

Human Rights and Resource Development Project

**Health, Human Rights and
Resource Development in Alberta:
Current and Emerging Law**

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Alberta Civil Liberties Research Centre
Centre de recherche de l'Alberta sur les libertés civiques



Canadian Institute of Resources Law
Institut canadien du droit des ressources

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Foreword

This paper is the first publication to come from the Human Rights and Resource Development Project, the purpose of which is to explore the relationship between two important areas of law: human rights, as they are protected by law in Alberta, and the legal regime, pursuant to which natural resources, such as oil and gas, are developed in the Province. The two non-profit organizations which have undertaken this Project – the Alberta Civil Liberties Research Centre and the Canadian Institute of Resources Law – are dedicated to legal research, publication and education. Thus, we do not take positions regarding the factual controversies, which lie behind some of the conflicts over resource development in Alberta. Nevertheless, our work on the Project proceeds from the assumption that those controversies are serious enough, that it is crucial for the relevant law on these matters to be as clearly articulated and as widely understood as possible.

A great deal of hard thought and research went into the writing of this paper, which we feel makes a real contribution to the literature in the field. We thank the author, Nickie Vlavianos, for her fine work and her collegiality while working on the Project. We would also like to thank Monique Ross for her insights and efforts. In addition, Jennifer Koshan, of the Faculty of Law, University of Calgary, provided valuable input on the constitutional law section of the research, and participated in a workshop we presented on our findings. Further, law student Mary Ann Bendfeld also shared her research on related issues, and this was very helpful.

We also want to express thanks to our own organizations for supporting our desire to undertake the Human Rights and Resource Development Project and to the Alberta Law Foundation for providing the funds to make it all possible.

Linda McKay-Panos
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September 2003

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1.0 Introduction

Rural Albertans have worried about the actual and potential effects of oil and gas development on their health for years. Recently, these concerns have intensified. Before Alberta's energy regulator, the Energy and Utilities Board (the "EUB"), health concerns are being raised more often and more forcefully. The EUB has acknowledged that "[d]isputes between residents and petroleum companies seem to be increasing in number and intensity."¹

A number of factors are likely contributing to this increase in health concerns. Among them, two stand out: the growing awareness amongst Albertans of the interrelationship between human health and the environment; and the intensification of oil and gas development in the province.²

Like others worldwide, Albertans are becoming increasingly aware of the links between human and environmental health. As noted by one commentator, "[p]ublic interest in and unease about environmental risks and health hazards has reached exceptional heights in recent years."³ Driven by new scientific research, we have become increasingly aware that "... substances that are released into the environment can ultimately find their way back to us in various amounts and combinations through our air, water, soil and food, and can affect our health and the health of ecosystems."⁴ Federal and provincial environmental legislation in Canada highlight these interconnections.⁵

¹Alberta Energy and Utilities Board, *Regulatory Highlights for 1999* (Calgary: EUB, 1999) at 10.

²For other contributing factors, see: T. Marr-Laing & C. Severson-Baker, *Beyond Eco-Terrorism: The Deeper Issues Affecting Alberta's Oilpatch* (Drayton Valley: The Pembina Institute for Appropriate Development, 1999).

³Lord Woolf, Lord Chief Justice of England and Wales, "Environmental Risk: The Responsibilities of the Law and Science", The Environmental Law Foundation Professor David Hall Memorial Lecture (London: Brunei Gallery, May 24, 2001).

⁴Report of the Commissioner of the Environment and Sustainable Development to the House of Commons, Chapter 3: "Managing Toxic Substances" (Ottawa: Public Works Canada, 1999) at 3-7.

⁵The subtitle of the *Canadian Environmental Protection Act*, S.C. 1999, c. 33, for example, describes it as "[a]n Act respecting pollution prevention and the protection of the environment *and human health* in order to contribute to sustainable development" [emphasis added]. See also s. 2(a) of Alberta's *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") which states that "... the protection of the environment is essential to the integrity of ecosystems *and human health* and to the well-being of society." [emphasis added]. Elsewhere, *EPEA* recognizes the "... integral relationship between human health and the environment ..." and directs the provincial Environment Minister to "... cooperate with and assist the Minister of Health and Wellness in promoting human health through environmental protection": s. 11.

Recent public campaigns across the country to eliminate the broad use of pesticides and exposure to second-hand smoke also evidence this growing awareness. In 2000, 93 percent of Canadians expressed concern that environmental hazards are affecting the health of their children.⁶ Undoubtedly, Albertans have been part of, and have been influenced by, this worldwide trend.

At the same time, the development of oil and gas in Alberta has intensified at a frantic pace in recent years. By 1998, more than 199,025 wells had been drilled in Alberta⁷ and, between 1998 and 2002, an average of about 12,000 additional wells were drilled each year.⁸ By July 2002, 703 gas plants were operating in the province and over 300,000 kilometres of pipeline were in the ground.⁹ In addition to conventional oil and gas development, the development of Alberta's oil sands is just beginning. In 2002, crude bitumen production surpassed conventional oil production by 25 percent,¹⁰ and the EUB estimates that production of crude bitumen will triple by 2011, accounting for as much as 75 percent of Alberta's total oil supply.¹¹

This increase in oil and gas activity not only means that more Albertans are coming into contact with the industry, but it also means that those already living and working near resource facilities are coming into more contact with industry activities. While the presence of one well in any given area may not be particularly worrisome, the addition of a number of others along with batteries, pipelines and gas plants may raise the level of actual or perceived environmental risk amongst those in the area. Such growing concerns about cumulative effects have been summarized as follows:

“Researchers now suspect that accumulated pollution and low-level exposure to several pollutants at once (also known as ‘total pollution loads’) have interactive and cumulative impacts on human health. Exposure may fall short of causing death or hospital admission, but still may affect large numbers of people. Ongoing exposure to low levels of pollution may result in permanent harm to healthy human function.”¹²

⁶Ekos poll, 2000, cited in National Round Table on the Environment and the Economy, *Achieving a Balance: Four Challenges for Canada in the Next Decade* (Ottawa: NRTEE, 2001).

⁷EUB, *Alberta's Energy Resources: 1998 in Review* (Calgary: EUB, 1999) at 4.

⁸EUB, *Field Surveillance Provincial Summary April 2001/March 2002*, Statistical Series 57 (Calgary: EUB, July 2002) at 19.

⁹Ibid. at v.

¹⁰EUB, *Alberta's Reserves 2002 & Supply/Demand Outlook 2003-2012*.

¹¹EUB, *Alberta's Reserves 2001 & Supply/Demand Outlook 2002-2011*.

¹²National Round Table on the Environment and the Economy, *supra* note 6. Elsewhere, the NRTEE has similarly noted that although “... cancer has historically been the focus of assessments, recent research suggests that significant, non-cancer health impacts can arise from long-term, low-level exposure to a mix of substances”: National Round Table on the Environment and the Economy, *Managing Potentially Toxic Substances in Canada – A State of the Debate Report* (Ottawa: NRTEE, 2001) at 3. For a detailed review of

Faced with actual or potential impacts on their health from the development of oil and gas in the province, Albertans are increasingly voicing their concerns through the language of rights. The argument is being made that oil and gas operations may, in certain circumstances, infringe upon fundamental human rights. In a recent decision, the EUB summarized the submissions of a number of interveners opposing further oil and gas activity around their residence as follows:

“Anita Sorgard, Darrell Graff, and Barbara Graff detailed achievements in their respective careers and business, community and family pursuits. They reported that these endeavours, as well as their normal lives, had been abruptly and severely disrupted by their illnesses. Each of the affected Graff family members strongly contended that because of their ill health, they had been deprived of fundamental individual rights – clean air, clean food, shelter, career and livelihood.”¹³

In another case, a number of applicants argued that they were entitled to a hearing before further oil and gas development was approved in a particular area of the province because they held certain public health rights that might be implicated. Specifically, the applicants submitted that Canadian law grants them a fundamental right to life and liberty, which “... arguably includes a right to a healthy environment – i.e., one free from exposure to any harmful pollution emanating from [the] proposed well.”¹⁴

And finally, in response to a recent decision ordering a former operator to clean up soil pollution caused by a defunct oil refinery, one stakeholder proclaimed that he believed the decision reflected “...the fundamental human right of citizens in Canada and in Alberta to live in a safe environment.”¹⁵

In short, these Albertans believe that they have a “right” which addresses the health effects they feel they face (or might face) from the environmental impacts of oil and gas development in the province. As noted in their statements, such a right may take various forms. It could be a positive right to health, a right to clean air, or a right to a safe or healthy environment. Conversely, it could be conceived as a negative right to be free from exposure to toxic or harmful substances.

how cumulative effects are addressed in Canada and the difficulties of doing so, see: S. Kennett, *Towards a New Paradigm for Cumulative Effects Management*, Occasional Paper #8 (Calgary: Canadian Institute of Resources Law, 1999).

¹³EUB, Gulf Canada Resources Limited Applications for Well Licences and Pipelines Vulcan Field, Decision 2001-48 (June 5, 2001) at 14.

¹⁴Re: Application Nos. 1070380 & 1071058 Well Licence and Pipelines, Shell Canada Ltd. *et al.* – Waterton 13-35-5-3 (Carbondale Area), Request for a Hearing under s. 29 of the *Energy Resources Conservation Act*, Brief of the Applicants, December 4, 2000.

¹⁵W. Thompson, “Province demands Imperial Oil replace soil”, *Calgary Herald* (July 25, 2002).

This paper seeks to examine whether these Albertans are correct. In short, does the law of human rights in Canada provide some protection from exposure to environmental contamination that impacts human health?

Through an examination of both domestic and international human rights law, the paper finds that, as it stands today, human rights law does not unequivocally protect Albertans (or Canadians for that matter) from exposure to environmental pollution. It is difficult to find those rights often referred to by affected stakeholders such as the right to health, to breathe clean air, to be free from exposure to toxic substances, or the more general right to a clean or healthy environment in current Canadian human rights law. Nonetheless, at the international level, the use of human rights law to address the impacts on human health from environmental degradation is increasing. As this body of law evolves, it may need to be considered when determining the future course of oil and gas development in Alberta.

