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Heavy Oil Processing in Peace River, Alberta: a Case Study on the Scope of Section 7 of the Charter in the Environmental Realm

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In 2013, the Alberta Energy Regulator (AER) conducted a public inquiry into whether odours and emissions from heavy oil facilities in the Peace River region were responsible for adverse health symptoms reported by area residents. Drawing on the inquiry's findings, this article explores the role s. 7 of the Charter of Rights and Freedoms can play in environmental litigation. This is first done by reviewing the impact heavy oil development is having on residents of Peace River and the findings of fact made by the AER inquiry. Next, relevant Charter jurisprudence is outlined to identify the elements of a s. 7 claim. These elements are then assessed in relation to the facts established by the AER inquiry. The article closes with a discussion on how the court's approach to causation under s. 7 of the Charter can be used to impose the pre-cautionary principle on governments in Canada.

En 2013, l'agence albertaine de supervision de l'industrie énergétique, l'Alberta Energy Regulator (AER), a mené une enquête publique afin de déterminer si les odeurs et les substances émises par des usines de transformation du pétrole lourd situées dans la région de Peace River étaient à l'origine des symptômes de problèmes de santé dont se plaignaient les résidents de la région. À partir des conclusions tirées au terme de cette enquête, l'auteur explore, dans cet article, la façon dont l'art. 7 de la Charte canadienne des droits et libertés peut être invoqué dans le cadre de litiges en matière environnementale. Pour y arriver, l'auteur procède tout d'abord à un examen de l'impact du développement de l'industrie du pétrole lourd sur les résidents de la région de Peace River et des conclusions de fait tirées au terme de l'enquête de l'AER. Puis, l'auteur procède à une revue de la jurisprudence en matière de garanties constitutionnelles en vue de déterminer les éléments d'une réclamation fondée sur l'art. 7 de la Charte. L'auteur évalue ensuite ces éléments à la lumière des faits constatés dans le cadre de l'enquête menée par l'AER. Enfin, l'auteur conclut en évoquant la manière dont l'approche

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préconisée par les tribunaux en matière de lien de causalité dans le cadre de réclamations fondées sur l'art. 7 de la Charte peut être utilisée pour imposer le principe de précaution aux différents gouvernements au Canada.

I. INTRODUCTION

Despite growing recognition of the acute environmental and health harms associated with oil sands development in Alberta,[1] the federal and provincial governments have done relatively little to mitigate the development's impacts.[2] If anything, recent changes have sought to facilitate greater and swifter exploitation of the oil sands at the expense of adequate environmental and public health protections. These legislative failures mean that the courts will continue to play a central role in defining to what extent and under what circumstances oil sands development will occur.[3] As one lawyer said in the context of changes to government oversight of the oil sands, Alberta is in for "[a]ll litigation, all the time."[4]

The bulk of lawsuits related to the oil sands — and to environmental harms more generally — have been grounded in environmental statutes, treaties, and common law causes of action. To date, with the exception of a handful of suits, plaintiffs have not looked to substantive rights in constitutional law — specifically, s. 7 of the *Charter of Rights and Freedoms* — to advance their claims.

In my view, s. 7 of the Charter has a greater role to play in environmental litigation. In its current state, s. 7 jurisprudence provides a strong basis for challenging government-sanctioned industrial activities that create health risks to individuals and communities. The failure to invoke s. 7 more regularly in this subset of environmental law cases strikes me as a missed opportunity.

My purpose, in the pages that follow, is to demonstrate how such a s. 7 claim could be argued. Using heavy oil processing in Peace River, Alberta as a case study, I argue that s. 7 should be an arrow in the quiver of any lawyer seeking to curb industrial development that creates serious health risks. As outlined below, these harms may engage and violate an individual's right to liberty and security of the person under s. 7. Moreover, in some cases, it will be more advantageous to

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1 See Erin N Kelly, David W Schindler, Peter V Hodson, Jeffrey W Short, Roseanna Radmanovich & Charlene C Nielsen, "Oil sands development contributes elements toxic at low concentrations to the Athabasca River and its tributaries" *PNAS* 2010, 107(37) 16178–16183; Erin N Kelly, Jeffrey W Short, David W Schindler, Peter V Hodson, Mingsheng Ma, Alvin K Kwan & Barbra L Fortin, "Oil sands development contributes polycyclic aromatic compounds to the Athabasca River and its tributaries" PNAS 2009 106(52) 22346–22351; and Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf>.

