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Legal Rights to a Healthy Environment

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1.0 Introduction

1.1 Bill C-28, 2021 – A New Focus for Canadian Environmental Rights?

Bill C-28, the *Strengthening Environmental Protection for a Healthier Canada Act* [1] *,* an amendment to the *Canadian Environmental Protection Act* (*CEPA*) [2], received first Parliamentary reading on April 13, 2021. It was intended to strengthen the established toxicity assessment and toxic substance regulation provisions of *CEPA* that have long been central to federal environmental policy.

However, the provision that received the most attention was not substantive; it was an addition to the *CEPA's* preamble that added the following: "Whereas the Government of Canada recognizes that every individual in Canada has a right to a healthy environment as provided under the Act."[3]

Further, explicit preambular recognition was given to "the role of science"[4] in the protection of the environment and human health, as well as to the "precautionary principle." [5] But what was immediately noted by policy makers, non-governmental organizations (NGOs) and environmental lawyers was this new environmental rights provision. Discussion immediately bubbled up with praise for government recognition of a rights principle that dedicated environmentalists had campaigned for over half a century.

But others were less enthusiastic, noting that it was only part of the preamble and appeared to be limited to rights already provided in *CEPA*. It was not a sweeping citizens' endowment of environmental rights that would revolutionize Canadian environmental law and policy. Rather, as discussed below, it was a step that must be assessed against a range of stepwise legal developments, some of which have brought the idea of citizen enforceable environmental rights tantalizingly close.

Under Bill C-28 this included required development within two years of an implementation framework setting out how the right will be implemented in the administration of *CEPA*. [6] Questions abounded. What use is a preamble provision? What do the terms "healthy", and "environment" mean? Presumably the latter has the same meaning that exists under section 3(1) of *CEPA*. It turns out that plenty of perspective, but no clear answers in particular contexts are

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[1] *Strengthening Environmental Protection for a Healthier Canada Act, Bill C-28, 202.* (Bill C-28); Died on order paper following first reading and was reintroduced and passed as Senate Bill S-5 before again receiving first reading in the Commons.
[2] *Canadian Environmental Protection Act,1999,* SC 1999, c 33 [*CEPA*].
[3] Bill C-28, S. 2 (1).
[4] *Ibid,* s. 2 (5).
[5] *Ibid,* s.3 (1) (a) (2).
[6] Bill C-28, S. 5.1.

available. Much of this leads down the international law rabbit hole because Canadian courts have recognized international law's persuasive definitional value, not to mention *in pari materia* implications of other rather scattered federal environmental statutes.[7] Also relevant is the Canadian Constitution.

Unfortunately, following this burst of scholarly and public discussion, Bill C- 28 died on the order paper when Parliament was prorogued in the spring of 2022. However, the bill was then reintroduced in the form of a Senate bill[8] that replicated Bill C-28 with some minor amendments. The "right to a healthy environment" provision remained the same. This latter bill was passed by the Senate on June 22, 2022, and in January 2023 awaited first reading in the House of Commons.

1.2 The Idea of Environmental Rights – Scope of This Paper

It has been argued that environmental rights already exist as a matter of moral imperative, citing rights-based UN declarations, particularly the 1972 Stockholm Declaration on the Human Environment.[9] As such, these may influence government policy and legislative action.

This paper assesses the status of environmental rights in Alberta and Canada, taking its cue from Bill C-28, above. The conclusion is that Canada has no substantive constitution or statute - based environmental rights. However, international law norms influence Canadian Law, particularly in statutory interpretation and application of common law substantive doctrine and traditional procedural principles. Relevant international law will be explored, but the focus will be on Canada with limited international comparison. A handful of Canadian judicial decisions have discussed these concepts and values, and statutory and common law procedural rights exist. But environmental rights remain largely without legal recognition.

2.0 The Global Context for Environmental Rights

The right to a clean and healthy environment has become a global phenomenon. Wortsman states that as of 2018, 155 countries have a binding right to a healthy environment in their laws, with many others having "less binding, soft law declarations that recognize the right to a healthy environment."[10]

The context of environmental rights in international law has mostly been considered from the human rights perspective and the doctrine of inter-generational equity. As Cima puts it, "the

[7] See *Spraytech v Hudson,* 2001 SCC 40 *[Hudson*].
[8] Senate Bill S-5, 2022.
[9] See Sara Bagg, 'The Human Right to a Healthy Environment', in William Tilleman et al (eds), *Environmental Law and Policy Fourth Edition* (Emond 2020) at 576 [Tilleman]; David Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution*, (UBC Press 2012) [Boyd].
[10] Lauren Wortsman, 'Greening the Charter: Section 7 and the Right to a Healthy Environment' (2019) 28 Dal J Leg Stud 1.

International Council on Human Rights Policy stated that 'as a matter of simple fact, climate change is already undermining the realisation of a broad range of internationally protected human rights.'"[11]

Agreeing with the point above, González traces the development of the right to a clean and healthy environment as an international human right, characterizing it as a third generation right; stating first generation human rights are those set out in the International Covenant on Civil and Political Rights (ICCPR), second generation human rights as those enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and global environmental protection and rights, and third generation rights are those influenced by laws relating to "development and human rights."[12] González sums it up as follows:

> [t]he right to a clean and healthy environment is considered a third-generation human right and therefore must be seen as other human rights, because human rights are universal, indivisible, interdependent and interrelated. As the environment can be considered as a common amenity, it must be protected so that human beings can enjoy a safe, clean, healthy and sustainable environment.[13]

This realization of the impact of climate change on the exercise of human rights puts the conversation of the right to a healthy environment in perspective. Can human rights guaranteed to citizens be exercised if they do not live in healthy environments? Or put more simply, is the guarantee of a healthy environment critical to the enjoyment of human rights? If the answer to these questions is yes (as proposed in this paper), what is the global regime for this and how can state practices in other countries be applied in Canada.

2.1 The United Nations Declaration

It was reported on July 28, 2022, that the United Nations have declared access to clean and healthy environment a universal human right, calling "upon States, international organisations, and business enterprises to scale up efforts to ensure a healthy environment for all." [14] This development builds on the success of the UN Human Rights Council's passage of a resolution "recognising access to a healthy and sustainable environment as a universal right". [15] UN Secretary-General Antonio Guterres welcomed what he has characterized as an historic action stating that:

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[11] Elena Cima, "The right to a healthy environment: Reconceptualizing human rights in the face of climate change' 2022 RECIEL 31 at 39.
[12] Alicia Gutiérrez González, 'The Right to a Clean and Healthy Environment: GMOS in Mexico and the European Union', Mex. law rev vol.11 no.2 Ciudad de México ene./jun. 2019; https://doi.org/10.22201/iij.24485306e.2019.1.13129 .
[13] *Ibid.*
[14] "UN General Assembly declares access to clean and healthy environment a universal human right", (28 July 2022), online: *UN News* <https://news.un.org/en/story/2022/07/1123482>.
[15] "The right to a healthy environment: 6 things you need to know", (15 October 2021), online: *UN News* <https://news.un.org/en/story/2021/10/1103082>.

