigants and, while important to take note of, s. 1 will not likely play a very big role in a section 7 claim. Interestingly, the test for a s. 1 defence appears to contain several of the elements of the section 7 analysis relating to the principles of fundamental justice. Step two, a rational connection, must satisfy the rule against arbitrariness. Step three, a requirement that the right now be impaired anymore than is necessary, is similar to the rule against overbreadth. Step four, the requirements that the law not have a disproportionately severe test, reflects the same value contained in the rule against grossly disproportionate laws. If any of these three substantive principles of fundamental justice have been successfully argued by the plaintiff in their section 7 argument, then there would be strong grounds to assume that the government defendant would not be able to defend their action under section 1. Indeed, the SCC has noted on several occasions that, due to the limiting role of the principles of fundamental justice, any matter that violates section 7 is unlikely to be justifiable under section 1. The Court took explicit note of this in *Chaoulli*, and explains that matters that are found to be arbitrary or overbroad will rarely, if ever, be able to pass the “rational connection” step, and laws that are grossly disproportionate are unlikely to pass the branch of the test requiring a balance between the overall benefits and the deleterious effects.<sup>236</sup>

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<sup>235</sup> *Oakes*, *supra* note 234.

<sup>236</sup> *Chaoulli*, *supra* note 120.

However, given the conclusion reached in this thesis that the most applicable principle of fundamental justice is procedural fairness due to the difficulties presented by the rules against arbitrariness, overbreadth, and gross disproportionality in an environmental context, failure of the section 1 at step two, three, or four cannot be relied upon. If a claim cannot be rooted in arbitrariness, overbreadth, or gross disproportionality, then it is reasonable to assume that the government's defence *will* pass each of the final three components of the section 1 test. Thus, an argument on behalf of government rooted in the first grounds for defending an action – a sufficiently important objective to justify infringing a *Charter* right – must be anticipated.

Section 1 jurisprudence related to the “sufficiently important objective” part of the *Oakes* tests assists with clarifying the relationship between section 1 and section 7. This first part of the test demonstrates that section 7 does *not* require a balance between the interests of society at large with the interests of the individual whose section 7 interests have been infringed. In *Bedford*, McLachlin C.J. explains that

Section 7 and s. 1 work in different ways. Under s. 1, the government bears the burden of showing that a law that breaches an individual's right can be justified having regard to the government's goal... By contrast, under section 7, the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person in a manner that is not connected to the law's object... An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of section 7. To require section 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under section 7. That cannot be right.<sup>237</sup>

Alastair Lucas nevertheless warns that plaintiffs should anticipate that “a range of factors including economic and other public objectives may be weighed by the court.”<sup>238</sup> These

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<sup>237</sup> *Bedford*, *supra* note 117 at paras 126-7.

<sup>238</sup> Alastair R Lucas, “Natural Resource and Environmental Management: A Jurisdictional Primer” in Donna Tingley, ed, *Environmental Protection and the Canadian Constitution: Proceedings of the*

are considerations that have been explicitly excluded by courts from the section 7 analysis, but can resurface here. The Newfoundland Court of Appeal *Labrador Inuit Association* (although note that it is not a constitutional case), comments on the need to balance environmental interests with economic interests. Marshall, Steele, and Green J.J. explain that “important as are environmental considerations, sight cannot be lost of the economic and social benefits that flow from the production of these resources. Legitimate concerns of meaningful employment and security for families are at stake. This is a reality that must also be taken into account along with environmental considerations. The importance of development of resources to the lives of people should not be understated. It, and the investment that brings it about, are essential to the well-being and progress of society.”<sup>239</sup>

Given that no section 7 cases have moved past the part of the analysis requiring causation, it is unclear how the court would balance the impacts on individuals related to environmental impacts with the economic concerns highlighted in *Labrador Inuit Association*. However, given the SCC has repeatedly asserted that a law that violates the principles of fundamental justice is unlikely to tip the scale for step one in the government’s favour,<sup>240</sup> plaintiffs should be able to be relatively confident that if they are able to successfully demonstrate that there has been a section 7 violation, section 1 should not interfere with that success.

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*Canadian Symposium on Jurisdiction and Responsibility for the Environment*, (Alberta: Environmental Law Centre, 1987) 31 at 30.

<sup>239</sup> *Labrador Inuit Association*, *supra* note 69 at para 7.

<sup>240</sup> *Bedford*, *supra* note 117 at para 129; *MVA Reference*, *supra* note 146 at page 518.

## ii) Subsections 52(1) & 24(1) – Repeals and remedies

Subsections 52(1) and 24(1) provide the options available following a finding of unconstitutionality. First, under subsection 52(1) unconstitutional laws are to be declared, to the extent of the inconsistency, of no force or effect. Similarly, administrative decisions that are unconstitutional will be overturned. The Board’s decision to authorize the sour gas wells in *Kelly*, for example, would no longer be valid.

For a declaration of unconstitutionality, a claimant does not need to demonstrate that they have suffered any identifiable harm. However, an applicant who has suffered harm can apply for a remedy under subsection 24(1). It provides that “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” Constitutional remedies under subsection 24(1), such as damages, are only available to individuals and not corporate identities. Thus, it may not be lucrative for a corporate entity to challenge past government behaviour if the entity has no interest in stopping the behaviour, as the entity will not be able to receive compensation.

An analysis of the different sorts of available remedies is beyond the scope of this paper; however, common remedies include damages and equitable remedies, such as injunctions. When the subject at appeal is a provision in a piece of legislation, courts will also often issue a declaration of invalidity that is suspended for a certain period of time.<sup>241</sup> This provides the government with an opportunity to “craft an appropriate

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<sup>241</sup> For example, in *Carter*, *supra* note 33, the SCC issued a declaration of invalidity of the offending provisions of the criminal code, but suspended the declaration for 12 months to allow the *Charter* rights of patients and physicians to be reconciled with the upcoming regulatory and legislative response to the judgment.

remedy,” and then enact legislation that is consistent with any new constitutional parameters.<sup>242</sup> If necessary, it may be possible for the court to provide exemption mechanisms to individuals still subject to the old law in the interim period.<sup>243</sup>

With challenges to procedures fairness, however, it is most likely that the Court would send the decision back to the original administrative decision-maker to reconsider the issue while carrying out the proper procedures.

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<sup>242</sup> *Carter, supra* note 33 at para 125.

<sup>243</sup> *Carter, supra* note 33 at para 129.

## Chapter 5: Applying section 7 to regulatory approval processes

Chapter four described how the elements of the section 7 legal framework apply broadly to the environmental. The general conclusion is that circumstances involving administrative decisions connected to environmental impacts may require certain procedural safeguards if the decision causes a sufficient risk to security of the person. This chapter discusses more specific applications. It provides example factual scenarios of the role that section 7 could play in regulatory approval processes in the environmental sector, and applies those scenarios to each component of the legal framework.

### Step 1: Triggering s. 32(1)

There are numerous regulatory approval schemes that apply to decisions made across Canada on existing or proposed undertakings that do or may impact the environment. Most are concerned chiefly with the avoidance or mitigation of adverse effects. Private or government activities related to mining, tailings ponds, industrial waste (such as the discharge of contaminants into bodies of water or fume emissions), energy generation, resource extraction, pipeline construction, and almost any sort of development or land use planning initiative that may have significant environmental effects are all subject to governmental approval under various legislative and regulatory schemes. In *Kelly*, for example, the Energy and Utilities Board is a body that is governed by the provincial Energy Resources Conservation Act.<sup>244</sup> The Board authorized the construction of the sour gas wells, which could lead to harmful air emissions, and was the subject of complaint. In Sarnia (and across Ontario), industry standards for fume emissions are set by provincial

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<sup>244</sup> *Energy Resources Conservation Act*, RSA 2000, c E-10.

government regulations.<sup>245</sup> Similarly, permits to discharge contaminants into bodies of water in Ontario (a situation not discussed in the case law examined for this thesis) are granted by a Director appointed by the Minister of the Environment under the *Environmental Protection Act*.<sup>246</sup> All of these scenarios involve administrative actions.

If an approval or authorization by government is required, subsection 32 is engaged. The provision refers to *all* matters of government authority, and thus applies broadly, catching final decisions as well as minor decisions made throughout an approval process. However, not all decisions are suitable to section 7 claims. While controversial environmental decisions may be made daily, only those that could have serious impacts to individuals, and not just the environment, should be considered. This implication is further explored below under causation, but is worth noting at the beginning of the analysis.