2 See Pembina Institute, *Solving the Puzzle: Progress Update* (April 2013), online: Pembina Institute <http://www.pembina.org/reports/solving-puzzle-progress-2013.pdf>.

3 See Bob Weber, "'All litigation, all the time': Simmering Alberta oil sands disputes set to ignite legal firestorm in 2014" *National Post* (January 2, 2014), online: National Post <http://business.financialpost.com/2014/01/02/alberta-oil-sands-legal-disputes/?__lsa=1e81-8cf5>.

4 *Ibid.*

litigate claims under s. 7 than to rely on traditional causes of action. To be clear, I do not argue here — as others persuasively have[5] — that s. 7's scope should be broadened to include a distinct right to a healthy environment. Rather, my aim is to show that certain environmental claims fit neatly within the boundaries of existing s. 7 jurisprudence.

The article proceeds in four parts. First, I describe heavy oil processing and the nature of its impact on residents of Peace River. Next, I lay out the elements of a s. 7 claim and review cases in which plaintiffs have challenged environmental harms under s. 7. Then, I analyze how a claim against heavy oil processing would satisfy all the elements of s. 7. I close with a discussion of how s. 7 provides the constitutional basis for imposing the precautionary principle on governments in Canada.

II. HEAVY OIL PROCESSING IN PEACE RIVER

In this section, I describe the nature of heavy oil processing in the Peace River area, the complaints lodged by residents about its impacts, and the inquiry report that grew out of those complaints.

(a) Background

Though it garners little attention outside the province, Peace River is a vastly important piece of the province's oil industry. Conventional oil and gas production in Peace River began in the 1950s and has continued since.[6] However, Peace River is also the site of the fourth largest oil sands deposit in the province, and over the last decade, the region has witnessed a shift towards unconventional or "heavy oil" production.[7] Dwindling conventional oil reserves, as well as an increase in oil prices and technological advances in oil recovery, have largely driven this transition.[8]

Heavy oil is more difficult to extract than conventional oil. The density and viscosity of heavy oil prevent it from flowing as easily as conventional oil, making extraction more resource-intensive and expensive. The extractive technique most

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5 David R Boyd, *The Right to a Healthy Environment* (Vancouver: UBC Press, 2012): amending the Constitution to include a right to a healthy environment is a popular sentiment and currently the aim of a national campaign led by the David Suzuki Foundation.

6 Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf> at para 2.

7 Martin Fowler, P*etroleum Geochemistry in the Peace River Area as it Pertains to Proceeding 1769924* (December 16, 2013), p. 2 online: Alberta Energy Regulator — Phase 3A Submissions, Volume IV <http://www.aer.ca/applications-and-notices/hearings/proceeding-1769924>; and Province of Alberta, *Alberta Oil Sands Industry: Quarterly Update* (Winter 2013), p. 2 online: <http://www.albertacanada.com/files/albertacanada/AOSID_QuarterlyUpdate_Winter2013.pdf>.

8 Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf> at para 2.

commonly employed in the Peace River region is a process known as Cold Heavy Oil Production with Sand (CHOPS).[9] The process is only effective for heavy oil that is viscous enough to flow without the addition of heat.

The CHOPS process works as follows.[10] First, sand is pumped into angled wells, enhancing the permeability of well fluids. Next, the well fluids are pumped out and sent to process or storage tanks located at well batteries. These tanks act as gravity separators, in which fluids separate into five distinct layers: solution gas, heavy crude oil, formation water, sand, and oil and water emulsion. Fluid separation is assisted by heating the tanks to 70–80°C. Odours and emissions are released at various stages of this process through designated discharges, leaks or other means. There are currently 910 licensed CHOPS wells in the Peace River area, with an additional 170 licensed single or multi-well batteries.[11]

The increase of CHOPS processing facilities in the Peace River region coincided with an increase in odour-related complaints to the Alberta Energy Regulator (AER). The AER is a creature of the *Responsible Energy Development Act* (*REDA*), which took effect in 2013.[12] *REDA* replaced the prior statutory regime and merged the regulatory functions of several agencies into a single regulator for energy development in the province: the AER.[13] Among other things, *REDA* provides that the AER's mandate is "to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta".[14]