> [T]he landmark development demonstrates that Member States can come together in the collective fight against the triple planetary crisis of climate change, biodiversity loss and pollution. The resolution will help states to reduce environmental injustices, close protection gaps and empower people, especially those that are in vulnerable situations, including environmental rights defenders, children, youth, women, and Indigenous peoples[16]

The history of this resolution can be traced to the 1972 United Nations Conference on the Environment in Stockholm where environmental issues were placed on the front burner of international law, and the interaction between industrialized countries and developing countries on environmental issues was initiated. The declaration made in 1972 was to the effect that people have a fundamental "right to an environment of a quality that permits a life of dignity and well-being."[17]

2.2 International Law Right to Health Protection

This protection is based on the well-established international law right to life, liberty and security of the person. Expression of this right dates from the 1949 *Universal Declaration of Human Rights*, and the 1966 *International Covenant of Civil and Political Rights*. The former merely set standards, but is now recognized as customary law, including the right to life, liberty, and security of the person,[18] while the latter sets out the same as basic rights.[19]

Flowing from the above, the next section of this paper will consider environmental rights in selected jurisdictions. This is not an exhaustive list; these countries have been randomly selected.

3.0 Environmental Rights in other Jurisdictions

3.1 Mexico

Prior to the amendment of the Constitution of Mexico in 2012, Mexico has had an environmental right protection in its constitution, but it was in a limited form that had grown within a steady pace. As González notes, Mexico has had environmental protection provisions in its constitution since 1971 and being a member state of the Organization of American States, and a party to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), it has a regional obligation to protect the environment.[20]

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[16] UN Secretary General Antonio Guterres, 'UN General Assembly declares access to clean and healthy environment a universal human right', UN News, 28 July 2022.
[17] *Ibid.*
[18] Online: Microsoft Word - 912d Universal Declaration of HR.doc (gov.mb.ca), Article 3.
[19] UN General Assembly resolution 2200A (XXI)**,** Articles 6 and 9.
[20] González, *supra* note 12.

More importantly, Article 1 of the Mexican Constitution was amended in 2011 to allow for the enforcement of the right to a healthy environment. In the 2005 version of the Political Constitution of Mexico, Article 4 Paragraph 4 provided that "Every person has a right to live in an adequate environment for her development and welfare."
However, as more international developments on the right to a healthy environment occurred, there has been a progressive movement in the right in Mexico. In the 2015 Amendment of the Political Constitution of Mexico, Article 4 Paragraph 5 now reads:

> Any person has the right to a healthy environment for his/her own development and well-being. The State will guarantee the respect to such right. Environmental damage and deterioration will generate a liability for whoever provokes them in terms of the provisions by the law.

It thus appears from the new wording in Article 4 that the country has adopted the international environmental law principle, that emerged from the 1992 Rio Declaration on Environment and Development that those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment, otherwise known as the Polluter Pays Principle.[21]

Concluding on Mexico, we can see the impact of developments in international environmental law in the progressiveness of environmental obligations in the country.

3.2 France

France has not always had a right to a healthy environment embedded in its Constitution. It adopted the Charter for the Environment in 2004 and added it to the Constitution in 2005.[22] A holistic review of the French Charter gives an insight into the policy consideration that underscores its adoption and entrenchment in the Constitution.

Of particular relevance to this paper is Article 1 of the Charter, providing that "each person has the right to live in a balanced environment which shows due respect for health." Articles 3 and 4 of the Charter, like the Mexican Constitution, adopt the Polluter Pays Principle.

As in Mexico, the right is ascribed to persons individually and not as a group, giving the citizens the rights and powers to enforce an infringement of this right as well as imposing obligations on citizens.

An excellent review of the French Charter for the Environment can be found in Dadomo's work.[23]

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[21] Tyron Bache, "What is the polluter pays principle?", online: *Grantham Research Institute on climate change and the environment* <https://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-polluter-pays-principle/>.
[22] David Marrani, "Human Rights and Environmental Protection: The Pressure of the Charter for the Environment on the French Administrative Courts", Fall 2009, Sustainable Development Law & Policy [10:1]
[23] Christian Dadomo, "The "constitutionalisation" of French Environmental Law Under the 2004 Environmental Charter", In E. Daly, L. Kotze, J. May, & C. Soyapi (Eds.), New Frontiers in Environmental Constitutionalism, 2017, 146-159. UNEP.

3.3 Japan

Japan has an environmental law policy that aims to promote environmental protection, ensure healthy and cultured living, and preserve the environment for future generations. The Japanese Ministry of the Environment states that before the enactment of the Basic Law,

> Japanese environmental policies had been promoted on two basic laws - one is the Basic Law for Environmental Pollution Control, enacted in 1967 to combat serious industrial pollution…the other is the Nature Conservation Law, enacted in 1972 to stop the destruction of outstanding features of the natural environment.[24]

Recognizing that these two basic laws, even though successful, could not keep up with global environmental challenges, the Government of Japan, in 1993, enacted "The Basic Environment Law", Law No. 91 of 1993. Article 3 of the Basic Environment Law provides that:

> Environmental conservation shall be conducted appropriately to ensure that the present and future generations of human beings can enjoy the blessings of a healthy and productive environment and that the environment as the foundation of human survival can be preserved into the future, in consideration that preserving the healthy and productive environment is indispensable for healthy and cultured living for the people, and that the environment is maintained by a delicate balance of the ecosystem and forms the foundation of human survival, which is finite in its carrying capacity and presently at risk of being damaged by the environmental load generated by human activities.

The Law also sets obligations on the State, Local Governments, corporations, and citizens for protection of the environment. However, there are concerns regarding the Japanese government's commitments to environmental protection over the years, regardless of the provisions of the Basic Environment Law. Human Rights Now, and Kiko Network, in a joint article, condemned the abstention of the Japanese government in the UN Human Rights Council's resolution on the human right to a safe, clean, healthy, and sustainable environment, following the Fukushima nuclear disaster.[25] Japan, however, voted in favour of the UN resolution declaring access to a clean and healthy environment a universal human right in July 2022.