## Step 2: Standing

There is a low threshold for standing, meaning that achieving individual standing should be relatively easy for those exposed to alleged harms. The plaintiff families in *Kelly* lived only a few kilometers downwind from the drilling site for the wells, and could be exposed to dangerous substances if there was a gas leak.<sup>247</sup> The residents of the Aamjiwnaag First Nation in Sarnia breathe in air contaminated by industrial fumes daily. This provides the Aanishnaabek people with an even stronger chance of obtaining standing than the plaintiffs in *Kelly*, as the exposure has already occurred. Individuals living downstream from contamination discharge or near tailings ponds would also likely

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<sup>245</sup> EPA, *supra* note 42, RRO 1990, Regulation 346, General – Air Pollution.

<sup>246</sup> EPA, *supra* note 42 at s 6.

<sup>247</sup> EUB Decision 2007-061 at 12.

be at risk of being exposed to any toxic substances within the discharge and are strong candidates for individual standing.

In general, it should not be difficult for individuals exposed in some capacity to alleged adverse environmental impacts to demonstrate a direct interest in an outcome of an approval. The requirement that the plaintiffs have ‘some’ chance of proving a claim is a low threshold, and is likely met by anyone who can demonstrate a reasonable chance of being exposed to an alleged harm. Thus, if there are reasonable grounds to believe that the plaintiffs’ own health is at risk, this would likely demonstrate a direct interest in the outcome of an approval sufficient to be granted individual standing. Only exceptionally frivolous claims would be dismissed at this stage. Even the plaintiffs in *Millership* and *Locke*, who alleged section 7 violations due to white spots on their teeth, were granted standing.

### **Step 3: An infringement of security of the person**

While triggering the *Charter* and achieving standing are easily accomplished, the next steps are more difficult. In addressing the elements of section 7 itself, the requirements for a strong evidentiary foundation for a claim are stringent. As noted in step one, only approvals that can be scientifically linked to serious harms to individuals should be considered. Circumstances where a plaintiff can demonstrate a connection between the environmental impact and the harm on a balance of probabilities may be limited. For a case to be successful, it must be possible to collect the requisite level of scientific proof (i.e., on a balance of probabilities) of significant risk of harm. This could include multiple considerations, such as the likelihood of an accident leading to the release of hydrogen sulfide, confidence in the calculation of the likelihood of an accident, likelihood of harm

in the event of an accident, confidence in the calculation of the likelihood of harm in the event of an accident, significance of harm, and confidence in the assessment of significance. As was seen in *Dixon*, this level of proof might not always exist.

However, the standard of proof in constitutional claims is on a balance of probabilities, meaning that evidence demonstrating a risk of harm need not be absolute. The plaintiff is not required to prove that serious harms are inevitable, only that the chance of infringement is greater than 50%. In *Kelly*, the decision of the Board noted that contradictory evidence had been presented regarding the severity of health risks. This evidence would have been presented before the Court, meaning that the judges would have been aware of the contradictions, and yet and made the suggestion that the plaintiffs consider a section 7 claim nonetheless.

To date, it appears that *Kelly* is the only case brought before the courts that may be able to meet the standards for causation. According to the Court, the Board found that eight families living downwind from the site in an “area of above average risk” would be exposed to an “unacceptable risk during the drilling and completion of the wells”<sup>248</sup> in the event of an accident. The wells created a “risk of death or health damage resulting from the release of toxic gases, including hydrogen sulfide and sulfur dioxide, as well as the potential for an explosion.”<sup>249</sup> These conclusions were reached based on scientific evidence of the health risks associated with fumes from sour gas leaks.<sup>250</sup> The plaintiffs had not yet been exposed to risks, as the wells had not yet been drilled, but the known connection between the risk of harm and sour gas, and the clear causal connection between the approval to dig the wells and the presence of the risk, meant that the facts of

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<sup>248</sup> *Kelly*, *supra* note 36 at para 15.

<sup>249</sup> As paraphrased by Collins, *supra* note 26 at 27.

<sup>250</sup> EUB Decision 2007-061 at 21.

this case would likely meet the standard of proof for a physical infringement of security of the person required by section 7.

Cases with the most likely chance of demonstrating causation are those where affected individuals are directly exposed to contaminants that are known to be dangerous and are released following an approval or licensing process. Of the examples listed above, exposure to excessive industrial fumes, as in Sarnia, and contamination of water used by downstream residents could be likely candidates. Plaintiffs under these circumstances are in direct contact with contaminants that are associated with a risk of harm.

Another consideration is that it is likely that the risk of exposure to a harmful substance (i.e., through an accident) is sufficient to make out an infringement of security of the person, even if the individual may not actually come into contact with the substance. This is in line with McLachlin C.J.'s ruling in *Bedford*, where the impugned prohibitions increased the chance that prostitutes would be exposed to harm. This rule would apply in *Kelly*, where there was no guarantee that the plaintiffs would actually be exposed to the fumes, as that would only happen following an accident. Tailings ponds, then, could be the subject of a challenge due to the risk they pose if a leak occurs, even though their purpose is to contain contaminants and not to discharge or release it. Thus, the creation of a risk tied to a possible but not inevitable accident, could infringe security of the person. Given that the facts in *Kelly* were not eventually litigated in a section 7 argument, it is unclear what type of evidence would be sufficient. However, factors such as severity of harm following exposure and industry standards and records would likely be considered.

#### Step 4: A violation of procedural fairness

Approval processes can infringe security of the person. The qualifier is that the infringement must be done in a manner that complies with the principles of fundamental justice. With regulatory approvals, this most likely means that the process must be procedurally fair.

The existence of an approval process does not mean that adequate procedural protection is in place. An example of an arguably flawed approval process is seen in the federal environmental assessment scheme. Under the *CEAA 1995 (Canadian Environmental Assessment Act 1995, now repealed and replaced)*, the approach to federal environmental assessments was, as explained by Meinhard Doelle “a generally inclusive approach that tried to look at a broad range of adverse environmental effects of proposed projects.”<sup>251</sup> Today, under *CEAA 2012*, the new federal environmental assessment legislation, the standard scope of federal environmental assessments is significantly narrower.<sup>252</sup> According to Doelle, “the scope of federal [environmental assessment] has moved to one that is focused on a few issues within the direct regulatory authority of the federal governments.”<sup>253</sup> Now, many projects bypass the requirement for a federal environmental assessment due to the fact that certain considerations no longer trigger assessment, not necessarily because the project would not have significant adverse effects. It appears that approvals can be granted without employing many procedural safeguards.

Other regulatory schemes in Canada provide for a minimization of procedures as well. An attempt at procedural cutbacks was seen in *Labrador Inuit Association*, where

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<sup>251</sup> Meinhard Doelle, “CEAA 2012: The End of Federal EA as We Know It?” (2012) 24 JELP 1, at 4.

<sup>252</sup> *CEAA 2012*, *supra* note 193.

<sup>253</sup> Doelle, *supra* note 251 at 4.

the Newfoundland and Labrador Minister of Environment and Labour attempted to split undertakings. A road and an airstrip from a larger mining project undertaking was split into two separate, smaller scoped, projects in order to avoid an environmental assessment process altogether for the road and airstrip.<sup>254</sup> Other times, an environmental assessment may be initiated, but the content of the process as provided is inadequate in the opinion of some parties. For example, in *Dixon*, the plaintiffs complained that they should have been consulted about the wind turbines before their construction.<sup>255</sup> However, the legislative scheme did not require consultation under the circumstances, and thus it did not take place.

This is where the significance of section 7 for environmental purposes lies. The case law demonstrates that there are sound grounds for concluding that if an approval is linked to an infringement of security of the person, then procedural protections, *regardless of any legislative scheme that might be in place*, must be provided. Since *Suresh*, courts and academics have repeatedly stated that even the “minimal” content of the duty of fairness as a principle of fundamental justice when there has been as infringement of security of the person includes notice, participation, and reasons. While statutory schemes can explicitly oust the minimum requirements of the duty of fairness in general administrative processes, they cannot legislate away procedural fairness when section 7 rights have been engaged.<sup>256</sup>

Legislative schemes that allow for certain projects to bypass environmental assessments, such as *CEAA 2012*, cannot be implemented to avoid assessment if the

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<sup>254</sup> For example, see *Labrador Inuit Association*, *supra* note 69.

<sup>255</sup> *Dixon*, *supra* note 41.