This paper is organized as follows. Section 2 provides some background by outlining the health concerns Albertans have raised in regard to oil and gas development. In Section 3, the main differences between the traditional regulatory model for environmental protection and a rights-based regime are highlighted. The nature of human rights and human rights law in Canada is also briefly discussed. Section 4 of the paper then considers whether current domestic human rights law in Canada provides any avenues of redress for Albertans alleging harmful health effects from oil and gas development. Section 5 conducts a similar inquiry at the international level. These sections find that, while this area of law is in its infancy, there is a definite trend internationally towards viewing environmental pollution as a human rights issue in certain circumstances. Section 6 concludes the paper with some brief observations on what all of this might mean for oil and gas development in Alberta.

2.0 Health Concerns of Albertans¹⁶

The actual and potential effects of oil and gas operations on the environment have been well documented. As noted by the Petroleum Communication Foundation, activities in each of the drilling, production and processing sectors of the industry face a number of environmental challenges. Of primary concern are emissions of hydrocarbons and other

¹⁶It should be noted at the outset that this section sets out the health concerns of Albertans by way of background to set the context only. The debate over whether there are actual human health risks or impacts from oil and gas development in Alberta will not be considered in this paper. The substantive validity of the scientific and medical issues about the effects of oil and gas activities on human health is not examined; nor is any position taken on these issues. Rather, the paper asks whether there is any protection in human rights law if such health risks were to exist.

toxic substances into the air, soil or water. These can occur through routine operations or through spills and leaks.¹⁷

In a 1999 report, T. Marr-Laing and C. Severson-Baker outline some of the concerns about these environmental impacts from a human health perspective. With respect to air impacts, the authors examine a number of worrisome air contaminants caused by oil and gas operations in Alberta. These include: sulphur dioxide, nitrogen oxides, volatile organic compounds, ground level ozone, fine particulate matter, and air toxics.¹⁸ These contaminants can seriously impact human health as follows:

- acute exposure to high concentrations of sulphur dioxide can irritate the upper respiratory tract and increase susceptibility to respiratory infections; long term exposure may increase the risk of developing chronic respiratory disease;
- volatile organic compounds (which include compounds such as benzene) are known carcinogens and are toxic to humans;
- ground level ozone causes adverse effects on humans, including irritation of the eyes, nose and throat, reduced lung function, and the development of chronic respiratory disease;
- fine particulate matter can penetrate the lungs, have serious effects on respiratory function, and have been linked to respiratory and cardiac disease; and
- air toxics such as benzene, styrene and toluene are known carcinogens.¹⁹

Despite increasing regulation of oil and gas activities to minimize risks to human health in Alberta, complaints about negative impacts remain. The following is just a sampling of recent submissions made to the EUB by Albertans:

- According to the Ludwig, Boonstra and Schilthuis families, air emissions from oil and gas activities around their farm have resulted in health problems for years.

¹⁷Petroleum Communication Foundation, *Canada's Oil and Gas Industry and Our Global Environment* (Calgary: Petroleum Communication Foundation, 1997) at 33. See also: Society of Petroleum Engineers of AIME, *Petroleum Production and the Environment* (Dallas, Texas: Society of Petroleum Engineers of AIME, 1975) and P. KostECKI & E. Calabrese, *Hydrocarbon contaminated soils and groundwater* (Chelsea, Mich.: Lewis Publishers, 1991).

¹⁸Marr-Laing & Severson-Baker, *supra* note 2 at 4. Although the oil and gas industry is not the sole contributor of such air emissions in Alberta, the authors note that it is the primary contributor.

¹⁹*Ibid.*

These include: headaches, nausea, colds, skin rashes, insomnia, miscarriages and stillbirths.²⁰

- According to A. Dzurny, under certain wind conditions, air pollutants from emissions caused by oil and gas activities around his property cause him lengthy headaches and asthma attacks. The Emslie family is so concerned about their health that when the air smells badly, or the sky is very grey or an unusual color, the children are not allowed to play outdoors. This occurs on average a couple of times a month.²¹
- According to the Proc family, they have suffered a significant deterioration in health due directly to emission activities of oil and gas operations in the area around their property. Some of their symptoms (in varying degrees) include: headaches, weight loss, burning of the eyes and nose, memory loss, lethargy, nausea, abdominal pain, and blood in the urine.²²
- In 2001, A. Sorgard, D. Graff and B. Graff told the EUB that exposure to emissions from oil and gas operations near their farm had caused them to be acutely sensitive to hydrocarbons and the combustion products of natural gas. Diagnosed as suffering from a form of multiple chemical sensitivity, their symptoms include weight loss and digestive problems, as well as neurological impairment which affects coordination, physical strength, stamina, concentration and vision. Further, each suffers from a progressively heightened sensitivity and adverse reaction to a variety of chemicals, including exhaust fumes, methanol, ammonia, cleaning products, plastics and printing ink.²³

3.0 Why Human Rights?

The idea of addressing questions of environmental pollution through the lens of human rights is, although not new, a radical departure from traditional approaches to environmental protection. As early as 1970, J. Sax exposed the differences between our

²⁰EUB, Response to Inquiry Request from the Ludwig, Schilthuis, Boonstra, Wraight, Bryzgorni, and Johnstone Families and Dr. W.O. Scott (May 9, 2000).

²¹EUB, Shell Canada Limited Cogeneration Plant and Hydrogen Pipeline Fort Saskatchewan Area, Addendum to Decision 2000-30 (July 25, 2000).

²²EUB, Avalanche Energy Limited Applications for a Holding, Reduced Spacing and Review of Well Licences, Keoma/Entice Area, Decision 2000-49 (July 14, 2000).

²³EUB, Gulf Canada Resources Limited Applications for Well Licences and Pipelines Vulcan Field, Decision 2001-48 (June 5, 2001).

traditional regulatory model of environmental protection and a rights-based regime. The primary characteristics of the former include broad governmental powers, sweeping administrative discretion, and various procedural rights such as the right to be consulted or to be heard in a decision-making forum. By contrast, in Sax's view, a truly rights-based regime would be one which granted to its citizens clear substantive environmental rights that would have to be balanced against other legally-recognized interests (property rights, for example).²⁴

According to Sax:

“The elaborate structure of administrative middlemen we have interposed between the citizen and his interest in environmental quality has had [a] pernicious effect. It has dulled our sensitivity to the claim that citizens, as members of the public, have rights. The citizen who comes to an administrative agency comes essentially as a supplicant, requesting that somehow the public interest be interpreted to protect the environmental values from which he benefits. The citizen who comes to court has quite a different status – he stands as a claimant of rights to which he is entitled.”²⁵

Sax contrasted the position of the “supplicant” with that of the holder of rights. He pointed out how strange it would be if the owner of private property could not initiate action to enforce his individual property rights, but had to rely on some bureaucrat to vindicate them when, and if, that person determined them to be consistent with the public interest.

Thirty years after J. Sax's critique, current Canadian environmental law and policy continue to mirror the traditional approach to dealing with environmental issues described by Sax. It is certainly apparent in Alberta's approach to dealing with environmental issues generally and with respect to oil and gas development in particular. If an Albertan wants to dispute a particular oil and gas development because of alleged harmful health effects, this must be done by convincing the EUB that the project is not in the *public* interest (having regard to its social, economic and environmental effects).²⁶ The question is not whether the claimant has any valid rights that may or may not be infringed in the circumstances but rather, whether the interests of Albertans as a whole justify the particular project. As for specific health concerns, these are considered having regard to the public's well-being and standards based on protecting the general public,

²⁴J. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: A. Knopf, 1970). Although the distinction between a “substantive” and a “procedural” right is arguable, it is often said that “substantive” concerns matters of substance (i.e., what the right consists of) while “procedural” refers to the process through which the right can be enforced: see, for example, E. Swanson & E. Hughes, *The Price of Pollution* (Edmonton: Environmental Law Centre, 1990) at 206.

²⁵Sax, *supra* note 24 at 58.

²⁶*Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, s. 3. See also: *Oil and Gas Conservation Act*, R.S.A. 2000, c. O.6, s. 4(c).

not particular individuals. Discussing sour gas operations in Alberta, the EUB has described the protection of human health through the traditional regulatory model as follows:

“Residents’ concern about their health, well being, and safety when living near sour oil or gas facilities is a paramount consideration of the Board when reviewing [energy] applications. Indeed, the bulk of the Board’s regulations, requirements, and guidelines in this area embody the principles of protection of the *public’s* well-being and the environment. Strict regulations are in place that govern the drilling and subsequent production of sour gas and oil.”²⁷

Put simply (and in the words of Sax), an Albertan facing particular health effects from oil and gas operations must come before the EUB “essentially as a supplicant” and request that the public interest be interpreted to protect his/her health. This is very difficult to do where the applicable standards that protect the general public are already being met.²⁸ The idea that such a claimant could base his/her claim on certain legal substantive “rights” to health, clean air, etc., that must be balanced against the public interest is not part of the traditional regulatory model governing oil and gas development in the province.

And yet, as noted at the outset of this paper, Albertans are increasingly speaking in terms of rights that they believe should be recognized. This may be a response to a sense of powerlessness in the current system. As noted by J. Swaigen and R. Woods, “[r]ightly or wrongly, members of the public ... have equated powerlessness with a lack of rights.”²⁹ It also reveals how some Albertans view human rights and what they believe human rights can do for them.

3.1 The Nature of Human Rights

People tend to speak in terms of human rights when they believe something is critically important. Human rights rhetoric is reserved for the most fundamental of issues that somehow speak to the intrinsic worth and dignity of every human being. It is often a statement of what should be – a goal, an ideal to strive for.