From these countries, we can conclude that the development of environmental rights within their constitutional framework has been one of progressive development. While Canada at the moment does not have a right to a healthy environment, as other sections of this paper show, there has been a progressive development in environmental protection.

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[24] "The Basic Environment Law - Outline", online: *Ministry of the Environment, Government of Japan* <https://www.env.go.jp/en/laws/policy/basic/leaflet2.html>.

[25] "Japan: NGOs protest government abstention from UN resolution on right to clean environment and call for proactive measures to guarantee the right", online: *Business & Human Rights Resource Centre* <https://www.business-humanrights.org/en/latest-news/japan-ngos-protest-govts-abstention-from-un-resolution-on-right-to-clean-environment-call-for-proactive-measures-to-guarantee-the-right/>.

4.0 The Significance in Canada of International Environmental Rights Law and Policy

Closely tied to the development of the UN declaration on environmental rights, and its predecessor declarations noted above, is the conversation around the significance this declaration holds, given its non-binding nature. While the focus of this paper is not a debate on the legal effect of UN Declarations, it has been argued over time that resolutions and declarations of the United Nations, however described may have legal effects on participating States. As Asamoah puts it, "Resolutions may have a legal effect even though they are not considered by states to be binding upon them."[26]

Thus, while we may argue that this Declaration is not binding on States and does no further good than previous declarations in the area of environmental law, David Boyd's commentary proves useful. Boyd states that:

> …it really is historic…so right off the bat if we can use this resolution as a catalyst for actions to clean up air quality, then we're going to be improving the lives of billions of people. So, while the declaration creates no binding obligation on member states regarding the protection of the environment or their peoples' rights to a healthy environment, international law practice has shown that different states have, on the back of previous UN declarations, expanded their human rights and or environmental protection approach domestically, thus, achieving the aim of these declarations.[27]

On the other hand, Boyd, in another commentary states that the right to a healthy environment is

> …included in regional human rights treaties and environmental treaties binding more than 120 States. It enjoys constitutional protection in more than 100 States and is incorporated into the environmental legislation of more than 100 States. In total, 155 States have already established legal recognition of the right to a healthy and sustainable environment.[28]

Thus, the effect of these Declarations is seen in the widespread growth of this right.

The Supreme Court of Canada (SCC) has signaled that international law and policy can be used to inform interpretation of Canadian environmental law. *R. v. Canadian Pacific Ltd.,* [29] which involved prosecution of the railway under Ontario's *Environmental Protection Act* arising from trackside burning, showed that the Supreme Court was interested in the larger international context in resolving environment related statutory interpretation issues. The court noted that: "[E]everyone is aware that individually and collectively, we are responsible for preserving the natural

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[26] Obed Asamoah, 'The Legal Effect of Resolutions of the General Assembly' (1964) 3:2 Colum J Transnat'l L 210.
[27] Boyd, *supra,* note 9
[28] David Boyd, "The Right to a Healthy Environment", (29 October 2021), online: *IUCN* <https://www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment>.
[29] *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 [*Canadian Pacific*].

environment…environmental protection has emerged as a fundamental value in Canadian society."[30]

Spraytech, Societe d'arossage v. Hudson (town)[30] involved whether the town had authority under Quebec's *Municipal Act* to pass a bylaw banning use of lawn enhancing pesticides. A key issue for the SCC was statutory interpretation to determine the scope of the *Municipal Act* enabling provision, and potential conflict of this provision with other provincial statutes. Public interest intervenors in the case urged the court to go farther and consider international law, particularly the precautionary principle as a principle of customary international law. In its decision, the court agreed stating,

> To conclude this section on statutory authority, I note that reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. My reasons for the Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 70, observed that 'the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review'.
> As stated in *Driedger on the Construction of Statutes*, *supra*, at p. 330:
>
> > [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred." [Emphasis added.]
>
> The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):
>
> > In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
>
> Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations (D. VanderZwaag, *CEPA* Issue Elaboration Paper No. 18, *CEPA and the Precautionary Principle/Approach* (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the *Oceans Act*, S.C. 1996, c. 31, Preamble (para. 6); *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 2(1)(*a*); *Endangered Species Act*, S.N.S. 1998, c. 11, ss. 2(1)(*h*) and 11(1).[31]

[30] *Hudson*, *supra*, note 7.
[31] *Ibid* at paras 30 - 31.

Another case in which the Supreme Court drew on international law principles is *Imperial Oil Ltd. v. Quebec (Minister of the Environment).*[32] In approving the validity of a Quebec Environment ministerial clean up order issued to Imperial, the Court relied on the "polluter pays principle", an international law norm that has been incorporated into Quebec's environmental legislation, and "has become firmly entrenched in environmental law in Canada."[33]

SCC constitutional law decisions have given weight to Canada's international law obligations.[34] This is particularly evident in cases involving the national concern branch of the federal peace, order, and good government (POGG) power.[35] The issue involves assessing whether the matter in question has reached the necessary level of national concern.

In *References re Greenhouse Gas Pollution Pricing Act* [36] Canada's international climate obligations were significant in applying the constitutional law test - both to characterize the pith and substance of the *Greenhouse Gas Pollution Pricing Act* as "establishing minimum national standards to reduce greenhouse gas emissions", and to "classify" this matter as within Parliament's POGG power. Similarly, in *R. v. Crown Zellerbach Canada Ltd*.[37], the SCC referred to Canadian international marine waters protection commitments under the Convention on the Law of the Sea (1982) and relevant United Nations commissioned scientific studies.[38] This was a factor in the court's subject matter characterization as regulation of waste dumping in marine waters, and its conclusion that this is a matter of national concern within POGG.

5.0 Canadian Environmental Rights

5.1 History and Context

The idea of environmental rights first flourished in Canada in the early 1970s. It followed from a series of legal challenges by citizens and NGOs of orders and decisions under federal and provincial environmental regulatory legislation that blossomed in that era. This was pure administrative law which at that time featured very narrow grounds for substantive review[39] based on a since-discredited distinction between "administrative" and "quasi-judicial" decisions. The former presented few grounds of attack leaving environmental officials and agencies with broad discretionary powers. The latter was equally narrow, limited to decisions that bore most hallmarks

[32] [2003] 2 SCR 624.
[33] *Ibid* at para 23.
[34] Patricia Galvao Ferreira,' International Law Influences', in Tilleman *supra* note 9, 117, 140-144.
[35] *Constitution Act, 1867* (UK), 30 & 31 Vict., c 3, s 91, reprinted in RSC 1985, Appendix II, No 5. s 91.
[36] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.
[37] 1988 CanLII 63 (SCC), [1988] 1 SCR 401.
[38] *Ibid* at para 27-38.
[39] See E.*g., Piatoka v Utah Construction and Mining Company,* [1972] 21 DLR (3d) 87 (BCSC); Van Harten *et al*, *Administrative Law Cases, Text, and Materials, Seventh Edition* (Emond, 2015) at 78. Later, the law developed along functionalist lines, widening reasonableness grounds for judicial review: Alastair Lucas and Brett Carlson, 'Judicial Review and Public Participation' in Tilleman, *supra* note 9 at 377, 379, 383.

of judicial decisions. However, for true quasi-judicial decisions, in principle, common law procedural fairness rights suggested potential procedural environmental rights grounds.