<sup>256</sup> *Slaight Communications v Davidson*, [1989] 1 SCR 1038, [*Slaight*]; *Dore v Barreau de Quebec*, 2012 SCC 12, [*Dore*].

project poses a risk to security of the person.<sup>257</sup> Had the plaintiffs in *Dixon* successfully demonstrated that wind turbines caused serious health risks, then the fact that they were not notified or able to participate in the decision making process would likely render the authorization to construct the wind turbine farms unconstitutional under section 7. The decision would likely be sent back and have to be re-considered after allowing affected individuals a chance to participate in the decision making process. In *Kelly*, where the plaintiffs were notified and consulted, they would also likely be entitled to reasons for the final decision. Before authorities grant permits to factories to discharge contaminants into water, or approving emission levels, they would need to inform members of the affected community of the decision to be made, allow those people to provide input, and make them aware of the final decision and of any eventual exposure they would face. The significance of reasons is not only to provide for a transparent decision-making process when section 7 rights are engaged, but also to provide individuals with a chance to appeal a decision if the reasons demonstrate that the decision was flawed.

The rule against arbitrariness may also play a role in ensuring the adequacy of the reasons provided as a component of procedural fairness. Given that the principles of fundamental justice do not operate in watertight components, the rule against arbitrariness informs the content of procedural fairness. The combined effect of procedural fairness and the rule against arbitrariness on the reasons provided in final outcomes may be one of the most significant roles for section 7 in relation to the environment. Any reasons provided cannot be made arbitrarily in that there must be a rational connection between the purpose of granting a regulatory license or approval and

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<sup>257</sup> Unless the legislative scheme also satisfies the requirements of s. 1, discussed in Part 4 of this Chapter.

the actual decision rendered, based on the evidence that is adduced. Decisions could not be made solely to further the agenda of a single (perhaps political) player.

Plaintiffs may also be able to argue for additional procedures. If a plaintiff can demonstrate that the third *Baker* factor – the significance of the decision to the individual affected (i.e., the right to security of the person) – was not adequately taken into consideration, the content of the decision making process may have been flawed. If the content of a decision making process is flawed, additional procedures, such as the implementation of the precautionary principle, may be required in order to make the approval process constitutionally fair. Advocating for additional procedures may be a difficult argument in court, but the opportunity is there nonetheless.

### **Overbreadth and arbitrariness**

It may also be possible to make out a successful arbitrariness or overbreadth argument. While this is much less likely than a procedural fairness argument, the substantive principles of fundamental justice are mentioned throughout the work of Boyd and Collins, and are therefore worth addressing here.

Firstly, it appears that it would be difficult to adduce strong enough evidence to demonstrate a violation of the rules against arbitrariness and overbreadth. The “no connection” test for arbitrariness would likely fail, as there will almost always be some connection between an approval process and the purpose for which the approval was granted. For example, the purposes of the *Energy Resources Conservation Act*, the governing legislation in relation to the *Kelly* case, are only in relation to energy resources. Thus, while negative impacts to the Kelly family may be an unintended or unfortunate side effect of the approval of the wells, such a side effect does not necessarily frustrate

the overall purpose of the legislation. Therefore, a ‘no connection’ arbitrariness argument focusing on the effect of approving drilling operations and the purpose of the Act to promote the use of energy resources would likely fail.

The “unnecessary” approach to arbitrariness is slightly more likely to be applicable when challenging the drilling approval decision. In this case, it may be used to reign in the scope of the drilling. The plaintiffs in *Kelly* may be able to challenge the decision of the Board if, while connected to the purpose of legislation, the drilling approval allows for a greater number of wells, and thus exposure to a higher level of risk, than is necessary to produce the proposed outcome. Under these circumstances, the scope of the approval may be seen to be excessive (i.e., unnecessary) to meet the desired end and therefore violates the rule against arbitrariness.

As noted in chapter 3, the unnecessary approach to arbitrariness can have a similar application to the rule against overbreadth. Overbreadth, like arbitrariness, may be applicable to regulatory approvals in certain contexts, such as in the above example where the ambit of an approval might be shown to be broader than necessary to achieve the desired end. To use the same example as above, approvals allowing for greater levels of extraction or emissions than are necessary to complete a project may be overbroad, even if there is a rational connection between the project and the purpose. If an approved undertaking could have serious health risks, the scope of the project should be scoped to be as narrow as possible.

However, as noted, arbitrariness and overbreadth on their own are not likely the ideal avenue for challenging regulatory approvals, unless the requisite proof can be obtained. This will be a difficult task.

## Conclusion

Section 7 can address procedural shortcomings of regulatory approval schemes that do not adequately address and prevent adverse environmental effects even when there is a risk of harm to individuals. Under such circumstances, plaintiffs are likely entitled to, at the very least, a decision-making process that includes notice, participation, and meaningful reasons for a decision. In addition, these reasons should take into account and address any scientific evidence of potential adverse environmental impacts that contribute to the alleged harm. If these were not provided, or if the reasons demonstrated that the risk to their security of the person was not properly considered, the decision would likely violate the principles of fundamental justice and be overturned due to its unconstitutionality.

A potential lasting effect of such a decision, if it were to go to the SCC, would be to constitutionalize the minimum requirements of regulatory approval processes where the result of the approval results in a risk to security of the person, regardless of the overarching legislative scheme. By qualifying the minimum requirements (notice, participation, and non-arbitrary reasons) and overriding the general rule that procedural fairness can be ousted by legislation, procedural fairness under section 7 goes above the regular requirements of procedural fairness under administrative law. It does not matter whether or not there is an environmental assessment or regulatory regime in place to address a specific scenario. If the infringement of security of the person is there and an approval is required, then procedural fairness as a principle of fundamental justice requires certain procedures to be provided.

## Limitations

There are limitations to section 7 that become evident when applying the legal framework above under practical circumstances, as was attempted in this chapter. First, as noted above, section 7 can only apply when there are serious risks to the health of the individuals involved. While procedural fairness is a significant outcome for individuals subject to such risks, there may be few circumstances where these serious risks can actually be established (even on a balance of probabilities). Many, indeed most, undertakings that may have significant adverse environmental effects may not lead to serious risks to individuals. Exempted mining projects in areas far removed from individual dwellings, for example, may not have a direct impact on physical or psychological wellbeing. Thus, while section 7 can play an important role, the benefits of section 7 in an environmental context may not be very widespread.

Second, the rights contained in section 7 do not encompass protection against broader environmental harms. Section 7 is not likely going to provide a certain level of environmental protection, or necessarily prevent exposure to the problematic environmental impacts.

Third, what constitutes notice, participation, and reasons can be interpreted broadly. How these and any additional procedures are fulfilled will likely vary according to the kind of impact. Thus, it is difficult to paint a clear picture of what these procedures, as well as any procedures beyond the minimum requirements will look like in advance.

Fourth, section 7 will likely only apply when physical infringements of security of the person can be made out. This may be fatal for plaintiffs (especially public interest plaintiffs) wishing to make claims rooted in issues such as climate change, ecosystem

degradation, or loss of biodiversity. While the effects of climate change are well documented, these are predominantly long terms harms that may not be able to be identified with sufficient directness or precision at a single point in time. Therefore, for more immediate arguments, these types of claims may arguably be more related to psychological stresses, which are more difficult to establish. While these issues are important, the current interpretation of section 7 is not likely the most viable way to address broader environmental concerns in a court of law. The requisite scientific evidence for demonstrating a causal connection between an approval for a certain project (or multiple projects, assuming that cumulative effects can be considered) and either the future physical harms or current levels of stress caused by climate change are likely difficult to ascertain at this point in time.

## Chapter 6: Further considerations

This chapter discusses some of the additional challenges and benefits of implementing section 7 in relation to the environment that have not been addressed above. While there is overlap between these challenges, for simplicity's sake they are divided into three categories. The first category relates to the doctrine of the separation of powers, in particular the connection between the environment and property/economic interests and the risk of imposing positive obligations upon government. The second category addresses challenges posed by the rules of administrative law and role of discretion. The third category describes the relationship between administrative and constitutional law.

### The Separation of Powers

The doctrine of the separation of powers explains that state powers can be divided into three distinct spheres: legislative, executive, and judicial. Each branch of power “checks the powers of the other... [to] ensure compliance with the rule of law.”<sup>258</sup> Asking the courts to compel governments to regulate the environment in a manner that delivers a certain outcome may be seen as overstepping judicial boundaries and taking a role that is inherently political. This essentially asks the courts to create or actively contribute to government environmental protection schemes, which is precisely the type of lawmaking that the doctrine of the separation of powers works to prevent.