As stated by M. Cranston,

²⁷Range Petroleum Corporation Application for a Well Licence LSD 4-35-70-24W5M Sturgeon Lake Area, Decision 99-18 at 25 [emphasis added].

²⁸In fact, in each of the cases referred to in Section 2.0 where Albertans complained about health effects, the EUB granted approvals stating, *inter alia*, that all the operations were being (or would be) conducted in compliance with all required licenses and applicable environmental standards.

²⁹J. Swaigen & R. Woods, “A Substantive Right to Environmental Quality” in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at 197.

“A human right by definition is a universal moral right, something which all men everywhere, at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human.”³⁰

From a moral standpoint, the idea that human beings have a right to breathe clean air, drink clean water or, more generally, live in a clean and healthy environment is not particularly controversial. Since environmental health is a prerequisite to human life, such “rights” go to the core of the inherent worth and dignity of every human being. As E. Swanson has put it: “[c]lean water and clean air are believed to be ours by birth; we somehow assume that such important and fundamental rights are protected by law.”³¹

But history has shown repeatedly that a moral right does not always necessarily translate into a legal right – one that is actually protected by law and which, when violated, allows for legal redress. Not all rights that have found broad moral support in a particular community are necessarily reflected in law – or at least not yet. Often the goal of human rights advocates is to have current moral human rights evolve into rights protected in law.³²

Once law, human rights may create a balance between competing interests, or they may shift an existing balance. As noted by J. Swaigen & R. Woods:

“Sometimes a right may preclude any balancing of interests; for example, when a fundamental constitutional right prevents the majority from overriding the interest of an individual or minority group, even to serve a public interest or provide some benefit to the community.”³³

Perhaps this is what Albertans want when they invoke the language of rights in the face of oil and gas development. Faced with development that is deemed to be in the public interest, perhaps those Albertans who allege harmful health effects want the law to serve one of its primary functions of protecting “... the fundamental rights of the individual even when they conflict with the policy choices of the democratic majority.”³⁴

T. Schorn has similarly noted that:

³⁰M. Cranston, *What are Human Rights?* (London: Bodley Head, 1973) at 36. There is of course a vast literature on the nature and effect of rights. M. Cranston’s view conforms to the view that rights are *based upon* the holder’s intrinsic dignity and worth (which in turn *confers* upon that person an entitlement to concern and respect). See also: R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard Univ. Press, 1978). Another view holds that the granting of rights *confers* status and dignity upon the holder. See, for example, C. Stone, “Should Trees Have Standing?” (1972) 45 S. Cal. L. Rev. 450.

³¹E. Swanson & E. Hughes, *The Price of Pollution* (Edmonton: Environmental Law Centre, 1990) at 205.

³²B. Orend, *Human Rights: Concept and Context* (Peterborough: Broadview Press, 2002) at 24.

³³*Supra* note 29 at 199.

³⁴*Supra* note 3.

“The very concept of human rights, as it has heretofore been understood, rests on a view of the individual person as separate from and endowed with inalienable rights held primarily in relation to society, and especially the state. Furthermore, within the area defined by these rights, the individual is superior to society in the sense that ordinarily, in cases of conflict between individual human rights and social goals or interests, individual rights must prevail.”³⁵

Or, perhaps these Albertans simply want a balancing of interests that are at least on equal footing. Although the existence of a right may preclude a flagrant disregard of that right, it is doubtful that any right is ever absolute.³⁶ Perhaps these Albertans are simply seeking to be treated as equal in respect and dignity as other parties in the process. In the context of environmental decision-making in Canada, J. Swaigen has noted that:

“... administrative agencies in Canada which attempt to interpret the public interest in a situation where one party has property rights and the other has none treat the right-holder with more concern and respect than they do the non-right holder.”³⁷

In short, by using the language of rights in the context of perceived health impacts from oil and gas development, Albertans are asserting how fundamental they believe human health is to one’s dignity. They also hope such “rights talk” will draw lines when societal benefits are considered and set limits on what effects from environmental pollution we are willing to tolerate. After all, this is the crux of human rights law – to ensure that the rights of the individual are balanced against the will of the majority or, in some cases, to even trump that will.

3.2 Human Rights Law in Canada

Generally-speaking, human rights law in Canada is found in a number of different sources. First, there are provincial and federal human rights statutes that, for the most part, protect against discrimination on certain grounds in a number of specific areas (employment, tenancy, the provision of public services, for example). In regard to human rights that might protect human health against adverse environmental conditions, these statutes have little, if any, application.

By far the most significant domestic source of human rights law in Canada is the *Canadian Charter of Rights and Freedoms*, passed in 1982. As part of the Constitution of Canada, the *Charter* invalidates any law that is inconsistent with its terms. It also ensures

³⁵T. Schorn, “Drinkable Water and Breathable Air: A Livable Environment as a Human Right” (2000) *Great Plains Nat. Res. J.* 121 at 125-126.

³⁶As will be seen, even the fundamental rights guaranteed by the *Canadian Charter of Rights and Freedoms* are not absolute and can be overridden in certain circumstances.

³⁷*Supra* note 29 at 198.

that any action or decision by government does not violate the rights and freedoms it guarantees.

Another main source of human rights law in Canada is international human rights law. International human rights law consists of both conventional international law (conventions, treaties, etc.) as well as customary international law (principles or rules that the majority of states have accepted as law through long-term practice). Along with these sources of legally-binding principles, there is another category of international “law”, called “soft” law, that is increasingly important, especially in the human rights and environment areas. Soft law is “soft” because it is not (yet) intended by states to be legally binding, but it can over time solidify through practice and acceptance into legally binding international law. Primary sources of soft law include declarations and guidelines of the United Nations and other international organizations.³⁸

International human rights law may apply in Canada in its own right.³⁹ Or, more importantly for our purposes, it may be used to assist Canadian courts in interpreting the rights and freedoms guaranteed by the *Charter*.⁴⁰ Moreover, even where a principle has not yet reached the status of international law *per se*, courts may find it persuasive or look to it for guidance in their interpretation of Canadian law.⁴¹ In addition, Canadian courts faced with a novel situation often consider approaches taken by other countries.⁴²

³⁸Clearly this is a very brief synopsis of the sources of international law. For more detailed consideration, see: I. Brownlie, *Principles of Public International Law*, 5th ed. (New York: Clarendon Press, 1998) and A. Cassese, *International Law* (New York: Oxford University Press, 2001).

³⁹The direct application of international law in Canada is complex and is beyond the scope of this paper. For comprehensive treatments of this issue, see: H. Kindred *et al.*, *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000) and G. Van Ert, *International Law in Canada: Principles, Customs, Treaties and Rights* (LL.M. Thesis, University of Toronto, 2000). See also: Alberta Civil Liberties Research Centre, *Volume III: Background to International Human Rights Law* (Calgary: ACLRC, University of Calgary, 1997).

⁴⁰See generally, A. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) and W. Schabas, *International Human Rights Law and the Canadian Charter*, 2d ed. (Toronto: Carswell, 1996). See also G. McGregor, “The International Covenant on Social, Economic and Cultural Rights: Will It Get Its Day in Court?” (2002) 28 Man. L.J. 321 where the author criticizes Canadian courts for not clearly explaining their use of international law in human rights cases.

⁴¹See, for example, *114957 Canada Ltée v. Hudson (Town)*, [2001] 2 S.C.R. 241 where the Supreme Court of Canada referred to the precautionary principle to assist in its analysis without first deciding whether it is in fact a principle of international law.

⁴²Again, see *ibid.* where the Supreme Court considered the approach taken by the Supreme Court of India in regard to the precautionary principle.

4.0 The Canadian Charter of Rights and Freedoms

For Albertans wanting to invoke human rights to protect their health from environmental effects of oil and gas development in the province, the most likely place to begin such an inquiry is the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).⁴³ Unlike some other provinces, Alberta does not have legislation that specifically grants certain rights with respect to the environment.⁴⁴

Simply stated, the *Charter* guarantees certain rights and freedoms and protects individuals from governmental actions or decisions that infringe upon those rights. Unlike other state constitutions, the *Charter* does not explicitly grant any rights that directly address human health concerns arising from environmental impacts. There are, for instance, no explicit rights to health, clean air, clean water, or, more broadly, a clean or healthy environment in our constitution; nor can one find any type of more negative right such as the right not to be exposed to toxic or harmful substances.⁴⁵

Nonetheless, the absence of any such explicit right does not preclude argument that it may exist implicitly within the provisions of the *Charter*. In particular, the language of and case law around section 7 of the *Charter* suggest that a right that protects human

⁴³Albertans could also look at s. 1(a) of the *Alberta Bill of Rights*, R.S.A. 2000, c. A-14, but the guarantee of a right to “liberty” and “security of the person” in that section has been, and likely will continue to be, influenced by the interpretation of the equivalent section in the *Charter* to be considered below.

⁴⁴Provinces and territories in Canada with so-called “environmental bills of rights” include Ontario, New Brunswick, the Yukon, and the Northwest Territories. For critiques of the failure of these statutes to guarantee substantive environmental rights, see: E. Hughes & D. Iyalomhe, “Substantive Environmental Rights in Canada” (1998-99) 30:2 *Ottawa L. Rev.* 229; M. Winfield, G. Ford, & G. Crann, *Achieving the Holy Grail? A Legal and Political Analysis of Ontario’s Environmental Bill of Rights* (Toronto: C.I.E.L.A.P. 1995); and S. Levy-Diener, *The Environmental Bill of Rights Approach under the Ontario Environmental Bill of Rights: Survey, Critique, and Proposals for Reform* (LL.M. Thesis, University of Toronto, 1997).