The AER is charged with discharging duties under several statutes, including the *Oil Sands Conservation Act*[15] (*OSCA*). The *OSCA* bars commencing, continuing, or constructing facilities in relation to "a scheme or operation for the recovery of oil sands or crude bitumen" or the construction or operation of a processing plant in the absence of an approval by the AER.[16] Upon receipt of an application for an oil sands operation, the AER has the discretion to grant an approval on terms and conditions it "considers appropriate", refuse to grant an approval, defer consideration of the application, or "make any other disposition of the application that [it]

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9 *Ibid* at para 4.

10 Maurice Dusseault, *Emerging Technology for Economic Heavy Oil Development*, p 302 online: <http:// http://www.energy.gov.ab.ca/>; and Ray Porter and Thierry Page, *Expert Opinion — Monitoring and Characterization of Odour Sources* (November 2013), p 19 online: Alberta Energy Regulator — Phase 2 Submissions, Volume IV <http://www.aer.ca/applications-and-notices/hearings/proceeding-1769924>.

11 Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf> at para 5.

12 SA 2012, c. R-17.3. The REDA was passed on December 10, 2012 and proclaimed on June 17, 2013.

13 Alberta Energy Regulator, *What is the Alberta Energy Regulator* (FAQs) (Calgary: Alberta Energy Regulator), online: Alberta Energy Regulator <http://www.aer.ca/compliance-and-enforcement/enerfaqs/enerfaqs-what-is-the-aer>.

14 *REDA*, s. 2(1)(a).

15 R.S.A. 2000, c. O-7.

16 *OSCA*, ss. 10(1), 11(1).

considers appropriate".[17] The AER may also make any inquiries or hold hearings it considers "necessary or desirable" in connection with an application.[18] Importantly, the *OSCA* also confers on the AER the authority to amend, suspend, or even cancel approvals in certain circumstances.[19] Pursuant to the *OSCA*, the AER has issued approvals in connection with heavy oil processing in the Peace River region to several companies, including Baytex Energy Ltd., Shell Canada, Murphy Oil Company Ltd., Penn West Exploration, and Husky Oil Operations Ltd.

(b) The Complaints

Between January 1, 2009 and November 1, 2013, the AER received at total of 881 odour-related complaints from residents in the Peace River region.[20] The bulk of these complaints came from the Three Creeks and Reno area, located in the eastern part of Peace River.[21] Claims of adverse health effects as a result of odours and emissions from the CHOPS facilities accounted for about 40% of the complaints.[22]

To its credit, the AER responded to the complaints by engaging collaboratively with industry and residents to understand the concerns and develop solutions. These consultations led to a variety of changes: more rigorous environmental monitoring, significant reductions to vented gas and emissions from heavy oil operations, and more public outreach and direct investigations of complaints.[23]

The complaints did not abate. The AER yielded to calls for a public inquiry to investigate resident concerns, and established *Proceeding into Odours and Emissions in the Peace River*.[24] It designated an independent panel to review evidence tendered by relevant parties and experts and make findings of fact as necessary. The AER inquiry focused on the following:

> i) Concerns of area residents and other local stakeholders regarding hydrocarbon emissions and odours from cold heavy oil production facilities and related impacts;
>
> ii) Expert, technical information about human and animal health impacts from hydrocarbon emissions and odours;
>
> iii) Existing Government of Alberta and AER policies and regulations relating to flaring, venting and incinerating and air quality standards;

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17 *OSCA*, ss. 10(3), 11(3).

18 *OSCA*, ss. 10(2), 11(2).

19 *OSCA*, ss. 13(1), 15(1).

20 Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf> at para 6.

21 *Ibid* at para 6 and 7.

22 *Ibid* at para 6.

23 *Ibid* at paras 8 and 9.