An example of a potential violation of the separation of powers was seen in *Chaoulli*. McLachlin C.J.'s decision in this case has received much criticism for going beyond the role of the courts and making an inherently political decision about the

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<sup>258</sup> The Honourable Chief Justice John D. Richard, “Separation of Powers: The Canadian Experience” 47 *Duq L Rev* 731.

“supposed ability of the government to attain its objectives,”<sup>259</sup> namely, how to govern health care. The merits of transferring the power to make law from democratically elected legislative institutions to unelected judges under section 7 is a highly controversial topic, and beyond the scope of this paper, but is an issue that environmental section 7 applicants should bear in mind.

In reference to the environmental case law discussed in Chapter 3, it is important to note that the courts did not, in any of these cases, impose environmental values onto otherwise unrelated areas of law. In *Oldman River*, *Spraytech*, and *Canfor*, despite commenting on the need for environmental protection, the observations regarding the environment were not in relation to the ultimate questions of law before the court and, thus, did not contribute to the decisions reached and are therefore obiter only. For example, despite the Court’s strong opening statements in *Spraytech* regarding the common future of Canadians and the need for environmental protection, L’Heureux-Dube immediately clarified that, regardless of the potential for environmental threats posed by the pesticides, the legal question to be decided was about whether creating regulations about pesticide use was within the jurisdiction of the municipality. The need for a healthy environment was not sufficient to establish or overrule the municipality’s power to regulate pesticide use in the manner it saw fit. In *Sault Ste Marie, Hydro-Quebec*, *Labrador Inuit Association*, and *Canadian Pacific*, the pith of the impugned pieces of legislation was in relation to the environment itself. Thus, the Court was able to rely on the need for environmental protection to justify its decisions because the government bodies in these cases had explicitly decided to create environmental

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<sup>259</sup> Jeremy Webber, “Section 7, *Insite*, and the Competence of the Courts” (2010-2011) 19 Const F 125 at 127.

protection legislation and subject themselves to judicial review on these matters. Thus, these cases do not demonstrate unwarranted interference by the Court with the environment or an infringement of the separation of powers.

### Positive obligations

Related to the separation of powers, there are problems when plaintiffs seek to use section 7 to require governments to take specific steps to prevent adverse environmental effects from arising. Indeed, both Boyd and Collins note that difficulties may arise if the remedies sought require positive actions by government. The purpose of the *Charter* is to ensure that government matters do not violate the rights protected within it – as per section 7, not to *deprive* an individual of their right to life, liberty, or security of the person. Courts have yet to hold that the government must take active steps to promote those rights. Moreover, the SCC has commented numerous times that it is hesitant to impose positive obligations on government to actively uphold the rights to life, liberty, and security of the person, as this risks violating the separation of powers. In fact, the Court has yet to recognize a deprivation of security of the person related to state inaction. In *Gosselin*, for example, where an applicant contended that she had a “right to a level of social assistance sufficient to meet basic needs”,<sup>260</sup> the Court held that the government was not required to set a scheme in place to ensure her needs were met. McLachlin C.J. analyzed the content of the rights to life, liberty, and security of the person, and outlines what, at the time of this paper, remains the current state of the law in regards to positive obligations under section 7:

Section 7 speaks of the right not to be deprived of life, liberty and security of the person... Nothing in the jurisprudence thus far suggests that section 7 places a

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<sup>260</sup> *Gosselin*, *supra* note 133.

positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, section 7 has been interpreted as restricting the state's ability to deprive people of these [rights]...

In this case, the Court held that the government was not obliged to uphold Gosselin's security of the person by providing her with a "particular level"<sup>261</sup> of social assistance. Thus, it may be difficult to argue that section 7 imposes an obligation to uphold a particular level of environmental protection. *Gosselin* favours the procedural approach over a substantive argument, which avoids imposing an obligation on the court to define a minimum level of substantive health.

That said, McLachlin C. J. leaves open the possibility that under "special circumstances", "section 7 may be interpreted to include positive obligations [and that it] would be a mistake to regard section 7 as frozen, or its content as having been exhaustively defined in previous cases."<sup>262</sup> The failing point of the argument for Gosselin was not necessarily a reluctance of the court to proceed in a certain direction, but a lack of compelling evidence to "warrant a novel application of section 7 as the basis for a positive state obligation to guarantee adequate living standards."<sup>263</sup> However, there is little guidance in the case law of what the special circumstances referred to in *Gosselin* may be, the strength of evidence required, or what types of factors ought to inform them. A potentially strong argument may be to argue that when there is a significant risk of harm, the government has a positive obligation to perform an environmental impact assessment.<sup>264</sup>

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<sup>261</sup> *Gosselin*, *supra* note 133 at para 75.

<sup>262</sup> *Gosselin*, *supra* note 133 at paras 81-83.

<sup>263</sup> *Gosselin*, *supra* note 133 at paras 81-82.

<sup>264</sup> For example, see United Nations General Assembly, "Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox" (2013), A/HRC/25/53 at paras 29-35.

## Negative impacts to property & economic interests

Another complicating factor for environmental section 7 claims is the intrinsic connection between the environment and land, and, therefore, economic and property interests. This connection raises concerns not only because property rights are not explicitly covered by section 7, but also because parliament has historically taken a “principled objection” against entwining constitutional and economic rights.<sup>265</sup> This is demonstrated by the fact that property rights are explicitly mentioned in the Bill of Rights, and, just as intentionally, are left out of the *Charter*. The Court has taken explicit notice of Parliament’s intention to keep property rights and the constitution separated when interpreting section 7. In *Manicom*, for example, the Ontario High Court of Justice notes, “section 7 of the Charter does not provide specific protection for property rights. It is well known that the omission of the word “property” from the section was deliberate when the Charter was enacted.”<sup>266</sup> In this case, the Court struck out the plaintiff’s statement of claim because only harm to property, as opposed to a detriment to health, was pleaded.

Even the Court’s environmentally friendly ruling in *Canfor* appears to be of little assistance here. In this case, the Court referred to the “intrinsic value” of the trees that had been burned down due to Canfor’s negligence. However, this value was still in relation to the Crown’s interest as a landowner and contributed to the economic damages incurred by the Crown following the fire. Thus, *Canfor* actually reinforces the connection between the environment – even its “intrinsic”, non-numerical value – and property. The

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<sup>265</sup> Vincent Kazmierski, "Something to Talk about: Is there a *Charter* Right to Access Government Information?" (2009) 31 Dal LJ 351, at 369.

<sup>266</sup> *Manicom et al v County of Oxford et al*, [1985] 52 OR (2d) 137 (Ont Div Ct), [*Manicom*] at part V.

more the environment is connected to property interests, the less likely courts are to interfere when the *Charter* is involved.

Environmental applicants, then, ought to be cautious with how their section 7 claims are framed. The purpose of the *Charter* is to protect individual rights and makes no reference to the environment. By advocating for a right to a healthy or safe environment, the issue is framed as one relating to the physical land, water, and air that surrounds a claimant – in essence, either a right to property or to a certain quality of property, or a restriction on the property rights of others, including the Crown. Furthermore, a substantive environmental rights approach requires courts to consider trade-offs between environmental and economic interests, which is a decision that ought to be determined by the legislatures.

Despite these concerns, it is worth considering Arbour J's dissent in *Gosselin*. She distinguishes economic rights that are fundamental to human life and survival from economic rights of a more commercial or corporate variety that are more akin to property rights. She proposes that rights that are fundamental to human life and survival can be “readily accommodated under the section 7 rights... without the need to constitutionalize ‘property’ rights or interests.”<sup>267</sup> It may be argued that clean water and air are not purely related to property, but are integral to human life and security of the person. Negative impacts to these elements may be connected to negative impacts on security of the person. However, a majority of the Court has yet to rule in favour of this idea.

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<sup>267</sup> *Gosselin*, *supra* note 133 at para 311.

## Challenges posed by Administrative Law

The above challenges posed by the separation of powers and positive obligations may be best avoided by focusing a section 7 argument on procedural fairness. Procedural fairness, in a sense, imposes positive obligations upon government as it requires certain steps to be taken. However, the distinction is that it does not require a specific government program or scheme be implemented to uphold a right. Rather, it requires a fair procedure if a decision that is already being made carries the risk of infringement. Thus, it is not a free-standing positive obligation, but a requirement for due process for government-initiated actions. For example, while courts have been reluctant to impose substantive regimes or levels of protection, as was the case in *Gosselin*, the Court's ruling in *Suresh*, a case involving deportation to torture, demonstrates a willingness to dictate specific procedural requirements when section 7 is engaged in an administrative context.