⁴⁵States which have explicitly adopted some type of constitutional right to a clean or healthy environment include Sweden, the Netherlands, Switzerland, Greece, Spain, Portugal, Brazil, Peru, Poland, Austria, Sweden, and the Philippines: see A. Fijalkowski & M. Fitzmaurice, eds., *The Right of the Child to a Clean Environment* (Aldershot, England: Ashgate Publishing, 2000) at 343-349. Most recently, France’s cabinet has approved a plan to modify its constitution to provide for a right to a “balanced and healthy” environment: C. Ollivier, “French Cabinet approves plan for a new environmental Charter” *Associated Press* (June 26, 2003). For a thorough critique of the efficacy of such constitutional provisions, see: E. Brandl & H. Bungert, “Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad” (1992) 16:1 *Harv. Env’t L. Rev.* 1.

health from adverse environmental conditions may be implicit within that provision. To a lesser extent, section 15 may have some relevance as well. Both are examined below.

4.1 Section 7

In terms of protecting human health from environmental impacts, section 7 of the *Charter* is the most relevant provision. It states as follows:

“Everyone 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.”

Like all *Charter* rights, section 7 is triggered when a law or governmental action or decision interferes with the rights guaranteed therein. A violation of section 7 occurs when such law or action is not in accordance with the principles of fundamental justice.⁴⁶

By its own terms, the broad language of “life, liberty and security of the person” suggests that section 7 may be a “vast storehouse of human rights”.⁴⁷ We know, however, that the scope of section 7 is not unlimited. The courts have, for example, determined that property and economic interests are not protected by section 7.⁴⁸

Still, numerous scholars have argued that, since clean air, water and a clean environment generally are so fundamental to life, liberty and security of the person, such rights must necessarily be included within section 7. The same can clearly be said about health. According to C. Stevenson, for example:

“[i]f section 7 purports to protect rights to life, liberty and security of person, surely this must also be taken to include a right to a clean environment. Without such an environment life itself cannot be supported or at best may be prohibited (and our liberty consequently reduced) from certain areas, for example, entering industrial zones where the environment is so polluted as to be toxic and dangerous to health.”⁴⁹

Similarly, M. Hatherly has said the following about section 7:

⁴⁶It will be noted that the Charter does not apply to the actions of private entities, such as privately-owned oil and gas companies. A law, action or decision of the government (including a regulatory agency such as the EUB) must be involved: see s. 32(1) of the *Charter* and R.W.D.S.U., *Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

⁴⁷Swanson & Hughes, *supra* note 31 at 96.

⁴⁸P. Hogg, *Constitutional Law in Canada*, looseleaf (Scarborough: Carswell, 2001) at 44-9 and 44-12.1-13.

⁴⁹C. Stevenson, “A New Perspective on Environmental Rights After the Charter” (1983) 21 Osgoode Hall L.J. 390 at 413.

“[i]t is my opinion that terms like “life, liberty, and security of the person” are broad enough to include rights to a healthy environment and rights to be free from contamination.”⁵⁰

To date, however, Canadian courts have yet to definitively decide whether (and what) substantive environmental rights are protected by section 7. The courts have not, however, definitively precluded the argument that such rights are implicit within section 7. Moreover, aside from environmental rights, the case law developed under section 7 strongly suggests that section 7 may contain a right to health or at least a right to be free from unreasonable risks to human health.⁵¹ Thus, where human health is jeopardized because of environmental impacts, section 7 may be triggered. A. Lucas noted this possibility early on in the *Charter*'s history:

“... the substance of laws that authorize environmentally damaging activities that affect or threaten life or health may be attacked as infringing the s. 7 rights to life, liberty and security of the person.”⁵²

Similarly, according to W. Andrews:

“[a]rguably, a health threat caused by toxic pollution may deprive individuals of “security of the person”, or even result in death.”⁵³

And, in referring to section 7 of the *Charter*, Dale Gibson has concluded that:

“[e]nvironmental hazards that endanger human life or pose a threat to human health may well be found to be subject to this basic constitutional right.”⁵⁴

Although not determinative, there have been cases where the courts have hinted that human health impacts from environmental causes may be covered by section 7 of the *Charter*. In *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*,⁵⁵ for example, the court was prepared to find that the claim of a violation of section 7 of the *Charter* based on the threat to human health posed by the operation of a waste incinerator was a serious legal issue that needed to be tried. Since an environmental impact

⁵⁰M. Hatherly, “Constitutional Amendment” in *Environmental Protection and the Canadian Constitution*, Proceedings of the Canadian Symposium on Jurisdiction and Responsibility for the Environment (Edmonton: Environmental Law Centre, 1986) at 130.

⁵¹See Section 4.1.3 below.

⁵²A. Lucas, “Impact of the Charter of Rights and Freedoms on Environmental Law” in *Western Canadian Environmental Law and Practice: Coming Clean on the Legal and Business Issues* (Toronto: The Canadian Institute, 1988) at E-29.

⁵³W. Andrews, “The Environment and the Canadian Charter of Rights and Freedoms” in N. Duplé, ed., *Le droit à la qualité de l'environnement: un droit en devenir, un droit à définir*, 5th International Conference on Constitutional Law (Quebec: Editions Quebec/Amerique, 1988) at 266.

⁵⁴D. Gibson, “Constitutional Entrenchment of Environmental Rights” in Duplé, *ibid.* at 276.

⁵⁵(1993) 108 D.L.R. (4th) 145 (N.S.C.A.), leave to appeal to S.C.C. denied [1999] 1 S.C.R. vii.

assessment on the incinerator had yet to be completed, however, the court concluded that this *Charter* claim was not yet ripe for hearing and dismissed the claim.

Similarly, in *Manicom v. Oxford*,⁵⁶ one member of the court (in dissent) concluded that the plaintiffs' claim that a government decision to locate a waste disposal near their properties violated section 7 of the *Charter* was an important legal issue that should have been left to the trial judge. According to Potts J., the plaintiffs might conceivably have demonstrated adverse health effects and could have shown a link between those health effects and approval of the landfill.⁵⁷

Beyond these environmental cases, case law on section 7 in other contexts also signals that risks to human health may be covered by this provision. Although there have to date been no cases dealing specifically with the protection from adverse health consequences of environmental degradation, case law under section 7 of the *Charter* suggests that such protection may be available in some circumstances. Each aspect of section 7 is considered below.

4.1.1 Life

To date, there has been little judicial consideration of the right to “life” in section 7 of the *Charter*. Even the issue of abortion, which is sometimes characterized as implicating the right to life of a foetus, has not been decided in these terms.⁵⁸

Still, if it could be shown that environmental threats or degradation were of such a nature that they interfered with human life itself, it is not inconceivable that section 7 might have some application. The idea is, quite simply, that life is so fundamental that any threats to it from environmental harm should be captured by this right. As stated by B.G. Ramcharan,

“[i]nasmuch as threats to the environment, or serious environmental hazards may threaten the lives of large groups of people directly, the connection between the right to life and ... a decent and safe environment is an obvious one. (...) Environmental deterioration or risks may directly threaten loss of life or may affect quality of life.”⁵⁹

⁵⁶(1985), 52 O.R. (2d) 137 (Div. Ct.).

⁵⁷*Ibid.* The majority of the court dismissed the claim on the ground that the plaintiffs had failed to expressly allege health impacts and thus had to base their claim on interference with their use and enjoyment of property which is not protected by s. 7.

⁵⁸Rather, the courts have said that, since s. 7 grants “everyone” a right to life, and “everyone” does not include a foetus, the right to life has little application: see Hogg, *supra* note 48 at 44-4.

⁵⁹B.G. Ramcharan, “The Concept and Dimensions of the Right to Life” in B.G. Ramcharan, ed., *The Right to Life in International Law* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1985) at 13.

Indeed, as will be discussed below,⁶⁰ there is evidence that the right to life is being interpreted internationally as providing some protection from the threats of environmental degradation. Canadian courts may take this into account when considering the right to life in section 7 of the *Charter*.

4.1.2 Liberty

The right to “liberty” in section 7 of the *Charter* clearly includes freedom from physical restraint. Thus, any law that imposes the penalty of imprisonment is covered; so are statutory duties to submit to fingerprinting, to give oral testimony and not to loiter in or near schoolgrounds, playgrounds, etc.⁶¹

What is not as clear, however, is whether (and to what extent) liberty extends beyond freedom from physical restraint. To date, the Supreme Court of Canada has been cautious about significantly enlarging the “liberty” component of section 7. As already noted, it has held that economic interests (i.e., economic liberty) are not covered.⁶²

Nonetheless, there has been some indication that, in an appropriate case, “liberty” in section 7 may include more than freedom from physical restraint. According to a majority of judges in a recent decision of the Supreme Court of Canada, “liberty” in section 7 is “...no longer restricted to mere freedom from physical restraint”. Rather, the court held that it applies whenever the law or governmental action prevents a person from making “fundamental personal choices”.⁶³

Elsewhere, in a number of minority decisions, justices of the Supreme Court have suggested what circumstances may attract a broader interpretation of the right to liberty in section 7. A broad definition of liberty has been found to include the right to terminate a pregnancy,⁶⁴ the right to choose medical treatment for one’s children,⁶⁵ the right to bring up children,⁶⁶ and the right to privacy.⁶⁷ Most notably for our purposes, a minority of the Supreme Court of Canada has also held that the right to liberty in section 7

⁶⁰See Section 5.1.1.

⁶¹Hogg, *supra* note 48 at 44-7.

⁶²See *supra* note 48 and accompanying text.

⁶³*Blencoe v. British Columbia*, [2000] 2 S.C.R. 307.

⁶⁴*R. v. Morgentaler (No. 2)*, [1988] 1 S.C.R. 30.

⁶⁵*B.(R.) v. Children’s Aid Society*, [1995] 1 S.C.R. 315.

⁶⁶*New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46.

⁶⁷*R. v. O’Connor*, [1995] 4 S.C.R. 411.

includes the right to choose one's place of residence.⁶⁸ Based on this case and a broad interpretation of liberty, it is at least arguable that a decision by Albertans to live in a particular location without being forced to move because of adverse health effects from oil and gas development might be protected by section 7. It remains to be seen whether more cases with majority support of the Supreme Court will confirm the applicability of the right to liberty outside the context of physical restraint.