For both types of decision, standing to sue was also narrow, focusing on property and financial or specific personal harm. So proposed environmental law reform crystalized around these twin barriers – standing to sue and excessive regulatory discretion.

5.0.1 Statutory Environmental Rights

These issues were at the core of statutory environmental bills of rights introduced in Parliament and provincial legislatures in the early 1970s. At the same time there was no constitutional charter of rights on which to hang environmental rights. Nor did Canadian legislation include the kind of citizen suit provisions found in major US federal environmental statutes. The statutory character of these rights meant that they could be removed or rolled back by legislative amendment.

At the time, some US environmental litigation was of great interest in Canada. A virtual cult grew up around US professor, lawyer and environmental advocate, Joseph Sax and his advocacy around the *Michigan Environmental Protection Act*.[40] This substantive environmental rights statute was thought by some to be a promising model for Canada. Ultimately the Michigan Act foundered, to a great extent on judicial conservatism and doctrinal limitations.[41]

Enthusiasm notwithstanding, the early Canadian Bills either died on order papers or were rejected by legislative assemblies. A notable exception was section 19.1 of the *Quebec Environmental Quality Act*[42] that gave natural persons "… a right to a healthy environment and its protection … to the extent provided by this Act and its regulations, orders, approvals and authorization …"[43]

Note the similarity to Bill C-28's language. However, significantly, the Quebec environmental right is framed in substantive, not merely preambular language. The Quebec provision did increase citizen rights access to environmental decisions. Though no environmental panacea, it removed the standing to sue requirement and produced several notable judicial decisions.[44]

In the 1990s, broadly similar environmental rights statutes were passed in the Northwest Territories[45] and Yukon[46] that also invoked the public trust concept.[47] The latter involves a

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[40] Joseph Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Knopf, 1970).
[41] See John Swaigen and Richard Woods, *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 195, 197-98.
[42] *Environmental Quality Act,* CQLR c Q-2, s 19.1.
[43] *Ibid.*
[44] See *Imperial Oil c. Quebec (Minister of Environment)*, 2003 SCC 58; *Nadon c Anjou*, 1994 CanLII 5900 (CA); *Gestion Serge Lafreniere inc c Calve*, 1999 CanLII 13814 (CA).
[45] *Environmental Rights Act*, RSNWT 1988 (Nu) c. 83 Supp), re-enacted as RSNWT, c. 19, ss. 2 (a), 13.
[46] *Environment Act*, RSY 2002, c 76, ss. 6-12.
[47] *Ibid*, s. 8 (b); Northwest Territories *Environmental Rights Act*, 2019, *supra* note 45; See Stewart Elgie, 'Protected Spaces and Endangered Species' in Tilleman, *supra* note 9 at 605.

constitutional or legislative declaration that public land and resources within a jurisdiction are held by the government as trustee for the citizens. Citizen beneficiaries have a cause of action to enforce public trust obligations. In *British Columbia v. Canadian Forest Products Ltd*.,[48] the Supreme Court of Canada recognized the existence of "questions about the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown…"[49], but declined to pursue the issues.

The *Ontario Environmental Bill of Rights*, enacted in 1992, was about citizen engagement, aiming mainly to protect citizens' environmental procedural rights. This included notification of pending decisions, right to request Environment Ministry review or assessment of environmental harm, and rights to appeal Ministry decisions. There was also a narrow right to sue in public nuisance to prevent environmental harm.

The result is some notable citizen judicial success, particularly confirmation of citizen rights to appeal Ontario Minister of Environment approvals to the Environmental Review Board. [50] However, preliminary procedural hurdles, including required prior government investigation, have limited legal action to a handful of cases.

5.2 Constitutional Environmental Bills of Rights

Following statutory environmental rights disappointments, environmental law reform attention moved to the idea of constitutional rights. There were two possibilities. One is exemplified by Dale Gibson's 1988 [51] initiative to constitutionally entrench environmental rights. To avoid environmental decision discretion by conservative judges, Gibson drafted a constitutional duty that would require governments to delegate responsibility for creating and enforcing environmental rights to the "ordinary" legislative and administrative processes. He proposed that governments would have a duty to establish and enforce minimum environmental quality standards. These provisions would give "everyone" … "the right to a beneficial environment" and to enjoy its use. Further,

> Everyone [would have] the right to apply under s. 24 (1) of the Charter to apply to the [competent court] for a declaration that Parliament or a provincial legislature has failed to fulfil its duty to make and enforce environmental laws.[52]

The second possibility was to include environmental rights directly in the Constitutional amendments under federal Bill C-60[53], which had been taking form prior to the *Constitution Act*

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[48] 2004 SCC 88.
[49] *Ibid*, at paras 81-82. See Stewart Elgie, 'Protected Spaces and Endangered Species' in Tilleman, *supra* note 9 at 621-622.
[50] See *Lafarge Canada v Ontario (Ontario Environmental Review Tribunal)* (2008), 36 CELR 3d 191 (Ont Div Ct).
[51] Dale Gibson, 'Constitutional Entrenchment of Environmental Rights' in N. Duple ed, *Le droit de la qualite de l'environment* (Montreal: Quebec Amerique, 1988) 275 at 287.
[52] *Ibid,*
[53] Constitutional Amendment Act, Bill C-60, 1978.