Despite the assertion that the most applicable venue for success is through a procedural fairness argument, there are elements specific to administrative law that complicate using section 7 to challenge decisions of administrative decision-makers. The rules governing standards of review for administrative decisions are complex and beyond the scope of this paper, but the key factor is deference.<sup>268</sup> In *Dunsmuir*, the leading case on standard of review, the SCC explains that “deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the court and administrative bodies within the Canadian

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<sup>268</sup> See Audrey Macklin, “Chapter 9: Standard of Review: Back to the Future?”<sup>3</sup> in particular Part VIII, “Review of Standard of Review: I laughed, I cried, I Stood on my chair and...” in Flood & Sossin, *supra*, note 153 at 319.

constitutional system.”<sup>269</sup> Courts are much less hesitant to interfere with a decision or action of an administrative decision-maker than they are with those of the legislatures, especially if they are asked to review a question of fact. In many circumstances, courts are willing to grant deference in their decisions *regardless of whether they would have come to a different conclusion had they considered the issue themselves*. In these circumstances, courts will only interfere if the decision was unreasonable. As the Court asserts in *Southam*, an “unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be on the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it” (emphasis added).<sup>270</sup>

In the case of regulatory approvals, the fact-finding process generally takes place in front of various responsible authorities or review panels. *Kelly* illustrates the importance of adducing adequate evidence of harm during original fact-finding hearings, as courts are hesitant to overturn findings of fact. A primary reason that the court was willing to consider the section 7 claim was because the Board had already concluded, based on evidence brought by the Kellys, that a serious risk of harm was present. In contrast, in *Domke* (another section 7 case involving sour gas wells) the applicants argued to the Alberta Court of Appeal that the Alberta Energy and Utilities Board erred in a factual assessment of risk.<sup>271</sup> The Court declined to review the facts, and held that “the

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<sup>269</sup> *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, [*Dunsmuir*], at para 49.

<sup>270</sup> *Canada (Director of Investigation and Research) v Southam In* [1997] SCR 748, 1997 CanLII 385, at para 56, referred to in *Baker*, *supra* note 206 at para 63.

<sup>271</sup> *Domke*, *supra* note 91.

assessment is fact laden and involves the [Board]’s core expertise. At any appeal hearing it would be entitled substantial deference.”<sup>272</sup>

Questions of law, as opposed to questions of fact, may receive less deference. If an administrative decision-maker has incorrectly applied the relevant law in a decision-making process – for example, by failing to apply the correct *Baker* factors – then Courts are more likely to interfere with a decision. This interference can range from the Courts overturning the decision completely and replacing it with a decision of their own, to sending the decision back to the administrative decision-maker for reconsideration using the correct legal tests. However, as stated, determining the correct standard of review comes down to more than just the type of decision in question. An analysis of the dense area of law regarding the standard of review, even when applied to a single circumstance, is beyond the scope of this thesis.

### **The relationship between constitutional and administrative law**

The *Baker* factors and other rules of administrative law apply to all government decisions, regardless of whether or not there is a constitutional interest at stake. Thus, it may appear that framing a section 7 claim in an administrative context would not provide any protections beyond those already afforded under the general duty of fairness.

However, there are some additional requirements that enhance the protections afforded by the duty of fairness once section 7 is engaged. This section outlines some of the benefits associated with an administrative argument that incorporates constitutional principles.

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<sup>272</sup> *Domke, supra* note 91 at 27.

First, as mentioned above, procedural fairness cannot be ousted by legislation if a constitutional interest is at stake. Generally, the legislatures can prescribe the specific procedures that administrative decision-makers are required to follow, and, conversely, can relieve them of performing others, such as notice, participation, or reasons. While in *Suresh* the court explained that these procedures were generally the minimum contents of procedural fairness, the extent to which they are enforceable, particularly the duty to give reasons, depends on the case at hand and the legislative scheme at play. For example, in *Baker*, the SCC explains that while “in certain circumstances, the duty of procedural fairness will require the provision of a written reason for a decision ... the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions.”<sup>273</sup>

However, if a decision made under such a legislative scheme affects section 7 interests, then it appears that the minimum procedures must be undergone, even in the face of an explicit statutory exemption. When a decision has an important significance for the individual or when there is a right of appeal – both of which are met when constitutional interests are at stake – reasons will be required.<sup>274</sup> Thus, a set of facts that demonstrates an infringement of security of the person creates a categorical exclusion to an administrative scheme that would not be available under administrative law, but only exists once the *Charter* is triggered.

A second benefit to framing a procedural argument as a *Charter* claim is the integration of the rule against arbitrariness. The rule reigns in the deference afforded to a final decision and substantivizes the manner in which the procedures provided are carried

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<sup>273</sup> *Baker*, *supra* note 206 at para 37 & 43.

<sup>274</sup> *Baker*, *supra* note 206 at para 43.

out. Thus, not only must reasons be provided, as per *Baker*, but the content of those reasons must reflect a non-arbitrary decision that is based on proper weight and consideration of the relevant factors. Generally, as noted above, in *Southam*, an unreasonable decision under the regular rules of administrative law is “one that, in the main, is not supported by *any* reasons that can stand up to a somewhat probing examination.”<sup>275</sup> In the case of regulatory approvals, any economic benefit of a project might suffice. However, the unnecessary approach to arbitrariness and the rule against overbreadth require more from a decision than that it not be unreasonable in the manner described in *Southam*. A rational connection between decisions and all of the sound evidence adduced is likely required. This does not guarantee a specific outcome; therefore, a project may not be overturned despite a presence of serious harm. But, a decision may need to demonstrate that there are no unnecessary (i.e., arbitrary) components of a project. Decisions will likely have to reflect a careful consideration of any clear scientific evidence of harm or risk and the potential impacts on individuals that are adduced in order to justify the parameters of a project.

Moreover, the SCC suggests in *Baker* that reasons reflect must not only the purpose of the statutory scheme and the evidence as presented, but also interests that are “central... values in Canadian society.”<sup>276</sup> L’Heureux-Dube read into the *Immigration Act* that the needs and interests of children were central to humanitarian and compassionate values. Reasons provided in *Charter*-triggering environmental decisions, then, should reflect the environmental values that are fundamental to Canadian society that have been referenced by the Court for decades.

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<sup>275</sup> *Southam*, *supra* note 270 at para 56.

<sup>276</sup> *Baker*, *supra* note 206.

Finally, constitutional rights are indispensably linked to the rule of law.<sup>277</sup> According to Craik et al., at a minimum, under the rule of law “even the most powerful state organs and official are subordinate to the law. They may not act according to their simple wishes and desires, but must act in compliance with the law.”<sup>278</sup> In *Roncarelli*, the SCC explains that the rule of law limits statutory powers to the “express or implied purposes for which they were granted,”<sup>279</sup> and that if “an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, [this] would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.”<sup>280</sup> The rule of law, which has similarities to the rule against arbitrariness, imposes a duty of “good faith in acting with a rational appreciation of [the] intent and purpose [of the legislation] and not with an improper intent.”<sup>281</sup> Thus, under the rule of law, administrative decision-makers making environmental decisions must act in a manner that upholds the purpose of the legislation under which they obtain their power. In Canada, this power often comes from environmental legislation that is based in a need for environmental protection: the Preamble and Purposes under s. 4(1) of the *CEAA 2012* refer to the protection of the environment from significant adverse environment effects;<sup>282</sup> a purpose of the *Environmental Protection Act* is to provide for the protection and conservation of the natural environment;<sup>283</sup> to name a few. These

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<sup>277</sup> The preamble to the *Charter*, *supra* note 9 states that “Canada is founded upon principles that recognize... the rule of law.”

<sup>278</sup> Neil Craik et al, *Public Law: Cases, Material, and Commentary (Second Edition)* (Toronto: Emond Montgomery Publications, 2011) at 92.

<sup>279</sup> Craik et al: Public law, *supra* note 278 at 92.

<sup>280</sup> *Roncarelli v Duplessis*, [1959] SCR 121, [*Roncarelli*].

<sup>281</sup> *Roncarelli*, *supra* note 280.

<sup>282</sup> *CEAA 2012*, *supra* note 193.