4.1.3 Security of the Person

Unlike the concept of "liberty" in section 7, the courts have clearly given a broad interpretation to the "security of the person" aspect of that provision. Consequently, it is likely that this is the most relevant part of section 7 in terms of providing protection from adverse human health impacts.

In *R. v. Morgentaler*, a majority of the Supreme Court of Canada held that the right to security of the person in section 7 encompasses a right to bodily integrity and a right to be free from harm and from threats to that integrity, including risks to health.⁶⁹ In that case, the evidence demonstrated that a statutory requirement of approval by a therapeutic abortion committee restricted access to abortion and caused delays in treatment. This increased the risk to the health of pregnant women. A majority of the court agreed that the risk to health caused by the law was a deprivation of security of the person in section 7 of the *Charter*. Further, in *Rodriguez v. B.C. (A.G.)*, the Supreme Court of Canada concluded that "security of the person" includes the right to control over one's body, including the decision to commit suicide.⁷⁰

Along with physical integrity, the courts have found that "security of the person" also grants a right to be free from psychological stress. In *New Brunswick v. G.(J.)*, the Supreme Court of Canada held that an application by the state to remove children from a parent and place them under the wardship of the state affected the security of the person of the parent. Security of the person was affected because the government action would constitute "a serious interference with the psychological integrity of the parent".⁷¹

Similarly, in *Blencoe v. British Columbia*, the Supreme Court held that state-induced psychological stress could be a breach of security of the person, but found that the facts in that case did not evidence a sufficiently severe impact on the applicant's psychological state to qualify as a breach. The court indicated that the psychological integrity aspect of

⁶⁸*Godbout v. Longueuil*, [1997] 3 S.C.R. 844.

⁶⁹*Supra* note 64.

⁷⁰[1993] 3 S.C.R. 519.

⁷¹*Supra* note 66.

“security of the person” will only be violated where there is “serious state-imposed psychological stress”.⁷² This need not, however, reach the level of nervous shock or psychiatric illness, but it must be “greater than ordinary stress or anxiety”.⁷³

From these cases, it is arguable that “security of the person” in section 7 may include a right to be free from the adverse health consequences, including serious psychological stress, flowing from the environmental impacts of oil and gas development in Alberta. The cases are clear that section 7 protects both the physical and psychological integrity of the individual.

4.1.4 Principles of Fundamental Justice

Even if the right to life, liberty and security of the person has been infringed, however, it must be remembered that section 7 has a built-in limitation. There is no violation of section 7 of the *Charter* if the infringement occurred in accordance with the principles of fundamental justice. These principles include a right to reasonable notice, to a fair hearing, and to reasons for a decision before the government is justified in depriving a right to life, liberty or security of the person.⁷⁴

Consequently, any attempt to use section 7 of the *Charter* to address adverse health impacts from resource development will have to address the critical issue of whether the deprivation of life, liberty or security of the person did not accord with the principles of fundamental justice referred to in that provision. If it did, there is no violation of section 7 of the *Charter*.

4.2 Subsection 15(1) of the *Charter*

Along with section 7, the other right in the *Charter* that may be relevant to Albertans faced with health impacts from oil and gas development is that found in subsection 15(1). Subsection 15(1) provides as follows:

“[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

⁷²*Supra* note 63.

⁷³*Supra* note 66.

⁷⁴See generally Hogg, *supra* note 48, ch. 44.

Case law has determined that a subsection 15(1) claim has three elements. First, the claimant must experience differential treatment from a law or governmental action that results in the loss of a benefit or the imposition of a burden. Second, the differential treatment must be based either on an enumerated ground set out in subsection 15(1) or an analogous one. Third, the differential treatment must result in discrimination.⁷⁵ In short, section 15 embodies a comparative concept – an individual must experience differential treatment that amounts to discrimination.⁷⁶

When initially enacted, it was thought that section 15 might be applicable to ground a claim on the basis that certain people were differentially impacted by environmental conditions based on where they lived.⁷⁷ People living near a toxic waste dump, for example, would face different exposure than those who did not. Subsequent judicial interpretation has, however, restricted the scope of section 15 by insisting upon reference to either the enumerated grounds set out in that provision or analogous ones. The courts have held that, except in very limited circumstances, differences in treatment based on territory or geography are not covered by section 15.⁷⁸

Still, section 15 may continue to have a role to play, albeit a more limited one, in the context of health impacts from environmental degradation. It is at least arguable that persons who suffer from certain physical disabilities (asthma, for example) are differentially affected by exposure to certain environmental agents such that the government must act to protect their health interests. This could also be the case for children or the elderly if the evidence demonstrates that such persons are differentially impacted. Since there is no case law to date in this area, the success of such claims remains to be seen.

What is clear, however, is that the nature of section 15 is such that it is not a means through which to assert a general right to health, to a clean environment or to freedom from exposure to environmental toxins. Section 15 has a built-in comparative component and, even if it were applicable in the context of health effects from environmental degradation, it would have a limited role.⁷⁹

⁷⁵*Law v. Canada*, [1999] 1 S.C.R. 497.

⁷⁶See generally Hogg, *supra* note 48, ch. 52.

⁷⁷J. Benidickson, *Environmental Law* (Concord: Irwin Law, 1997) at 40.

⁷⁸*R. v. Turpin*, [1989] 1 S.C.R. 1296.

⁷⁹Moreover, even in these limited cases, it would still be open to the government to justify the differential treatment under s. 1 of the *Charter*: see generally Hogg, *supra* note 48, ch. 35.

4.3 Summary

From this review of Canadian human rights law, it is clear that the most relevant provision for Albertans seeking to make human rights claims in relation to health effects from resource development is section 7 of the *Charter*. Although there is no clear precedent that deals with health impacts from environmental degradation, there is case law under section 7 that suggests its potential applicability to this issue. In particular, the “security of the person” aspect of section 7 has been held to protect against health risks created by the state. Whether the courts would find that the EUB’s decision in a particular case or that the laws in Alberta regulating environmental pollution from oil and gas operations pose health risks that fall within section 7 of the *Charter* remains to be seen. Undoubtedly, however, one of the greatest obstacles to the success of such a claim would be whether the claimant is able to establish sufficient proof of a causal connection between the injury alleged and the law or EUB decision in question. Given the gradual and cumulative nature of many environmental health impacts, this may prove to be very difficult in some cases.⁸⁰

5.0 International Human Rights Law

As noted earlier, Canadian courts often look to international law or to approaches taken by other countries to assist them in interpreting the *Charter*, especially in novel cases. Although the idea of addressing the health impacts of environmental degradation from a human rights perspective is fairly novel in Canadian domestic law, there have been significant steps taken internationally towards exposing the links between human rights and the environment. Most recently, the *Plan of Implementation* adopted at the World Summit on Sustainable Development in the fall of 2002 “[a]cknowledge[d] the consideration being given to the possible relationship between environment and human

⁸⁰For the difficulties of proving causation in the environmental realm, see generally: B. Pardy, “Risk, Cause, and Toxic Torts: A Theory for Standard of Proof” (1989) 10 *Advocates’ Q.* 277; B.H. Powell, “Cause for Concern: An Overview of Approaches to the Causation Problem in Toxic Tort Litigation” (2000) 9 *J.E.L.P.* 227; and W. Charles & D. VanderZwaag, “Common Law and Environmental Protection: Legal Realities and Judicial Challenges” in E. Hughes, A. Lucas & W. Tilleman, eds., *Environmental Law and Policy*, 2d ed. (Toronto: Emond Montgomery, 1998). See also *Operation Dismantle v. R.*, [1985] 1 S.C.R. 441 where the Supreme Court of Canada dismissed a claim under s. 7 on the ground that the plaintiffs had failed to establish the necessary causal link between the impugned governmental decision (allowing cruise missile testing over Canada) and the alleged threat to life and security of the person (the increased risk of nuclear war).

rights”.⁸¹ G. Pring and S. Noé have summarized this relationship as follows: “[w]hen the environment suffers, people suffer, and when people suffer, the environment suffers”.⁸²

At the level of international law, two possible avenues for addressing health impacts from environmental degradation as human rights violations are available. First, there has been some movement towards exploring the environmental dimensions of existing rights – in particular, the right to life, liberty and security of the person and the right to health as those exist in international law. Second, since the late 1980s, there has been growing support amongst international environmental and human rights scholars towards the creation of a new human right – a right to a clean or healthy environment. Both avenues will be discussed below.

5.1 Existing Rights

The idea of addressing human health impacts by exploring the environmental dimensions of existing rights in international law points to two possible rights: the right to life, liberty and security of the person and the right to health. A recent petition to the Auditor General of Canada submits that the federal government’s failure to adequately regulate air pollution in this country violates both Canadians’ basic human right to life, liberty and security of the person and their right to health as those rights exist in international law.⁸³

Some scholars have argued that either one of these rights, as they now stand, could be used to ground legal claims for the protection of health from environmental pollution.⁸⁴ Others take a different view. According to these scholars, since these rights were developed at a time when environmental concerns were not prevalent, they need to

⁸¹The Plan of Implementation of the World Summit on Sustainable Development, A/CONF.199/L.1, 2002.

⁸²G. Pring & S. Noé, “The Emerging International Law of Public Participation Affecting Global Mining, Energy and Resource Development” in D. Zillman, A. Lucas & G. Pring, eds., *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford: Oxford University Press, 2002) at 51.

⁸³Sierra Legal Defence on behalf of Greenpeace Canada & Toronto Environmental Alliance, *Petition under the Auditor General Act*, R.S.C. 1985, c. A-17 (August 21, 2002).