24 W James Ellis, *Request to Initiate Inquiry Proceeding Under Section 17 of the Responsible Energy Development Act Cold Heavy Oil Production in the Peace River Area*, (July 17, 2013), online: Alberta Energy Regulator <http://aer.ca/documents/applications/hearings/1769924_Letter_20130717.pdf>.

iv) Possible technical and regulatory solutions to reduce hydrocarbon odours;

v) Potential impacts on licensees/operations of facilities of mandating reduction of emissions from cold heavy oil production facilities; and

vi) Specific geographic and geological information about the play within the Three Creeks and Reno areas, its reserves and recovery potential.[25]

Residents, industry, government, and other stakeholders were invited to participate in the inquiry through written and oral submissions. Numerous residents, along with heavy oil operators in the area, including Baytex Energy Ltd., Shell Canada and Penn West Exploration, took up the invitation.[26] The Province of Alberta took part through Alberta Health, Alberta Health Services, Alberta Transportation, Alberta Energy, and Alberta Environment and Sustainable Resource Development.[27] The panel also relied on relevant public reports and retained independent experts to provide research and analysis on issues within the scope of the inquiry's terms of reference.[28]

Written testimony was submitted and made available to all parties, and oral hearings were held from January 21–31, 2014.[29] The inquiry's counsel and staff also released background information to help parties address the issues under examination.[30] On March 31, 2014, the AER released the *Report of Recommendations on Odours and Emissions in the Peace River Area*, which set out the inquiry's findings of fact.

(c) The Inquiry Report

The inquiry's final report set out findings in relation to the six issue areas it explored.[31] The findings on three of these areas — the geology of the Peace River oil sands, the regulatory framework, and health impacts — are most relevant here and are summarized below.

(i) The Geology of the Peace River Oil Sands

The panel heard expert evidence explaining the distinct nature of the Peace River oil sands relative to bitumen deposits elsewhere in the province. The oil sands in Peace River are derived from rock formations unique to the region.[32] The

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25 *Ibid.*

26 Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf> at para 13.

27 *Ibid.*

28 *Ibid* at para 14.

29 *Ibid* at para 12.

30 *Ibid* at para 14.

31 Geology, Health, Operations, Monitoring and Modelling, Regulatory and Stakeholder Engagement.

32 Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf> at paras 31–34.

inquiry found that heavy oil derived from these formations is less viscous and contains higher sulphur and aromatic hydrocarbon content, including volatile sulphur — compounds known to have a distinct and powerful odour.[33]

(ii) The Regulatory Framework

Independent experts retained by the AER testified that odours and emissions from heavy oil operations in Alberta are regulated primarily through the Alberta Ambient Air Quality Objective (AAAQO).[34] The framework establishes ambient air limits for 48 specific air contaminants, setting thresholds at health-based levels.[35] Health-based thresholds refer to limits set on air contaminants where exposure past these levels could cause adverse health effects through direct toxic action. The AAAQO also sets odour-based thresholds for three chemicals: hydrogen sulphide, carbon disulphide and ammonia.[36] Odour-based thresholds mean that these contaminants are subject to emission limits that are determined by the ability of human populations to detect them by smell and are generally set below health-based thresholds.

The AAAQOs do not cover off-lease odours. Off-lease odours refer to emissions from wells or batteries that are detectable beyond the battery or wellsite by smell. Off-lease odours were unregulated at the time of the inquiry.[37]

Experts testified that the AAAQOs do not cover a wide enough range of potential odorants.[38] Further, of the odorants that are regulated, the thresholds are set too high.[39] Since the vast majority of air contaminants are set at health-based thresholds, the AAAQOs permit heavy oil operators to release emissions at levels detectable by smell. This stands in contrast to odour management frameworks in other Canadian jurisdictions, including Ontario, Quebec, Manitoba, and Saskatchewan, which set a perception based threshold on odours.[40] The employment of a sensory-based ambient limit in these jurisdictions makes it easier to determine odour detection thresholds and set ambient odour objectives for multiple chemicals.[41] Based on this evidence, the inquiry found that "the current regulatory frame-

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33 *Ibid.*

34 Ray Porter and Thierry Page, *Expert Opinion — Issues and Recommendations for the Characterization of Odour Sources* (December 2013), p 6 online: Alberta Energy Regulator — Phase 3A Submissions, Volume IV <http://www.aer.ca/applications-and-notices/hearings/proceeding-1769924>.

35 Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf>, at para 189.

36 *Ibid.*

37 *Ibid* at para 183.

38 *Ibid* at para 190.

39 *Ibid* at para 189.

40 *Ibid* at para 190.