<sup>283</sup> *EPA*, *supra* note 42.

purposes ought to be reflected in all actions taken under pieces of legislation like these in order to uphold the rule of law as a constitutional principle. For section 7 to be implemented, the purpose of the legislation need not be directly related to individuals. If an approval made under the *CEAA 2012* or the *Environmental Protection Act* (or otherwise) gives rise to an infringement of security of the person, then the court will be able to look to see if the approval is also in line with the purpose of the overarching legislation.<sup>284</sup>

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<sup>284</sup> *CEAA 2012*, *supra* note 191; *EPA*, *supra* note 42.

## Chapter 7: Conclusion

### Summary of findings

Many of the adverse environmental impacts of concern to Canadians are linked to projects that interfere with the environment, and the government is often within an arms length of these projects. Environmental legislation and regulations, contracts where the government is a party, and decisions of administrative-decision makers are all matters within the authority of government, and must comply with the *Charter*. Should these actions affect an individual directly or if the individual has a genuine interest in the outcome, that individual will likely be able to achieve standing and challenge the decision at a court of law.

Scientific evidence of serious risks of physical harm to human health on a balance of probabilities would demonstrate a negative impact on an individual's right to security of the person. While what exactly constitutes serious harm in the context of adverse environmental effects is unclear, there are a few guiding factors provided in the case law. Actual harm need not have arisen, demonstrating that a true health risk arises due to the environmental impact is a high threshold to meet. The case law currently demonstrates that it is incumbent on the plaintiff to demonstrate actual harm, not on the Crown to demonstrate a lack of harm. However, as demonstrated in *Kelly*, this does not appear to be an impossible burden. Sufficient causal connection between the physical interference with security of the person and the impugned government action will likely be present in regulatory approval processes, as there will have to be some sort of government authorization in order for harm or risk of harm to materialize. This will most likely be in the form of a decision from an administrative decision-making.

While an infringement of security of the person on its own is not sufficient to tie the government's hands, the action will be unconstitutional if it is coupled with a violation of the principles of fundamental justice. Procedural fairness as a principle of fundamental justice requires that the duty of fairness be met any time an administrative decision is made. Given that the minimum requirements for fairness include notice, participation, and reasons, this likely requires administrative decision-makers to undergo an unbiased regulatory approvals process whenever a project poses a risk to security of the person. This is a duty that cannot be ousted by legislation, including regulatory regimes that would otherwise provide exemptions for projects of a smaller scope. It is not the size or cost of a project that dictates the content of procedures, but whether the project poses a risk to a single individual. *Baker, Suresh, and G(J)* demonstrate that the required procedures are not necessarily limited to notice, participation, and reasons, listed above, and additional procedures, such as the implementation of the precautionary principle, or higher levels of notice, participation, or reasons may be pursued.

The rule of law, and the rules against arbitrariness and overbreadth, can also play a role in environmental decision-making. If a project authorization is unnecessarily broad to achieve its desired purpose, the authorization may be unconstitutionally arbitrary and/or overbroad. It is possible that a decision leading to environmental harms that “represent such a serious and imminent threat that [the] authorization under any circumstances violates the principle of fundamental justice” as suggested by Gage could stand alone as a violation of the principles of fundamental justice. It would likely pass the first and second steps of the *Malmo-Levine* test by being able to be identified as a legal principle – the environmental harm principle as discussed in chapter 4 – and that there is

significant social consensus that preventing this type of harm is fundamental to the way in which the legal system ought to operate. However, it may not be defined precisely enough for judges to be able to apply it uniformly, and without risk of rendering a policy decision instead of an objective judgment.

## **Implications**

While a potentially effective role for section 7 has been identified in this thesis, it has some broader implications for the literature. Specifically, some of the proposed options in other works for the provision should be put aside, as such arguments are unlikely to be successful at court. Mainly, it is highly unlikely that broad environmental rights will materialize through section 7 litigation. Other venues for substantive environmental rights – such as a harmonized environmental bill of rights that applies across Canada - should be proposed and explored if that is a desired goal. Outside of section 7 and substantive rights, there are also other tools to be considered for the promotion of environmental protection, such as in relation to property/economic interests and reliance on Aboriginal rights and title. Such a discussion, however, particularly in regards to aboriginal rights, is beyond the scope of this thesis.

Advocates seeking to rely on the approach provided in this thesis should recognize its limitations. Test cases most likely to be successful will be those with well-documented connections to harm (such as sour gas) that are governed by regulatory schemes that provide for minimal procedures or, in some circumstances, remove the duty of fairness completely. Further, substantive remedies will likely only be granted in limited circumstances. While a best-case scenario would involve replacing a regulatory decision with one of the plaintiff's choosing (which is highly unlikely), the more realistic

expectation for successful claims is to have a decision sent back to the decision-maker to be re-decided on the condition that the proper procedures are implemented.

There are also several implications for government decision makers. A first potential side effect is related to time. Environmental decision makers will need to look closely into the potential future impacts of their decisions to determine whether or not there will be a risk to security of the person when implementing an approval process, which may lengthen administrative proceedings. Lengthy processes may pose financial problems for government, and ultimately tax payers. However, if not done initially, future challenges to unfair processes could cause even further delays and, as such, it would be prudent to conduct the extra research at the onset of an approval process. Related, legislatures will need to take extra precaution to make sure legislation governing decision-making processes remains compliant with the *Charter*. They will not be able to legislate out notice, consultation, or the duty to give reasons when there is a serious risk of harm. For example, should future studies on wind turbines reveal that the plaintiffs' concerns in *Dixon* are legitimate, then the provisions in Ontario's *Green Energy Act* that remove consultation obligations might be subject to a *Charter* challenge.<sup>285</sup>

All in all, the conclusion reached in this thesis should not significantly prevent government or private industries from achieving their economic goals. Rather, it should promote fair, safe, and effective regulatory approval processes that deliver more desirable outcomes over the long term.

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<sup>285</sup> *Dixon*, *supra* note 41; *Green Energy Act*, 2009, SO 2009, c 12, Sched A.

## Moving forward: Areas for further research

Several areas for further research are presented by the questions explored in this thesis. Primarily, the analysis demonstrates that there may be a policy argument – reinforced by the continued reference of the SCC to the environment as a fundamental value to Canadian society – that supports the imposition of a duty to obtain and rely upon scientific evidence under certain circumstances. Specifically, it may be possible to argue that there is, or should be, a requirement for administrative decision makers to obtain the relevant scientific evidence themselves and/or apply the precautionary principle if scientific evidence is not available when making a decision that could result in significant adverse environmental impacts affecting section 7 interests. While this would move beyond the Court’s current interpretation of the scope of section 7, there are many indications that Courts may be willing to move forward in this way. As mentioned, the Court in *Gosselin* explicitly left open the possibility for positive obligations under “special circumstances.”<sup>286</sup> This may be an area where such special circumstances could arise. While the Court does not provide a clear analysis of what would be required under these special circumstances, it can be argued that they may be reflective of some of the requirements for recognizing a new principle of fundamental justice – rooted in a legal principle (in this case, procedural fairness), fundamental to the way in which the legal system ought to operate (which, arguably, includes sound environmental decision-making when there is a demonstrated risk of harm), and is able to be defined with sufficient precision to yield a manageable standard.

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<sup>286</sup> *Gosselin*, *supra* note 133 at 83.

Second, the law regarding standards of review is a rich and complex area of administrative law, and is an issue in most administrative decisions subject to judicial review. However, the application of the law to any scenario depends on the particular facts of the case at hand and the legislative and regulatory regimes governing the applicable administrative body. As such, it would not be reasonable to postpone conducting a full analysis on the standard of review until individual claims come forward.

The specific requirements for the rights to notice, information, and participation can also be further explored. For example, could the right to notice be used to impose an affirmative obligation on the government to take actions to inform themselves of the risks of an action before it is taken (either through scientific evidence, as suggested above, or otherwise), or does notice only involve notification of whatever information is currently known? Also, procedural fairness might require the consideration of the cumulative effects of projects under the authority of a multitude of decision makers. It could be argued that there ought to be a dialogue between different heads of power to ensure that cumulative effects across sectors are taken into consideration.

Additionally, the law of remedies is also robust and there may be additional types of remedies particularly suited to environmental applicants that could be applied for. Again, an adequate remedy will depend upon the individuals involved and the harms they have endured.

### **Closing remarks**

The movement to recognize the connection between the environment and human rights continues in Canada. Bill C-634 will soon go through its second reading, and Boyd and Suzuki will continue to entice followers in their pursuit of a constitutional

amendment for an explicit right to a healthy environment. However, success at both of those approaches requires a similar time-consuming step: the passing of legislation by the Canadian federal government. While it is highly unlikely that section 7 of the *Charter* will bring about the type of substantive right to environmental protection envisioned by some activists, the approach contained in this thesis is one that is available for individuals facing significant health risks that seek to take action today.