⁸⁴See, for example, A. Harding, “Practical Human Rights, NGOs and the Environment in Malaysia” in A. Boyle & M. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996); J. Merrills, “Environmental Protection and Human Rights: Conceptual Aspects” in Boyle & Anderson, *ibid.*; and R. Churchill, “Environmental Rights in Existing Human Rights Treaties” in Boyle & Anderson, *ibid.*

be creatively reinterpreted and significantly expanded to flesh out their environmental dimensions.⁸⁵

5.1.1 **Right to Life, Liberty and Security of the Person**

5.1.1.1 *International Law*

As in Canadian domestic law, the right to life, liberty and security of the person is a human right that is well-established in international law. Two early expressions of this right can be found in the 1949 *Universal Declaration of Human Rights* (the “*Universal Declaration*”), and in the *International Covenant of Civil and Political Rights*.⁸⁶ Although the *Declaration* is a soft law document not capable of being ratified, the general view is that it sets standards that are now considered to be customary international law and thus binding on all nations. Article 3 sets out the basic right in the following terms: “[e]veryone has the right to life, liberty and security of person”. As for the *ICCPR*, an international convention which Canada has ratified, Article 6 states that:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

With respect to liberty and security, Article 9 declares that:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”

As in section 7 of the *Charter*, the language of these fundamental rights highlights their non-absolutist nature. There is recognition that they may have to yield to other concerns in some circumstances. Further, even more so than the language of section 7, the wording of these rights indicates that the traditional focus was clearly not modern environmental problems. Rather, their goal was one of protection against the arbitrary deprivation of life, liberty and security by the state (murder, torture or imprisonment without trial, for example).⁸⁷

⁸⁵See, for example, M. Anderson, “Human Rights Approaches to Environmental Protection: An Overview” in Boyle & Anderson, *ibid.*

⁸⁶G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966) (the “*ICCPR*”). The *ICCPR* was ratified by Canada in 1976.

⁸⁷See I. Scott, “The Inter-American System of Human Rights: An Effective Means of Environmental Protection?” (2002) *Virginia Env’tl L.J.* 197 at 211 (concluding that the vast majority of cases finding a violation of the right to life are extreme cases of torture, murder, or forced disappearance by state agents). See also Ramcharan, *supra* note 59.

More recently, however, legal scholars have started to flesh out the environmental dimensions of this right.⁸⁸ The idea underlying these attempts is, as noted above, that life, liberty and security are fundamentally and inextricably tied up with an environment of a certain quality. An environment of poor quality means direct and indirect threats to life, liberty and security of person. Thus, according to this view, the right to life, liberty and security must protect against environmental harm because this right is so dependant on environmental protection. As stated by N. Popovic:

“The right to life represents the most basic human rights doctrine, the essential and non-derogable prerequisite to the enjoyment of all other rights. Environmental problems that endanger life – directly or indirectly – implicate this core right.”⁸⁹

Although there has yet to be an explicit binding statement to this effect by an international legal body in an actual case, there has been some suggestion of movement in that direction. In the early 1990s, for example, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities undertook an extensive study of human rights and the environment. After surveying national and international human rights law and international environmental law, the Final Report of this Sub-Commission concluded that the right to life in international law has environmental dimensions which are capable of “immediate” implementation by existing human rights bodies.⁹⁰

Subsequently, in 1997, in a General Comment issued by the main international human rights body, the United Nations Human Rights Committee, the Committee stated that the right to life, liberty and security in international law has often been interpreted too narrowly. In its view, this right has a broader meaning and does, for example, include state obligations to protect from threats (including environmental ones) to survival or quality of life.⁹¹ In fact, in the earlier case of *EHP v. Canada*,⁹² the United Nations Human Rights Committee did state that the storage of radioactive waste near homes raised “serious issues” with respect to state obligations to protect human life.

⁸⁸See *ibid.*

⁸⁹N. Popovic, “In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment” (1996) 27 Colum. Human Rts. L. Rev. 487 at 512.

⁹⁰U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment, Final Report of the Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994). The Report also included a *Draft Declaration of Human Rights and the Environment* which fleshed out the environmental dimensions of existing rights such as the right to life. For a detailed review of the Report and the Draft Declaration, see: Popovic, *ibid.*

⁹¹See the General Comment on Article 6 of the Civil and Political Covenant issued by the United Nations Human Rights Committee in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.3 (1997).

⁹²*Communication No. 67/1980*, 2 Selected Decisions of the Human Rights Committee (1990).

5.1.1.2 Regional Human Rights Law

Although the environmental aspects of the right to life, liberty and security of the person in international law have yet to be clearly delineated at the level of international law, guidance may be found in the approach taken by regional human rights bodies. In particular, the European Court of Human Rights has exposed the links between the right to life and environmental pollution in a series of cases. These cases have for the most part been brought under Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁹³ which grants everyone the right to respect for his “private and family life”.

In one case brought under Article 8, *Lopez Ostra v. Spain*,⁹⁴ Mrs. Lopez Ostra and her family had been exposed to significant toxic emissions (including hydrogen sulphide) from a waste treatment plant located only 12 metres from their home. She brought a complaint to the European Court of Human Rights alleging that they had all suffered serious health effects from the exposure which included nausea, vomiting, and allergies. She submitted that, in allowing the plant to operate, the state of Spain had breached her right to respect for her family life under Article 8 of the *Convention*.

In finding for Mrs. Lopez Ostra, the Court concluded that severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to adversely affect their private and family life. This is so, according to the Court, even if the pollution does not seriously endanger human health.

Although a balance must be struck between the competing interests of the individual and the community as a whole, the evidence in this case was that the state had failed to do anything significant to protect the people exposed. Consequently, the Court found a violation of the right to family life under the *Convention* and ordered damages to be paid by the government of Spain.

Also brought under Article 8 of the *Convention* is the recent case of *Guerra & Others v. Italy*.⁹⁵ In that case, a number of Italian nationals complained to the European Court of Human Rights about a chemical factory located approximately 1 kilometre from their homes. During operations, the evidence was that the factory released large amounts of highly toxic substances. According to the Court, the critical issue was whether the government of Italy had taken the necessary steps to ensure effective protection of the applicants’ right to respect for their private and family life under the *Convention*. The Court held that the government had not done so.

⁹³Nov. 4, 1950, 213 U.N.T.S. 222 (the “*Convention*”).

⁹⁴App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1994) (Eur. Ct. H.R.).

⁹⁵App. No. 14967/89, 26 Eur. H.R. Rep. 357 (1998) (Eur. Ct. H.R.).

In the Court's view, the Italian government violated Article 8 of the *Convention* by failing to adequately protect its nationals from the dangerous emissions at issue. Moreover, Article 8 was also violated by the government's failure to provide these people with information about all the risks they faced if they continued to live in the area.

In addition to Article 8, a number of judges also found that Article 2 of the *Convention* (which guarantees the right to life generally) had been violated in these circumstances. According to some, the protection of health and physical integrity is as closely associated with the "right to life" as with the right to "respect for private and family life". One judge specifically stated that it was time for the Court to start evolving its case law on the right to life to expose the environmental dimensions of that right.⁹⁶

Although not in and of itself reflective of international law, this growing body of case law from a regional human rights body can serve to influence the decisions of international bodies that are faced with human rights claims in the context of environmental pollution. Further, as this area of law develops, guidance may also be sought from the approach taken by domestic courts around the world. To cite but one example, the courts of India have repeatedly stated that the right to life in that state's constitution includes a right to live in a safe and pollution-free environment.⁹⁷

5.1.1.3 Outstanding Issues

As this evolution continues, however, there are a number of issues that will have to be resolved if the right to life is to be used to adequately protect human health from environmental degradation. The most significant problem is the question of scope. What should be protected and what should not be? Since the right covers life itself, do the environmental conditions at issue have to involve *direct* threats of *immediate* loss of life

⁹⁶For a summary of the details of this case and its possible implications, see: M. Acevedo, "The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights" (2000) N.Y. Univ. Env't'l L.J. 437. For a survey of pre-Guerra cases that trace the European Court's expansion of Article 8, see R. Desgagné, "Integrating Environmental Values into the European Convention on Human Rights" (1995) 89 A.J.I.L. 263.

⁹⁷Citing the right to life, the courts in India have closed down industries causing harm to health and safety in that country. They have stated that the right to life includes "the right to live with human dignity and all that goes along with it", including the right to live in a "healthy environment with minimal disturbance of [the] ecological balance". See *Mullin v. Union Territory of Delhi*, AIR 1986 S.C. 746 and *Vellore Citizens Welfare Forum v. Union of India*, [1996] Supp. 5 S.C.R. 241. See also J. Razzaque, "Human Rights and the Environment: Developments at the National Level, South Asia and Africa", Background Paper No. 4 presented at the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment in Geneva, 14-16 January 200. Online at: www.cedha.org.ar/hr-env-meeting.html; and M. Anderson, "Individual Rights to Environmental Protection in India" in Boyle & Anderson, *supra* note 84.

or can they be something less, especially if the focus is on quality of life or security of the person?⁹⁸

Along with this problem of scope, since the right to life traditionally prohibits the state from taking life intentionally or negligently, it is unclear whether this right also involves “a positive obligation on the state to take steps which would prevent a reduction in, or promote, life expectancy.”⁹⁹ As noted by M. Acevedo,

“An acknowledgment of such an affirmative obligation would have far-reaching consequences for environmental protection claims. Taken to its logical extremes it mandates that States not only ensure that their actions meet international standards, but that they also ensure that the international community as a whole complies with international standards through comprehensive monitoring programs.”¹⁰⁰

Another problem with establishing the links between environmental degradation and violations of the right to life really pervades all discussions of environmental harm. As noted above in relation to section 7 of the *Charter*, this is the problem of proving causation where the science establishing exact links is still evolving and is uncertain in many cases. Typically in human rights cases, the complainant must prove a rights violation on a balance of probabilities. Proving causation on this standard is often difficult, if not impossible, in environmental cases where so many variables may be at play.¹⁰¹

5.1.2 *Right to Health*

5.1.2.1 *International Law*

The second possible avenue for making human rights claims in the context of health concerns from environmental degradation is through the right to health, which is generally believed to also be an existing right in international law. One expression of the right is found in the *International Covenant on Economic, Social and Cultural Rights*.¹⁰²

⁹⁸See, for example, Scott, *supra* note 87 where the author argues that the right to life will likely only cover “clear and present obvious health threats”. See also Ramcharan, *supra* note 59, for a general discussion of this issue.