1982, or in subsequent constitutional amendment proposals. Bill C-60 included an explicit declaration of the "commitment of all Canadians to the balanced development of the land of their common inheritance and to the protection of its richness and beauty in trust for themselves and generations to come."[54]

However admirable this pioneering expression of sustainability and public trust ideas was, it never made it into what became the *Constitution Act 1982*.[55] Similar environmental rights promotion blossomed in 1987 around the proposed Meech Lake Accord;[56] but that ended with the failure to secure the necessary provincial consent.[57] The subsequent Charlottetown Accord failed in 1992 when Canadians voted against the Accord by a 55% margin in a national referendum.[58]

Another constitutional possibility that does not involve amendment is judicial recognition of environment-related rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*), particularly section 7 (legal rights) and section 15 (equality rights). This is discussed below.[59]

6.0 Substantive Environmental Rights

Substantive rights, either statutory or common law, require affirmative statute or common law duties by governments and private persons. These rights can be judicially enforced. John Swaigen and Richard Woods characterize a substantive right to environmental quality as:

> …one that ensures and advocates environmental quality in the legal system as a value equivalent to private property rights and a fetter on government discretion to permit environmentally harmful activities; a right that draws lines and sets limits on how much environmental degradation is permissible.[60]

In the view of David Boyd, who has been the UN Special Rapporteur on Human Rights and the Environment, a substantive constitutional right to a healthy environment would impose three duties on governments:

1. to not infringe the right through state action,
2. to protect the right against infringement by third parties, and
3. to take affirmative actions to implement the right "[61]

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[54] *Ibid* at s. 4.
[55] *Constitution Act 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[56] See Mary Dawson, 'From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown' (2012) 57 McGill LJ 955.
[57] *Ibid*.
[58] *Ibid*.
[59] At pp. 15-17.
[60] Swaigen and Woods, *supra* note 41.
[61] Boyd, *supra* note 9.

According to Boyd, a constitutionally based environmental right would have significant advantages, such as: strengthening environmental laws; serving as a standard for assessment of proposed new laws; acting as a safety net to close legal gaps; preventing rollback of healthy environment protection laws; improving environmental law implementation and enforcement; and increasing public involvement by broadening procedural rights.[62]

7.0 Procedural Environmental Rights

Arguably, courts are more comfortable with procedural environmental rights than with the substantive variety. Nothing is proposed to be permanently stopped. Direct confrontation with government agencies is thus avoided. Procedural environmental rights' success may merely mean that a decision in question will be delayed or reconsidered. Yet procedural litigation may cast a different light on an alleged environmentally damaging action. Economic conditions may change, public attention may be more focused. A greater depth of public concern may be revealed, and related or analogous government actions may produce new insights that lend support to the litigation. In short, the issue may get greater public attention, with significant new information produced.

Alternatively, government decision makers may simply have failed to comply with statutory or common law requirements. Some statutes, such as the Ontario *Environmental Bill of Rights, 1993*, [63] are bursting with procedural environmental rights, including specific public notice, investigation requests, and participation in environmental policy development.

The following common law procedural requirements underlie statutory rights, to fill gaps and resolve uncertainties. Classic procedural fairness includes rights to:

- Reasonable notice to affected persons,
- Reasonable opportunity to respond, and
- An impartial decision maker. [64]

These may be complicated by project research and modifications that are inevitable in the course of lengthy and complex environmental regulatory review of proposed projects.

8.0 Charter Rights to a Healthy Environment

A potential source of healthy environment rights is the *Canadian Charter of Rights and Freedoms* (the *Charter*), particularly sections 7 (legal rights) and 15 (equality rights). Neither of these

[62] *Ibid* at 18-23.
[63] SO 1993, c 28
[64] *Baker v Canada (Minister of Citizenship and Immigration*, [1999] 2 SCR 817.

Charter rights mentions any explicit form of environmental rights. The question is whether the scope of section7, section 15, or both is broad enough to include environmental rights.

Arguably, environmental rights are embedded in these *Charter* provisions. Section 7 rights infringement because of potential H_2S harm to human health was pleaded in *Kelly v. Alberta,*[65] which involved a sour gas well licence granting decision by Alberta's Energy Resources Conservation Board. The Alberta Court of Queen's Bench granted leave to appeal on section7 grounds, including the argument that the proposed well presented an inherent risk to nearby residents so that the applicant's section 7 rights were infringed. In *Domke v. Alberta ERCB*[66], leave to appeal on section 7 grounds was granted. But the Court of Appeal concluded that there was no infringement because the company proposing to drill the well had offered to relocate residents with health concerns.

In Ontario, the Court of Appeal ruled that an NGO challenging the validity of the federal *Nuclear Liability Act*[67] had standing and a reasonable cause of action based on infringement of the section 7 right to security of the person.[68] However, ultimately the heavy costs of funding the challenge forced the NGO and co-plaintiffs to abandon this appeal.

The SCC has touched on the possibility of environmental rights in the *Charter of Rights and Freedoms* (the *Charter*),[69] but there are no explicit SCC rulings. The SCC referred to section 7's right to "life" as engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. [70] Arguably, state action authorizing environmental actions that create or continue life threatening health risk may infringe this section 7 right. Similarly, the section 7 "security of the person" protection includes the right to control bodily integrity in the face of state action.[71] None of the cases concerned government environmental action. However, in *Ontario v. Canadian Pacific*[72], which involved smoke from the railway's track side burning, the court linked "sanctity of life" and "quality of life" to preservation of the natural environment.[73]

Overall, considering the judicial history and commentators' analysis, the prospects for broad section 7 environmental rights are not promising. This is apparent when one looks at how these rights are formulated and applied. They are rights of individual persons (including in some procedural contexts), corporations. They are narrow, arguably inappropriate for protecting broad

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[65] *Kelly v Alberta (Energy and Utilities Board)*, 2008 ABCA 52 (CanLII) [*Kelly*].
[66] 2008 ABCA 232.
[67] *Nuclear Liability Act*, RSC 1970 c. 29 (First Supplement), as amended by RSC 1985, c, N-28.
[68] *Energy Probe et al v Canada (Attorney General)* (1989), 68 OR (2d) 449, leave to appeal refused (1989), 102 N.R. 399 (note) (SCC) [*Energy Probe*]. The plaintiffs included The City of Toronto and several high-profile individuals.
[69] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[70] *Carter v Canada (A.G.)*, 2015 SCC 5 at para 62.
[71] *R v Morney,* [*1999*] 1 S.C.R. at para 678.
[72] Canadian Pacific, *supra* note 29.
[73] *Ibid.*

based societal interests in a healthy environment.

Section 7 states: "Every person has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with fundamental justice."

Section 7 judicial analysis, like that for other charter rights, proceeds stepwise, requiring:

- **Infringement,** a relatively low bar effects test that takes into account directness and effects, and
- Whether in accordance with **fundamental justice**, encompassing impacts found fundamentally in the criminal justice context including, presumption of innocence, self-incrimination protection, and procedural fairness in decisions.