41 *Ibid.*

work does not effectively manage hydrocarbon odours and emissions in the Peace River area."[42]

(iii) Health Impacts

Residents testified that they experienced a range of physical and psychological health effects as a result of odours and emissions from heavy oil processing. These symptoms include the following: cough, chronic nose and throat irritation, headaches, nose bleeds, nausea, eyelid spasms, shortness of breath, skin rashes, watery eyes, joint pain and stiffness, stomach aches, night sweats, muscle spasms, hair discoloration, incontinence, loss of balance, loss of sense of smell, developmental delays, dizziness, extreme fatigue, exhaustion, disorientation, memory loss, sleep disturbances, insomnia, and a range of other physical and psychological impairments.[43] Symptoms were experienced to varying degrees, and not by all residents.[44]

By way of example, one extended family reported dizziness, digestive problems, headaches, muscle cramps, muscle twitches, nosebleeds and other symptoms when CHOPS facilities began operating near their farms in the Reno area.[45] When they left their properties, the symptoms disappeared, only to remerge after they returned.[46] The symptoms have been so debilitating that many family members have abandoned their homes and moved outside the region.[47]

The panel heard evidence from numerous witnesses, both residents and experts, that odours from heavy oil processing facilities in the Peace River area are detectable by smell. The odours were described as tar-like, sharp, pungent, and acidic, akin to rotten eggs, natural gas, chemicals, asphalt and diesel.[48]

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42 *Ibid* at iv.

43 Donald B Davies, *Commentary on Potential Human Health Impacts Associated with Odours and Emissions* (November 29, 2013), p 2 online: Alberta Energy Regulator — Phase 2 Submissions, Volume V <http://www. http://aer.ca/applications-and-notices/hearings/proceeding-1769924>.

44 Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf>, at para 39.

45 Leslie Young, "Ill wind: Alberta families leaving homes for health reasons blame oil giants next door", *Global News* (August 16, 2013) online: <http://globalnews.ca/news/784583/ill-wind-alberta-families-leaving-homes-for-health-reasons-blame-oil-giants-next-door/>; Bob Weber, "Family asking court to stop oil producer due to sickening fumes," *Global News* (December 23, 2013) online: <http://globalnews.ca/news/1047739/family-asking-court-to-stop-oil-producer-due-to-sickening-fumes/>; and "Hearings begin in northern Alberta over smell from nearby oil sands operations," *Global News* (January 21, 2014) online: <http://globalnews.ca/news/1098687/hearings-begin-in-northern-alberta-over-smell-from-nearby-oil-sands-operations/>.

46 *Ibid.*

47 *Ibid.*

48 Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf>, at para 40.

Dr. Donald Davies, a toxicological expert retained by the AER to testify on the potential health impacts of oil and gas processing, stated that the symptoms reported by residents may be linked to the odours released by heavy oil operations.[49] Reviewing academic literature that examines the health impacts resulting from prolonged exposure to unpleasant odours, Dr. Davies noted the consistency between these documented symptoms and the symptoms reported by residents.[50] He also observed that, because responses to the odours vary across individuals, one would not expect all residents exposed to the odours to experience symptoms.[51] On the whole, Dr. Davies was persuaded of a possible link between the odours and health symptoms reported by residents.[52]

After reviewing the expert evidence, the panel found that "the characteristics of bitumen from the Peace River oil sands areas are likely a source of the ongoing odour and emissions complaints and symptoms reported by residents near Three Creeks and Reno bitumen production areas."[53] The panel did not specify further which particular symptoms were linked to the odours. However, it concluded that "heavy oil operations are causing odours in the area and that these odours have the potential to cause some of the symptoms of area residents."[54]

III. SECTION 7

Section 7 reads 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.

A claimant must make out four elements to establish a violation of s. 7: 1) that there is state conduct to which the Charter applies; 2) that the claimant has standing; 3) that the state conduct engages the claimant's life, liberty, or security of the person; and 4) that this deprivation is not consistent with the principles of fundamental justice.[55] I briefly review the jurisprudence on these elements, as well as on s. 1 of the Charter and available remedies, below. I follow that with a discussion of the success (or lack thereof) of litigating environmental claims under s. 7.

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49 *Ibid* at para 85.