⁹⁹Acevedo, *supra* note 96 at 456.

¹⁰⁰*Ibid.* According to M. Acevedo, the economic burden and political issues involved in the effective implementation of such an affirmative right makes its enforcement highly unlikely.

¹⁰¹See *supra* note 80.

¹⁰²G.A. Res. 22001 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, 993 U.N.T.S.3 (1966) (the “ICESCR”). The ICESCR was ratified by Canada in 1976.

Article 12 of the *ICESCR* declares that state parties to the Convention “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. Similar language is also found in more specific treaties such as the *Convention on the Elimination of All Forms of Discrimination of Women*¹⁰³ and the *Convention of the Rights of the Child*,¹⁰⁴ both of which have been ratified by Canada.

Despite the general belief that the right to health is an existing right in international law, there is significant debate on what the right consists of.¹⁰⁵ According to E. Kinney, the right to health in international law can be viewed on a continuum where, at a minimum, it may mean the right to conditions that protect the health of a population and, at a maximum, it may include notions of state-funded health care for those unable to pay.¹⁰⁶

Although much of the scholarly debate on the scope of the right to health has in fact centered on this latter issue of whether it includes a right to universal health care, there has been some development of the idea that the right to health includes a right to certain conditions (including environmental ones) for the protection of human health. According to some scholars, these environmental dimensions of the right are currently either recognized in international law or are being explored.¹⁰⁷

For instance, in a recent General Comment by the United Nations Committee on Economic, Social and Cultural Rights (the treaty body responsible for implementing and monitoring the *ICESCR*), the Committee outlined the content of what it calls the “international right to health”.¹⁰⁸ This General Comment is extensive and is intended to apply to all states (including Canada) that have ratified the *ICESCR*. Although it clarifies that the “right to health” is “not to be understood as a right to be healthy”, the Comment

¹⁰³Dec. 18, 1979, art. 12, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (1980) [ratified by Canada in 1981].

¹⁰⁴Nov. 20, 1989, art. 24, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc A/44/49 (1989) [ratified by Canada in 1991].

¹⁰⁵See, for example, L. Smith, “The Right to Health” in K. Mahoney & P. Mahoney, eds., *Human Rights in the Twenty-First Century* (London: Martinus Nijhoff Publishers, 1993); S. Jamar, “The International Human Right to Health” (1994) 22 S.U. L. Rev. 1; V.A. Leary, “The Right to Health in International Human Rights Law” (1994) 1 Int’l J. Health & Hum. Rts. 25; B. Toebes, “Toward an Improved Understanding of the International Human Right to Health” (1999) 21 Hum. Rts. Q. 661; and E. Kinney, “The International Human Right to Health: What Does this Mean for Our Nation and World?” (2001) 34 Ind. L. Rev. 1457.

¹⁰⁶Kinney, *ibid.* at 1457.

¹⁰⁷*Supra* note 105.

¹⁰⁸United Nations Committee on Economic, Social and Cultural Rights, U.N. ESCOR, 22nd Sess., *The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C, Dec. 4, 2000, ICESCR General Comment 14 (2000).

observes that the right to health extends to the underlying determinants of health which include access to safe, potable water, adequate sanitation, and an adequate supply of safe food. In addition, the Committee states that the right guarantees healthy occupational and environmental living conditions.

5.1.2.2 Regional Human Rights Law

Although the environmental dimensions of the right to health have yet to be established by an international human rights body in a specific case, we can again perhaps glean where international law might end up by looking at the approach taken by regional human rights bodies. The African Commission on Human and Peoples' Rights, for example, deals with complaints brought under the *African Charter on Human and Peoples' Rights*¹⁰⁹ and has dealt specifically with the right to health found therein which states that “[e]very individual has the right to enjoy the best attainable state of physical and mental health”. In one case, the Commission held that the failure by the state to provide safe drinking water constituted a violation of this right and furthermore that, under the right to health, states have a duty to take measures to protect the health of their people.¹¹⁰

Most recently, the African Commission has commented on the *African Charter's* right to health in the case of a complaint brought by the Ogoni peoples of Nigeria against the government of Nigeria.¹¹¹ The complaint alleged significant health effects from severe environmental pollution resulting from oil exploration. Although the facts of the case were extreme and involved active collusion by the government with industry to forcefully evict large numbers of peoples from their homes and destroy their way of life, the Commission's comments on the right to health and environmental pollution issue appear to have broader application outside the specific facts of this case.

According to the Commission, the right to health guaranteed by the *African Charter* at a minimum requires the state to not sponsor or tolerate any practice or policy that directly threatens the health of its citizens. The Commission also concluded that the government had an obligation to conduct on-going scientific monitoring of those communities that were exposed to hazardous materials and to provide them with this information.

¹⁰⁹June 27, 1981, 21 I.L.M. 59 (the “*African Charter*”).

¹¹⁰Communications 25/98, 47/90, 56/91 and 100/93 against Zaire, AHG/207 (XXXII), Annex VIII.

¹¹¹African Commission on Human & People's Rights, Re Communication 155/96, Ref: ACHPR/COMM/A044/1 (May 27, 2002).

Similarly, in *Yanomami Indians v. Brazil*,¹¹² the Inter-American Commission of Human Rights found a violation of the right to health protected by the *American Convention on Human Rights*.¹¹³ In that case, the Yanomami Indians, a population indigenous to Brazil, faced a number of threats to their health and life after the government began construction of a major highway through their native lands. The construction of this highway, undertaken to exploit and develop the native lands, led to the discovery of rich petroleum deposits. In their petition before the Commission, the Yanomami alleged that the building of the highway had led to a number of physical and psychological threats to their survival, including massive epidemics of influenza and tuberculosis which were ignored by the Brazilian government.

On the evidence before it, the Commission concluded that the building of the highway had resulted in violations of the right to life, liberty and personal security of the Yanomami, as well as the right to the preservation of health and well-being under the Convention. Although the Commission failed to discuss the specific extent of the environmental harm that had taken place, or the potential long-term effects on the Yanomami people, the case stands as yet another example of the emerging recognition of the linkages between environmental degradation and the rights to life and health. Given the facts of the case, however, it is difficult to conclude whether more long-term, low-level environmental damage would be covered under such a ruling. It may be that the case only serves to protect against significant obvious and immediate health consequences.¹¹⁴

In sum, if the movement towards interpreting the right to health by exposing its environmental dimensions continues in this way, and as the right evolves in international law, it might provide a sound basis upon which to make human rights claims in the context of health impacts caused by environmental pollution. Nonetheless, as with the right to life, serious issues in regard to the scope of the right and the problem of proving harm will need to be resolved.

5.2 Right to a Clean or Healthy Environment

5.2.1 International Law

Aside from existing rights, there remains another possible avenue through which human rights-based claims may be made in the case of health impacts from environmental

¹¹²(1985) Inter-Am. Comm. H.R. No. 7615, *Annual Report of the Inter-American Commission on Human Rights: 1985*, OEA/Ser.L/V/II.66/doc.10 rev.1.

¹¹³Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673.

¹¹⁴See Scott, *supra* note 87.

pollution. This involves the recognition of an entirely new right which has been variously referred to as the right to a “clean”, “safe”, or “healthy” environment, or even more simply, the “right to environment”.¹¹⁵ According to a minority of scholars, such a right has already emerged as a norm of customary international law.¹¹⁶

The consensus amongst the majority of scholars, however, is that such a right has not yet crystallized in international law.¹¹⁷ According to J. McClymonds, for example, although the right to a healthy environment has not been formally adopted or recognized as a general practice of states, international legal norms regarding the environment are emerging.¹¹⁸ A number of scholars have argued for the expansion of international norms to include such a right, and many believe that it is currently emerging as a norm of customary international law.¹¹⁹

To date, there is no international treaty or convention that explicitly includes a right to a clean or healthy environment. Nonetheless, many scholars argue that such a right can be found implicitly in the provisions of “soft” law instruments such as the *Stockholm Declaration*. Its first Principle declares that:

¹¹⁵For examples of the various formulations, see N. Gibson, “The Right to a Clean Environment” (1990) 54 Sask. L. Rev. 5; J. McClymonds, “The Human Right to a Healthy Environment: An International Legal Perspective” (1993) 37 N.Y.L. Sch. L. Rev. 583; and D. Shelton, “Human Rights, Environmental Rights, and the Right to Environment” (1991) 28:1 Stanford J. of Int’l L. 103.

¹¹⁶See, for example, L. Rodriguez-Rivera, “Is the Human Right to Environment Recognized Under International Law? It Depends on its Source” (2001) 12 Col. J. Int’l Env’t’l L. 1.

¹¹⁷See, for example, McClymonds, *supra* note 115; Shelton, *supra* note 115; I. Hodkova “Is There a Right to a Healthy Environment in the International Legal Order?” (1991) 7 Conn. J. Int’l L. 65; and P. Taylor, “From Environmental to Ecological Human Rights: A New Dynamic in International Law?” (1998) 10 Geo. Int’l Env’t’l L. Rev. 309.

¹¹⁸McClymonds, *supra* note 115.

¹¹⁹See, for example, W. Paul Gromley, “The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms” (1990) 3 Geo. Int’l Env’t’l L.R. 85; Shelton, *supra* note 115; J. Lee, “The Underlying Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary Law” (2000) 25 Col. J. Int’l L. 284; and Schorn, *supra* note 35. For scholars who would like to see more restraint in the creation of “new” human rights (environmental or otherwise), see P. Alston, “Conjuring Up New Human Rights: A Proposal for Quality Control” (1984) 78 A.J.I.L. 697; Gibson, *supra* note 115; and G. Handl, “Human Rights and Protection of the Environment: A Mildly ‘Revisionist’ Point of View” in A.A. Cançado Trindade, ed., *Human Rights, Sustainable Development and the Environment*, 2d ed. (San José de Costa Rica: Instituto Interamericano de Derechos Humanos, 1995).