Further, the general *Charter* saving clause may justify infringements that are "reasonable and demonstrably justified in a free and democratic society." [74] The test developed by the SCC[75] involves balancing four factors: 1) whether the government action or legislation is "pressing and substantial"; 2) whether there is a "rational connection" between the objective and the means used to achieve that objective; 3) whether the means used involves minimal impairment; and 4) whether the positive and negative effects of the action are "proportional." In the case of section 7 rights, since infringement requires action contrary to fundamental justice, there is little room for section 7 justification.

This judicial analytical scheme supports the careful, conservative approach that courts have taken to recognizing section 7 environmental rights.

The same approach is apparent when potential section 15 (1) environmental rights are explored. section 15(1) states:

> Every individual is equal before the law 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 ability.

Initially, it appeared that this created a broad right to protection against differential treatment that might include harm caused by adverse environmental conditions. This view of section 15 environmental rights is plausible. But SCC analysis has focused on discrimination. Three elements must be established: 1) differential treatment by a law or government action that removes a benefit or imposes a burden; 2) this must be based on a section15 (1) enumerated ground or an analogous ground; and 3) discrimination must result. The section1 saving clause, with its "reasonable limits prescribed by law", may also present a potential barrier.

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[74] *Charter, supra* note 69, s 1.
[75] *R v Oakes*, [1986] 1SCR 103.

The result is that differential treatment based on place and proximity, such as harm from a sour gas well or a toxic waste dump, has been largely excluded.[76] The Ontario chemical valley litigation shows that achieving success is likely to be problematic.[77]

9.0 Indigenous Rights

Indigenous rights and environmental rights are not the same. However, Aboriginal and treaty rights recognized under section 35 of the *Constitution Act 1982*[78] protect Aboriginal wildlife harvesting and use of certain other resources on traditional lands. [79] Section 35 (2) states: "… existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[80]

The scope and nature of these rights has been largely determined by judicial decisions. Aboriginal title, a unique group ownership form is a subset of Aboriginal rights that applies to specific areas. Otherwise, the rights are not ownership, nor do they convey total governance jurisdiction over these resources.

Establishing Aboriginal title involves a use-based approach rather than one that focuses on specific sites. This approach, as Nicole Schabus points out,

> … has a significant environmental dimension since a major element is the nature of the land and the population it can maintain in an environmentally, culturally and economically sustainable manner.[81]

To establish and protect Aboriginal rights, the SCC has outlined a two-step formula. This involves:

1. Identifying the nature of the Aboriginal right claimed in view of, "the nature of the action which the applicant is claiming was done pursuant to the Aboriginal right, the nature of the government regulation, statute or action being impugned, and the custom or tradition being relied upon to establish the right;"[82] and

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[76] Nickie Vlavianos, *The Potential Application of Human Rights law to Oil and Gas Development in Alberta*, ACLRC/CIRL, August 2006 at 20.
[77] Sara Bagg in Tilleman, *supra* note 9.
[78] *Constitution Act 1982, supra* note 55.
[79] See Heather Fast and Brenda L Gunn, 'Indigenous Peoples' Jurisdiction Over the Environment' in Tilleman, ab note 9, ch. 9 at 317-347.
[80] *Constitution Act 1982, supra* note 55.
[81] Nicole Schabus, '*Tsilhqot'in Nation*: A Territorial Land-Use Concept of Aboriginal Title and Aboriginal Governance' in Tilleman, *supra* note 9, Ch 8, 127 at 135.
82 *R v Van der Peet,* [1996] 2 SCR 507 at para 53.

2. Proof that the activity or action is an "element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right."[83]

The latter requires that this element of distinctive culture has been practised prior to European settlement and that there is reasonable continuity of practise to the present. There must be clear evidence of infringement.

However, once the right is established, infringement is still possible, but it must be justified[84] as in the public interest, with a compelling and substantial objective, consistent with the Crown's fiduciary obligation to the Aboriginal group, a rational connection between the objective and the impugned action, minimum impairment, and benefits that outweigh the negative effects on the Aboriginal group. Further, the Crown's duty to consult and accommodate must be met. It is apparent that this justification analysis largely mirrors that used in *Charter* analysis.

The duty to consult and accommodate does not create a free-standing Aboriginal right but is the corollary of obligations owed by the Crown to Indigenous peoples of Canada.[85] It arises when the Crown knows of aboriginal rights and contemplates action that might affect those rights adversely. The SCC has described a spectrum of Aboriginal rights and impact significance to determine the scope and content of consultation and accommodation required in specific circumstances.[86]

Aboriginal title is a communal Indigenous land right that extends beyond Aboriginal rights and includes use and occupation of particular land. The SCC in *Tsilhqot'in Nation v. British Columbia* (*Tsilhqot'in Nation*)[87] stated that this encompasses economic rights, including mineral rights and generally the right to manage the land. Essentially the same prior – to – European - settlement test applies, requiring that clear and obvious use and occupation be shown.

Tsilqot'in, *Nation*, decided in 2014 was the first SCC declaration of Aboriginal title. The litigation began in 1983.[88] In its reasons, the SCC used what it described as a "culturally sensitive" approach to sufficiency of territorial occupation. Its approach goes some way toward balancing resource development objectives and environmentally sensitive land use. This is underlined by the statement in the context of justification that, "… incursions into Aboriginal title cannot be justified if they would substantively deprive future generations of the benefit of the land."[89]

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[83] *Ibid* at para 46.
[84] *R v Sparrow*, [1990] 1 SCR 1075.
[82] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*]. For Indigenous opposition to pipelines, see: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153; and *Gitxaala Nation v Canada*, 2016 FCA 187 [*Gitxaala Nation*].
[86] *Gitxaala Nation*, *Ibid.*
[87] 2014 SCC 44.
[88] See Schabus, *supra* note 81.
[89] *Tsilhqot'in Nation, supra* note 87 at para 86.

This is consistent with the intergenerational equity elements of environmental sustainability.[90] Following the Supreme Court's title declaration, the Tsilhqot'in Nation proceeded to create a Tribal Park adjacent to the title lands designed to protect the ecological values that support their Aboriginal rights and title.[91]

Aboriginal governance is fundamentally a matter within federal jurisdiction. Further, developing jurisprudence suggests that Indigenous peoples have self-government rights that are a type of section 35 Aboriginal right.

As a result of the Quebec Court of Appeal's ruling in the 2022 *CFS Act Reference* [92] concerning regulation of Indigenous family services in the province, there is potential for Aboriginal governance rights under section 35 to give First Nations laws with federal implementation, authority to govern natural resource development, within provinces. This is a possible implication of an appeal that was before the SCC in early 2023.