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*Environmental Assessment Act*, RSO 1990 c E 18.

*Environmental Protection Act*, RSO 1990, c E-19.

*Immigration Regulations, 1978*, SOR/78-172, as am by SOR 93/44.

*Oceans Act*, SC 1996 c 31.

*Ontario Water Resources Commission Act*, RSO 1970, c 332.

*Security of Information Act*, RSB 1985, c O-5.

### **Other legal resources**

*1992 Rio Declaration on Environment and Development*, 14 June 1992, UN Doc A/CONF 151/26 (vol 1), 31 ILM 874.

Court file No. 528/10, Ontario Superior Court of Justice, between Ada Lockridge and Ronald Plain –and- Director, Ministry of the Environment, Her Majesty the Queen in Right of Ontario, (Amended) Notice of Application to Divisional Court for Judicial Review (January 10, 2012).

## Appendix I – Legal research as a research method

The preamble of the *Charter* provides that Canada is “founded upon principles that recognize... the rule of law”.<sup>287</sup> The rule of law requires the “creation and maintenance of an actual order of positive laws,”<sup>288</sup> meaning that the state of the law must always be able to be read, understood, and abided by. When presented with a legal issue, lawyers and legal researchers conduct legal research to determine the state of the law, and develop a “comprehensive analysis”<sup>289</sup> of how the law applies to the problem as presented. It is an investigative method used in the legal community with the purpose of informing an objective legal opinion. There are many similarities between the steps taken for legal research for practical purposes, where a lawyer conducts research for a client to address an issue that the client has personally experienced, and descriptive legal research, where the researcher explores an unaddressed legal issue for scholarship purposes. Given that most readers will be at least somewhat familiar with the purpose of practical legal research, it is discussed in this section for illustrative purposes. For both practical and descriptive legal research, the purpose of the work is to “describe the law, without offering prescriptions.”<sup>290</sup> The general steps taken for both types of research are laid out in this appendix, and then the explicit steps taken in this research are identified.

The purpose of this research was to explore the legal issue proposed by Gage, Collins and Boyd regarding the application of section 7 to the environment and provide a neutral review of the law as it relates to that issue. It is not a reformist or prescriptive piece, but provides a legal opinion as to the requirements for successful litigation. Only

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<sup>287</sup> *Charter*, *supra* note 9 Part I.

<sup>288</sup> *Re: Manitoba Language Rights*, [1985] 1 SCR 721.

<sup>289</sup> S L Simons, "Navigating through the Fog: Teaching Legal Research and Writing Students to Master Indeterminacy through Structure and Process" (2006) 56.3 J Legal Educ 356 at 356.

<sup>290</sup> Rubin, *supra* note 21 at 523.

case law from Canadian courts related to section 7 and how the provision might apply to environmental were analyzed. While the use of international may offer further insight in potential interpretations of section 7 given that, as mentioned by Boyd, multiple jurisdictions have considered similar environmental approaches to human rights legislation, a comparative approach was not taken. The complexity of international and the wide breadth of relevant case law from non-Canadian jurisdictions related to environmental rights renders such a comparative approach beyond the scope of this paper.

The following is an outline of the three phases of legal research that were undertaken for this thesis: i) defining the problem, ii) the library or research phase, and iii) application or analysis phase.<sup>291</sup>

### **Identifying the issue**

The first phase of legal research involves defining the problem the issue.<sup>292</sup> With practical legal research, the issue identified through fact gathering. The facts provide the context, and “dictate[s] the issues of law that need researching.”<sup>293</sup> Fact-gathering processes may include interviewing clients and/or witnesses, reviewing documents, such as medical records, policy records, receipts, leases, contracts, tax returns, etc, consulting experts, and/or inspecting tangible evidence, such as murder weapons, fingerprints,

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<sup>291</sup> Anita L Morse, "Research, Writing, and Advocacy in the Law School Curriculum" (1982) 75 Law Libr J 232; Christopher Wren & Jill Robinson Wren, *The Legal Research Manual: A Game Plan for Legal Research and Analysis*, 2d ed (Madison, IL: Legal Education Publishers, 1986) [Wren & Wren: Manual].

<sup>292</sup> Morse, *supra* note 291 at 346-7.

<sup>293</sup> Christopher Wren & Jill Robinson Wren, "The Teaching of Legal Research" (1988) 80 Law Libr J 7 at 16 [Wren & Wren: Teaching].

articles of clothing, or any objects seized in investigations.<sup>294</sup> After gathering and analyzing the facts, the researcher must identify the legal issues raised by the facts.<sup>295</sup>

For this work, the legal issue that formed the subject of this thesis had already been identified. Collins, Boyd, and Gage noted that the application of section 7 to an environmental context was an unexplored legal issue.<sup>296</sup> As noted in Chapter 2, the bibliographies contained in the works of authors were consulted, as well as bibliographies of works citing Collins, Gage, and Boyd. Online searches of journals, library databases, and general research databases that used key search terms such as *Charter*, security of the person, fundamental justice, and environment were performed to determine whether or not additional work had written on the topic of environmental rights and section 7. The searches yielded no other results, indicating that the application of section 7 to the environment had not yet been answered. The issue, then, is whether section 7 could apply to an environmental setting.

## **Library Phase**

After identifying the legal issue, a legal framework must be developed. The legal framework is developed in phase two of legal research, the Library Phase. The framework sets out the legal tests applicable to the issues identified in Phase I. There are three steps to the Library Phase: a) find the law, b) read the law, and, c) note-up the law.<sup>297</sup>

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<sup>294</sup> Wren & Wren: Teaching, *supra* note 293 at 38.

<sup>295</sup> Wren & Wren: Manual, *supra* note 291 at 32-36.

<sup>296</sup> Boyd, *supra* note 1 at Chapter 8; Collins, *supra* note 26 at 21; Gage, *supra* note 15.

<sup>297</sup> Wren & Wren: Teaching, *supra* note 293.

a) Locate the relevant sources of law

In the first step, the researcher must locate the relevant sources of law. There are two sources of law: primary and secondary. Primary sources contain binding sources of law, whereas secondary sources summarize or analyze the law.<sup>298</sup> Primary sources “cannot, in themselves, provide a complete statement of the law in any given situation.”<sup>299</sup> Thus, secondary sources of law ought to be consulted before primary sources when conducting legal research.<sup>300</sup>

Secondary sources do not constitute enforceable statements of law.<sup>301</sup> Instead, they provide the researcher with an overview of the applicable legal landscape and “assist the [researcher] in... explaining and understanding the law.”<sup>302</sup> Secondary sources also often identify the relevant primary sources.<sup>303</sup> Examples include the Canadian Abridgement, which is “a comprehensive collection of case digests, or summaries, of issues decided by Canadian courts and administrative tribunals”<sup>304</sup> and Canada’s official method of organizing case law<sup>305</sup>, peer-reviewed journal articles, textbooks, treatises, case books, dictionaries, journals, periodicals, government documents, case

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<sup>298</sup> Tanya Stern & Jessica Robinson. *When and how to use Secondary Sources and Persuasive Authority to Research and Write Legal Documents* (Washington DC: The Writing Centre, Georgetown University Law Center, 2004) at 2.

<sup>299</sup> Paul Chynoweth, "Chapter Three: Legal Research" in Andrew Knight, ed, *Advanced Research Methods in the Built Environment* (Manchester, England: School of the Build Environment, University of Salford: Les Ruddock, 2008) 28 at 29.

<sup>300</sup> Simons, *supra* note 289 at 368.

<sup>301</sup> University of Toronto, Faculty of Law, "Legal Research Process" (2013), online: Bora Laskin Law Library <<http://library.law.utoronto.ca/step-2-primary-sources-law-canadian-case-law-0>>.

<sup>302</sup> *Ibid.*

<sup>303</sup> Stern & Robinson, *supra* note 298 at 3.

<sup>304</sup> University of Ottawa. Faculty of Law, "Principles of Legal Research" (2011), online: Brian Dickson Law Library <[http://web5.uottawa.ca/www2/r1-lr/eng/case-law/case-law\\_canadian-abridgment.html](http://web5.uottawa.ca/www2/r1-lr/eng/case-law/case-law_canadian-abridgment.html)> at 3.0.

<sup>305</sup> J Jones, "[On Not] Taming the Information Wilderness" (2009) 9 *Legal Information Management* 53 at 54.

commentaries, and other lawyers, colleagues, or professors. A wide variety of secondary sources were consulted for this thesis, including all of the above.