“[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears solemn responsibility to protect and improve the environment, for present and future generations.”¹²⁰

In addition, scholars also point to Principle 1 of the *Rio Declaration* which recognizes that “[h]umans are at the centre of concerns for sustainable development” and that they are “entitled to a healthy and productive life in harmony with nature”.¹²¹ Taken together, it has been argued that these two declarations offer support for the proposition that a right to a clean or healthy environment is emerging as a norm of customary international law.¹²²

These same scholars, however, acknowledge that a definitive statement has yet to be made from an international tribunal on whether such a right exists or is even emerging. Notably, however, in a recent decision of the International Court of Justice, one justice explicitly stated that, in his view, everyone has “a right to the protection of their environment.”¹²³

5.2.2 Regional Human Rights Law

In addition to some of these signs at the international level, a number of regional human rights instruments expressly include a right to a clean or healthy environment, and the bodies responsible for enforcing these instruments are elaborating upon the content of this right in their decisions. These decisions may be influential or persuasive for the development of international law. Or, they may evidence state practice that a norm of customary international law is emerging.

Three examples from regional instruments are Article 24 of the *African Charter*,¹²⁴ Article 11 of the *Protocol of San Salvador*,¹²⁵ and Article 1 of the *Aarhus Convention*.¹²⁶ Article 24 of the *African Charter* states that:

¹²⁰Report of the United Nations Conference on the Human Environment, 1972, U.N. doc. A/CONF. 48/14 & Corr., pt. 1, ch.1, reprinted in 11 I.L.M. 1416.

¹²¹*Rio Declaration on the Environment and Development*, June 14, 1992, U.N. Doc. A/CONF.151/5, 31 I.L.M. 874. Others have taken a less positive view of the effect of the *Rio Declaration*. See, for example, D. Wirth, “The Rio Declaration on Environment and Development: Two Steps Forward and One Step Back, or Vice Versa?” (1995) 29 Ga. L. Rev. 599 and M. Pallemarts, “International Environmental Law from Stockholm to Rio: Back to the Future?” in P. Sands, ed., *Greening International Law* (New York: New Press, 1994).

¹²²*Supra* note 119.

¹²³Case concerning the Gabcikovo-Nagymaros Project (*Hungary v. Slovakia*) [1997] I.C.J. Rep. 92.

¹²⁴*African Charter*, *supra* note 109.

“[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.”

Similarly, Article 11 of the *Protocol of San Salvador* proclaims that:

“[e]veryone shall have the right to live in a healthy environment and to have access to basic public services.”

Rather than an explicit statement, the *Aarhus Convention* embodies the idea of a right to a clean or healthy environment implicitly in Article 1 by declaring that the Convention is being entered into “...in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being”.

Specific cases decided under these three Articles have yet to emerge, with one notable exception. In the case of the complaint brought by the Ogoni peoples of Nigeria discussed above, along with violations of other rights, the African Commission did specifically find a violation of the right to a satisfactory environment contained in Article 24 of the *African Charter*. Referring to this right as the right to a “healthy” environment, the Commission held that it imposes clear obligations upon governments. In particular, the right “... requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”¹²⁷

In addition to these developments at a regional level, a number of state constitutions around the world contain some type of substantive environmental right. Again, these may serve to provide evidence of state practice and emerging norms in international law. The constitution of the Philippines, for example, guarantees that the state “shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature”.¹²⁸ Still, though, by far the majority of states (including

¹²⁵Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 14 November 1988, San Salvador, (1989) 28 I.L.M. 156 (the “Protocol of San Salvador”).

¹²⁶United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 28 June, 1998 (the “Aarhus Convention”). Online at: www.unece.org/env/pp/.

¹²⁷*Supra* note 111.

¹²⁸For the texts of constitutions containing a right to a clean or healthy environment, see E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Tokyo: United Nations University Press, 1989) at 297-327.

Canada, the United States and most European countries) do not yet explicitly recognize a right to a clean or healthy environment in their constitutions.¹²⁹

In sum, there seems to be some significant signals internationally that states are becoming receptive to the notion of a human right to a clean or healthy environment. At the level of international law, however, it is clear that, at best, such a right is slowly emerging as a norm of customary international law. If this slow birth continues, there will clearly be obstacles to overcome along the way, the largest of which will be definitional. With general descriptors such as “clean” or “healthy”, it will require considerable effort to define the exact scope of what such a right will protect. In particular, finding an appropriate definition that balances necessary economic development with environmental protection is proving challenging for scholars.¹³⁰ And again, beyond such definitional problems, the perennial problem of proof and causation in environmental cases will also remain.

6.0 Conclusion

From this review of both domestic and international law, it is difficult to conclude that there are definitely existing human rights that can provide a remedy for people suffering health impacts of exposure to environmental pollution. This is clearly an emerging area of the law, but, as noted, there is evidence of movement in that direction, especially at the international level.

As this area of law develops, one can surmise that the recognition of a right that would protect human health from the adverse impacts of environmental degradation would have significant consequences for the way oil and gas development proceeds in Alberta. All stages in the process would likely be affected, from the disposition of mineral rights to the manner in which the operations are conducted and monitored.

By way of example, some brief comments in this regard can be made with respect to one stage in this process: the granting of a hearing before the EUB. In cases where Albertans wish to contest a proposed oil and gas operation by way of a hearing before the EUB, they must meet the test for standing set out in the applicable legislation. Subsection

¹²⁹E. Eacott, “A Clean & Healthy Environment: The Barriers & Limitations of This Emerging Human Right” (2001) 10 Dal. J. Leg. Stud. 74 at 83.

¹³⁰See, for example, B. Van Dyke, “A Proposal to Introduce the Right to a Healthy Environment into the European Convention Regime” (1994) 13 Va. Env’tl L.J. 323. For summaries of the definitional and other problems facing the creation of a right to a healthy environment, see Eacott, *ibid.* and P. Birnie & A. Boyle, *International Law & The Environment*, 2d ed. (New York: Oxford University Press, 2002) at 254-259.

26(2) of the *Energy Resources Conservation Act* states that a hearing is to be held where it appears to the Board that its decision on an application “may directly or adversely affect the *rights* of a person”.¹³¹

Clearly the use of the word “rights” in this provision suggests that human rights arguments may have a role to play in its interpretation. Decisions rendered by the EUB, however, have significantly narrowed the definition of what “rights” are included in subsection 26(2). The EUB has repeatedly stated that, in its view, the word “rights” in this context means that a person must be entitled to exercise a legally-recognized interest with respect to the land where the development will be located or land adjacent to it. Moreover, the Board maintains that such legally-recognized interests include only monetary or economic interests.¹³² In one case, the Board refused standing to a group that used a particular area impacted by a proposed oil and gas project for a variety of recreational activities, including fishing and hunting. In its submissions, the group had argued that the proposed development would impact their health in various ways. In dismissing their request for a hearing, the Board held that it was not convinced that “...legally recognized interests can include non-monetary interests”.¹³³

Clearly, if rights of the type examined in this paper were to exist, this interpretation of subsection 26(2) of the *ERCA* would be difficult to maintain. If Albertans have a right to health, to a clean environment or a right to be free from exposure to toxic substances, the interpretation given to the word “rights” in this provision would have to be reconsidered. Persons whose health is actually or potentially impacted by emissions from oil and gas development would be entitled to a hearing whether or not they have some monetary interest in the land involved.¹³⁴

Undoubtedly, then, a finding that Albertans have a right that protects against harm to health from environmental pollution would impact significantly on the way oil and gas is developed in the province. But the oil and gas industry would not be the only one affected. A right to health or a clean environment would clearly influence the way all other industries that impact on the environment operate.

¹³¹R.S.A. 2000, c. E-10 (the “*ERCA*”) [emphasis added].

¹³²EUB, Re: Objections to Application Nos. 1070380 & 1071058 Well Licence and Pipelines, Shell Canada Ltd. et al. – Waterton 13-35-5-3 (Carbondale Area) (May 11, 2001).

¹³³*Ibid.*

¹³⁴The argument that the word “rights” in s. 26(2) may include more than economic interests is further bolstered by the specific language used in the statutory provision applicable to local intervener costs. Subsection 28(1) of the *ERCA* specifies that a local intervener is a person or a group of persons who “has an interest ‘in’ or ‘is’ in actual occupation of or is entitled to occupy” land that is or may be directly or adversely affected by a decision of the Board. Unlike s. 26(2), this is clear language of property interests.

This far-reaching consequence might be enough to preclude serious discussion of human rights in the area of environmental degradation. Nonetheless, as human rights scholars have pointed out, it behooves those working in the area of human rights to push the discussion and to continually break new ground and establish new methods to keep apace with the moral sensibilities of people – including those Albertans cited at the outset of this paper. Speaking in the context of international human rights law, B.G. Ramcharan has stated as follows:

“[i]f the international human rights lawyer is doing his job well, he has to be ahead of his colleagues in postulating new theories, in advocating the recognition of new norms and in advancing new forms of action for promoting and protecting human rights. His more traditionalist colleagues will invariably exasperate him by consistent assertions that ‘this has not yet been established’ or that ‘that is not part of international law’. This is to be expected, but it must not deter the international human rights lawyer. For he is rooted in the most solid of bases for determining the validity of international norms: the universal conscience of the world’s peoples”¹³⁵

As health concerns from environmental impacts continue to grow, it may be that a right to health or a right to a clean environment will become firmly rooted in the “universal conscience of the world’s peoples”. The law should then follow suit.

¹³⁵Ramcharan, *supra* note 59 at 1.



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