The British Columbia (BC) Supreme Court has held that BC government regulatory decisions concerning assessment of cumulative impacts by development of natural gas and liquids in the Montney formation of Northern BC, infringed treaty rights to consultation.[93] The idea is that cumulative effects of agricultural settlement and regional resource development are so pervasive that section 35 rights are violated.

In *Duncan's First Nation v. Alberta*,[94], this is precisely the issue raised by a Northern Alberta First Nation's claim that cumulative impacts authorized by Alberta infringe the Band's Section 35 treaty rights. This action is modeled on *Yahey v. British Columbia*, which in its result directed changes in the provincial regulatory regime.[95]

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[90] See Lynda Collins, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) Dal L J 79.
[91] The Firelight Group, 'Dasiqox Tribal Park established by the Tsilhqot'in to protect their land and culture', March 31, 2016, <Dasiqox Tribal Park established by the Tsilhqot'in to protect their land and culture – The Firelight Group>
[92] *Reference to the Court of Appeal of Quebec in relation to the Act Respecting First Nations, Inuit, and Metis Children, youth, and families*, 2022 QCCA 185.
[93] *Yahey v British Columbia*, 2021 BCSC 1287, 1884 [*Yahey*]; see Robert Hamilton, 'Blueberry River First Nation and the Piecemeal Infringement of Treaty 8' Ablawg, 20 July 2020 accessed 28 October 2022; and Robert Hamilton and Nick Ettinger,*'Yahey v BC*, and Clarification of the Standard for Treaty Infringement' Ablawg 24 September 2021, accessed 28 October 2022.
[94] *Duncan's First Nation v Alberta* filed July 2022 (ABQB).
[95] Yahey, *supra* note 93; Bob Weber, 'First Nation sues province over cumulative environmental effects', The Globe and Mail, 7 September 2022 at A-6.

10.0 Systemic Barriers to Environmental Rights

10.1 Cost

An obvious barrier to environmental rights actions is litigation cost. Citizens or NGOs may find initiating litigation prohibitively expensive or may be forced by lack of funding to abandon actions commenced.

This is illustrated by the cautionary tale of a late 1980s NGO section 7 and 15 *Charter* challenge of the federal *Nuclear Liability Act*.[96] In 1986, Energy Probe Research Foundation (Energy Probe), the City of Toronto, and several individuals brought an application at the Ontario Superior Court challenging the constitutionality of the Act on the ground that its liability limitation provision intruded on provincial jurisdiction under section 92 (13), "property and civil rights in the province", or provincial jurisdiction over electricity generation and production, under section 92A of the *Constitution Act, 1982*, and (when proceedings reached the Ontario Court of Appeal) that it also infringed affected citizens' *Charter* rights to security of the person (s. 7) and to equality (s. 15).

The respondents, Atomic Energy Canada and the Attorney General of Canada responded with a flurry of motions including lack of standing and failure to demonstrate a reasonable cause of action. As well, several Ontario and New Brunswick nuclear plant operators sought leave to intervene. The trial judge dismissed the action, agreeing with the respondents on both the applicants' standing, and failure to present a reasonable cause of action. Applicants appealed to the Ontario Court of Appeal, which allowed the appeal. This court held that the applicants demonstrated public interest standing and a reasonable cause of action, based on constitutional jurisdiction grounds. The *Charter* grounds were also accepted as having some chance of success. The respondents leave to appeal application was denied by the SCC.

With the motion to strike cleared away, the applicants filed a new statement of claim that added a ground concerning federal regulations designed to protect nuclear facility contractors from liability. Once again, the Court of Justice dismissed the action with costs against the applicants. However, oddly, Justice Wright proceeded in any event to analyze and rule on the substantive grounds raised. The applicants again appealed to the Ontario Court of Appeal. At this point, 7 years had passed since the original action was filed, and costs continued to mount.

[96] *Energy Probe*, *supra* note 68; See Theresa McClenaghan, '*Nuclear Liability Act Challenge*' in Tilleman, *supra* note 9. ch 3 at 39-58.

Energy Probe concluded that the cost risks were simply too high and decided to abandon the appeal and try to negotiate a costs settlement with the respondents. It was not a happy position for Energy Probe. An original grant of $60,000 from the Charter Challenges Fund, as well as funds from Legal Aid Ontario, the City of Toronto, and private donors, were long gone. And neither the City of Toronto nor the Ontario provincial government was helpful at this point.[97]

10.2 Access to Justice

The issue here is the difficulties that communities affected by environmental damage may have accessing potential statutory or *Charter* environmental rights. These are individual rights, so that affected individuals must be mobilized as plaintiffs, or NGOs must be prepared to take on these causes. But affected citizens may not be of the same mind about legal and advocacy strategy, and potential costs may be daunting. Information and organizational, not to mention leadership problems, may be insurmountable. Potential rights litigation may not fit plans of NGOs.

10.3 Standing

Another problem is standing. Canadian courts have been reasonably flexible in constitutional cases, giving discretionary weight to public interest, as the *Energy Probe* case[98] shows, or using the more structured public interest standing approach based on the SCC's constitutional standing trilogy.[99] This requires that the applicant have a sufficient personal interest, or that there be a sufficient public interest at stake. Essentially the same approach applies in non-constitutional judicial review cases.[100] Again, standing is fundamentally discretionary, but effects on persons and causation, are factors, as are the broad community impacts that would be evident in environmental rights actions.[101]

10.4 Only Government Actions

A limitation on *Charter* rights is that these apply only to government action. However, the scope of government action is wide. It includes actions by governments – federal, provincial and municipal - and likely, First Nations governments, as well as their agents such as Crown corporations, and actions and decisions by regulatory agencies. Private persons and corporations are not included.

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94 Toronto was an original co-applicant with Energy Probe.
[98] Energy Probe, *supra*, note 68.
[99] *Thorson v Attorney General of Canada*, 1974 CanLII 6 (SCC), [1975] 1 SCR 138; *Nova Scotia Board of Censors v McNeil*, 1975 CanLII 14 (SCC), [1976] 2 SCR 265; *Minister of Justice of Canada v Borowski*, 1981 CanLII 34 (SCC), [1981] 2 SCR 575
[100] *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607.
[101] *Ibid.*

10.5 Causality

Plaintiffs asserting *Charter* infringement by harm to personal health or security as a result of environmentally damaging activity have the burden of proving it is more probable than not, that this activity caused the harm. The problem is that environmental harm may be "uncertain, speculative and hypothetical", a term used by the SCC in *Operational Dismantle,* an early *Charter* case. [102] This may, as Vlavianos suggests, be an argument faced in a *Charter* challenge of disposition of Alberta oil and gas rights because the details about development of these rights would not be known and they might not be developed at all. Further, knowledge about ecological effects may be incomplete so that proving connection to human health may be difficult.[103]