This work draws upon three broader areas of law: constitutional, administrative, and environmental (recognizing that environmental law encompasses multiple areas of law in itself). The key topics pursued in secondary sources were environmental law, environmental rights, procedural fairness, administrative law, the *Charter* and the Principles of Fundamental Justice.

In addition to providing an overview of the law, secondary sources often identify the relevant primary sources of law.

### **Primary sources of law**

Canada has a common law legal system, and thus has two primary sources of law: case law and legislation.<sup>306</sup> Canadian case law consists of written decisions from judges (i.e., judgments) from all levels of Canadian courts.<sup>307</sup> Thus, case law “cannot be found in any code or body of legislation, but exists only in past decisions.”<sup>308</sup> All case law is printed at end of the Canadian Abridgement or can be searched through electronic legal databases, such as LexisNexis, CanLii, or Westlaw.

The Canadian common law system is rooted in the principle of *stare decisis*, which requires judges to “follow the previous rulings (i.e. precedents) of other judges in higher courts in their province or territory and the Supreme Court of Canada on the same issue.”<sup>309</sup> However, the common law is also “flexible and adaptable to changing

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<sup>306</sup> University of Toronto, Faculty of Law, *supra* note 301.

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid.*

<sup>309</sup> University of Toronto, Faculty of Law, *supra* note 301.

circumstances.”<sup>310</sup> As new issues are presented at court, existing legal tests may need to be altered or expanded upon.

**Example:** if the Supreme Court of Canada states that a trespass constitutes a direct and intentional interference with an individual’s land, this statement becomes the legal test for trespass in Canada. This test can be broken down into four elements: a) a direct b) and intentional c) interference d) with land. Assume that for several years, the only cases of trespass to come before courts involved a person entering someone else’s land, which fulfills the “direct” element of the test. However, a judgment from the Ontario Court of Appeal later rules that a fallen tree on another’s land constitutes a “direct” interference. Thus, in Ontario, the “direct” element is now fulfilled by a person on the land, *or* by an object on the land.

Legislation, the second primary source of law, is law that is “made by elected representatives from any level of government”<sup>311</sup> and is used to “introduce a new law or to change or clarify existing laws.”<sup>312</sup> There are three types of legislation in Canada: statutes, regulations, and by-laws. Statutes are enacted at either the federal or provincial level, and are debated and voted on by elected representatives before coming into force. They contain broader rules that govern a particular area. Regulations and by-laws are enacted by ministers or administrative bodies, and provide the details that “operationalize and allow for implementation of the statute.”<sup>313</sup> Every jurisdiction is required to publish full-text legislation online.

For this thesis, the relevant case law includes all cases where section 7 claims relating to the environment were brought before any Canadian court; all cases from the Supreme Court of Canada that discuss the application of section 7, and administrative law cases from the Supreme Court of Canada addressing the duty of fairness, procedural

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<sup>310</sup> Department of Justice, Canada, "About Canada's System of Justice" (2013), online: Department of Justice <<http://www.justice.gc.ca/eng/csj-sjc/just/>> at 10.

<sup>311</sup> University of Toronto, Faculty of Law, *supra* note 301.

<sup>312</sup> *Ibid.*

<sup>313</sup> *Ibid.*

fairness, and the application of section 7 to administrative decisions. This case law was later accessed through LexisNexis and CanLii.

Given that this work constitutes a *Charter* analysis, the *Charter* is the most significant piece of legislation referred to in this work. Each step of the legal framework is rooted in a provision of the *Charter*: s. 1, section 7, s. 32(1), s. 24(1), and s. 52.

#### b) Reading and Evaluation

The second step of the Library Phase involves reading and evaluating the law, and confirming that the identified legal tests apply to the issue by “plac[ing] authorities in their broader legal context.”<sup>314</sup> Generally, this involves consulting the secondary sources identified in Phase I to obtain an understanding of the broader legal context, and then analyze the primary sources to confirm their particular relevance to the issue. It is *always* the duty of the legal researcher to read and evaluate the primary sources, and not to rely on the interpretations provided in secondary sources.<sup>315</sup> The number of sources to be consulted will depend the complexity of the issue(s).

Binding sources of law must be distinguished from persuasive sources of law. Binding sources *must* be followed, whereas persuasive sources may be considered, but courts are not obligated to apply them.<sup>316</sup> Only primary sources have the capacity to be binding, but not all primary sources are binding in every circumstance.

Legislation is always binding within its applicable jurisdiction. For example, federal legislation is binding across Canada, provincial legislation and regulations are binding within the province, and by-laws are binding within a municipality. In regards to

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<sup>314</sup> Wren & Wren: Manual, *supra* note 291 at 79-80.

<sup>315</sup> Stern & Robinson, *supra* note 298 at 3.

<sup>316</sup> *Ibid* at 2.

case law, there is a hierarchy among Canadian Courts (see figure 1), meaning that decisions from higher level courts bind lower level courts. Courts are also bound by their own judgments until they are overruled by a higher-level court within the same province, or by the Supreme Court of Canada. For example, decisions of the Supreme Court of Canada are binding across Canada,<sup>317</sup> and judgments from higher-level provincial courts (e.g., the Ontario Court of Appeal) are binding on lower-level provincial courts (e.g., the Ontario Supreme Court of Justice) within the same province.<sup>318</sup>

Persuasive sources of law include legislation and case law from other jurisdictions (e.g.: outside provinces, territories, or other countries), and secondary sources of law. Persuasive sources will not necessarily be applied, but may help strengthen an argument by illustrating how the law has been interpreted and/or developed by academics or by lawmakers in other jurisdictions. For example, legislation from other jurisdictions may be persuasive, but not binding. For example, Ontario's *Environmental Assessment Act*<sup>319</sup> may be used to interpret British Columbia's *Environmental Assessment Act*<sup>320</sup> if there are similarly worded provisions. Similarly, judgments from the Ontario Court of Appeal are often considered to be strongly persuasive on the British Columbia Provincial Court or Court of Appeal.

To the greatest extent possible, arguments should be based in binding sources of law.<sup>321</sup> However, if no binding primary source of law exists for a particular point, citing the most relevant persuasive sources may be useful.

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<sup>317</sup> University of Toronto, Faculty of Law, *supra* note 301.

<sup>318</sup> Stern & Robinson, *supra* note 298 at 1.

<sup>319</sup> *Environmental Assessment Act*. RSO 1990, c e 18.

<sup>320</sup> *Environmental Assessment Act*, 9SBC 2002] c 43.

<sup>321</sup> *Ibid* at 2.

### c) Noting-up

The final step of the Library Phase is to ensure that any case law used in the framework is still good law. This is done through a process called noting-up.<sup>322</sup> Noting-up involves checking for judicial treatment of a case; i.e., whether the case has been cited in subsequent judgments, and, if so, how the case was treated within those judgments.<sup>323</sup> Positive treatment in subsequent cases (i.e., the judge followed the original logic of the case) indicates that the case is still good law and reinforces its strength. Negative treatment (i.e., the case was criticized or overruled)<sup>324</sup> indicates that the case is no longer applicable, either in whole or in part. Negative treatment by a court within another jurisdiction does not overrule a case, but weakens its ability to be persuasive.

The two tools most commonly used for noting up case law are electronic legal databases and the Canadian Abridgement. LexisNexis was the primary tool used for noting up for this research. All databases include an option to note up a case, which provides a list of case law that has cited the case within the body of the decision. Most databases also indicate positive or negative treatment. The Abridgement includes a “Consolidated Table of Cases”, which provides the history of every case, including “subsequent decisions, developments in the case, and any judicial treatments the case received in another decision.”<sup>325</sup>

### **Application**

Finally, the researcher must analyze the issue as applied to the legal framework and form a legal opinion. A written opinion should then set out the legal framework, and an

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<sup>322</sup> University of Ottawa, Faculty of Law, *supra* note 304 at 1.10.

<sup>323</sup> University of Ottawa, Faculty of Law, *supra* note 304 at 1.10.

<sup>324</sup> University of Ottawa, Faculty of Law, *supra* note 304 at 1.10.

<sup>325</sup> University of Ottawa, Faculty of Law, *supra* note 304 at 1.11.

application of the law to the issue, and come to a clear, objective, and logical conclusion. Chapter 4 of this thesis contains the legal framework for section 7 and any environmental implications presented by the case law. Chapter 5 provides a hypothetical application of section 7 to environmental regulatory approval processes.