However, the SCC has ruled in a non-environmental context that section 7 rights may be infringed where there is a risk of harm to a group of unidentified individuals. [104] This is analogous to environmental *Charter* cases where, for example, potential risk of toxic substance release may threaten a community and it's not necessarily specified residents.[105]Similarly, in the case of a challenge by local residents to Alberta regulatory approval of sour gas drilling, leave to appeal on section 7 grounds was granted by the Alberta Court of Appeal.[106] Nor, Mascher argues, should causation necessarily be a bar to *Charter* cases focussing on government climate damaging action or inaction.[107]

10.6 Inability to Address Legislative Gaps

Courts have recognized that *Charter* rights cannot directly require governments to legislate on particular matters. For example, there is no federal legislation establishing a regime of standards for discharge by oil and gas operators of contaminants into waters. A judicial decision recognizing *Charter* rights cannot do this directly. However, it has been argued[108] that if such legislation is "under inclusive", in that it limits specific discharges, but fails to limit cumulative effects, it infringes *Charter* protected rights. In any event, it is possible for even unsuccessful cases of this kind to influence government policy and legislative action.

11.0 What Could a Free-Standing Right to a Healthy Environment Look Like?

Constitutional amendment appears to be a nonstarter. The amending formula under Part V of the Constitution requires a Governor General's proclamation, House of Commons and Senate resolutions and resolutions from the legislatures of two-thirds (7) of the provinces representing at

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[102] *Operation Dismantle v. The Queen,* 1985 Can LII 74, at para 3 [Operational Dismantle].
[103] Nickie Vlavianos, *surpra* note 76 at 41.
[104] The case involved risk of harm to sex workers: *Canada (Attorney General) v Bedford*, 2013 SCC 72.
[105] See *Manicon v County of Oxford* (1985), 52 OR (2d) 137.
[106] *Kelly*, *supra* note 65. *Cf*, *Domke v Alberta Energy Resources Conservation Board*, 2008 ABCA 32.
[107] Sharon Mascher, 'Domestic Climate Change' in Tilleman, *supra* note 9 at 170-172.
[108] Wortsman, *supra* note 10 at 267.

least 50% of Canadians. If this isn't barrier enough, the federal resolutions must be supported by Quebec, Ontario, British Columbia, two or more Atlantic provinces with at least 50% of the region's population, and two or more prairie provinces with at least 50% of the regional population. Moreover, no government is likely to be enthusiastic about the long list of interests likely to propose their amendments, as occurred during the Meech Lake process.

Most promising appears to be a federal (to ensure national consistency) statutory bill of rights that could be incorporated into *CEPA*,[109] and *perhaps* similar provincial statutes. In 2017 the House of Commons Standing Committee on Environment and Sustainable Development conducted a statutory five-year review of *CEPA* and recommended that the Federal government incorporate the right to a healthy environment in *CEPA*.[110] This would not be limited to the preamble as in Bill C-28. However, the government has not acted on these recommendations.

12.0 Common Law Rights

Though this is primarily a public law paper, it is worth remembering that citizen rights based on private tort law have a role to play in promoting a healthy environment. This kind of litigation may be the only way for citizens to pursue legitimate concerns where private actions are degrading environmental values and governments have failed to act. Here the overarching theme is protection of property. This is the basis for common law actions[111] in negligence, public authority liability, nuisance, strict liability, riparian rights, and trespass.

Perhaps the most promising cause of action is private nuisance because it is a form of strict liability; plaintiffs do not need to prove that the defendant acted intentionally or negligently. What must be proven is that the impugned action interfered unreasonably and significantly with the use and enjoyment of land owned or occupied by the plaintiff, or with the plaintiff's physical integrity. Courts take into account various factors, including the relative industrial character of the neighborhood, the significance of the interference, and whether the plaintiff has abnormal sensitivities. Often a key issue is whether the activity was approved under statutory authority.

A second form of this tort is public nuisance. This concerns damage to the public interest in protecting public amenities including health, safety, and convenience. It includes harm to physical amenities such as public beaches and navigable waters. What must be proven is damage to public property. Because public rights are vested in the Crown, actions must be brought by the Attorney General, except that in narrow circumstances private parties may sue if their rights are simultaneously harmed in a significant way. There must be personal harm. Some forms of economic loss may also qualify, but the case law is unclear.

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[109] *CEPA, supra* note 2.
[110] Committee Report No 2 – Envi (44-1) June 2017, 42nd Parl, 1st Session, at 22.
[111] See Cameron Jefferies, 'Environmental and Toxic Torts: Legal Realities and Contemporary Challenges', in Tilleman, *supra* note 9 at 229.

It can be seen that causation is likely to be a major constraint on actions of this kind. Thus, while nickel particles became embedded in the soil of neighboring properties as a result of Inco's refinery operations over nearly 70 years, the Ontario Court of Appeal concluded that the plaintiff property owners had not established "actual physical damage" to their properties or to their health.[112] "Toxic torts," where individuals are harmed by exposure to toxic substances, particularly where health damage manifested only in the long term,[113] are also problematic. Climate change harm has been the subject of private legal action in a number of countries, including the US and Canada, with mixed results. Canadian courts have not yet rendered a final substantive decision in an action of this kind.[114]

13.0 Conclusion

Bill C-28 (S-5) with its preambular reference to a right to a healthy environment, rekindled (at least briefly) interest in legally enforceable environmental rights. This is by no means a new idea. It enjoyed prominence as a legal theory and advocacy goal beginning in the early 1970s. Some provincial and territorial statutory environmental rights have been created; but these are mainly procedural, not substantive rights.

Several countries have established varieties of substantive rights, particularly constitutional rights. However, in Canada constitutional environmental rights have been a non-starter; though international law norms influence Canadian law particularly in statute and constitutional interpretation, and application of common law substantive doctrine and traditional procedural principles. Use of *Charter* rights for environmental purposes has gained little traction.

Perhaps the strongest possibilities are Indigenous rights based on section 35 of the *Constitution Act 1982*. But First Nations objectives and ecological protection goals do not always line up.

Otherwise, there is potential for expanding procedural rights, including public notice and participation rights. This has potential for impact by putting pressure on private sector actors and their government regulators. Further, Indigenous rights development seems likely to have environmental value. However, significant free standing statutory, constitutional or judicial common law environmental rights expansion remains largely in the political realm.

[112] *Smith v Inco Ltd*, 2011 ONCA 628.
[113] Jefferies, *supra* note 111 at 243.
[114] *Ibid* at 25.