50 *Ibid* and Donald B Davies, *Phase 3B Commentary — Proceeding into Odours and Emissions from Heavy Oil Operations in the Peace River Area* (January 14, 2014), p 4 online: Alberta Energy Regulator — Phase 3B Submissions, Volume II <http://www.aer.ca/applications-and-notices/hearings/proceeding-1769924>.

51 *Ibid.*

52 *Ibid.*

53 *Ibid* page 12 at para 32.

54 *Ibid* at para 88.

55 Hamish Stewart, *Principles of Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 21–22.

(a) The Elements of Section 7

(i) State Conduct

Under s. 32 of the Charter, constitutional protections are not triggered without state action.[56] Typically, the impugned state conduct on a s. 7 challenge will be a statute or regulation. Those measures are subject to Charter scrutiny whether they regulate conduct between the state and a private individual, or between two private individuals.[57] But the Charter sweeps more broadly than that; it reaches governmental entities,[58] exercises of statutory power and discretion,[59] and laws governing private litigation,[60] among other things.[61]

The Charter also captures "underinclusive" state action, which refers to legislation that fails to fully protect the Charter rights of individuals.[62] The basis for subjecting underinclusive legislation to Charter scrutiny is outlined in *Chaoulli v Quebec (Attorney General)*.[63] *Chaoulli* dealt with a challenge to a statutory prohibition on private insurance in Quebec. While the Charter did not confer a freestanding right to health care, McLachlin CJ and Major J noted in their concurrent decision that when the state decides to put in place a legislative scheme to provide health care, the scheme must comply with the Charter.[64] In other words, when the government decides to act in a particular sphere, it must do so in a Charter compliant manner.

The court has found underinclusive legislation to constitute state action in instances where a legislative scheme extends Charter protections to certain individuals but denies others.[65] For instance, the failure to include sexual orientation as a prohibited ground of discrimination in an early iteration of Alberta's human rights code led to *Vriend v Alberta*,[66] where the Supreme Court ruled that this "legislative omission" violated the s. 15 equality rights of sexual minorities in the province. Similarly in *Dunmore v Ontario (Attorney General)*,[67] the Supreme Court held that the exclusion of agricultural workers from Ontario's labour relations statute infringed their s. 2(d) freedom of association rights. According to the Court, the statutory exclusion of these groups led to harms that engaged the Charter. The remedy

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56 *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573.

57 Hamish Stewart, *Principles of Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 23.

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 *Ibid.* Also, the common law in public law litigation, investigative conduct, and tortious state conduct.

62 Peter Hogg, *Constitutional Law*, 37-32.

63 *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.

64 *Ibid* at para 104.

65 Peter Hogg, *Constitutional Law*, 37-32

66 *Vriend v. Alberta*, [1998] 1 SCR 493.

67 *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94.

of extension was granted in both instances, expanding the scope of the respective statutes to include protections for those excluded.[68] These cases provide a strong foundation to argue that underinclusive legislation constitutes state action for the purposes of a s. 7 Charter claim.

The Supreme Court has also expressly left open the possibility that, "[o]ne day", s. 7 could be enlarged to apply to state inaction and impose positive obligations on state actors.[69] Given the continuing vitality and growing scope of s. 7, it would not be fanciful to suggest that a right to a healthy environment could be among those obligations. For the purposes of this article, however, I accept as a premise that some state conduct is required to engage s. 7.

(ii) Standing

Section 7 affords protection to "[e]veryone". All natural living persons — citizens or otherwise — come within the meaning of this term, but corporations and other artificial persons do not.[70]

(iii) Life, Liberty and Security of the Person

Next, a claimant must establish that the state conduct engages his or her life, liberty, or security of the person. The focus here is on the latter two of these interests.

The liberty interest is engaged where state conduct occasions a deprivation of individual liberty.[71] The liberty interest is comprised of more than "physical liberty"; it also includes privacy interests and the ability to make fundamental personal choices, such as parental liberty,[72] the ability to choose where to establish one's home,[73] and — in Justice Bertha Wilson's view — a woman's decision to continue or terminate pregnancy.[74]

The Supreme Court has recognized two dimensions to the security of the person interest: "physical integrity" and "psychological integrity".[75] A government action that "involves a non-consensual application of force to a person's body" is the most obvious example of deprivation of a person's physical integrity,[76] but a state action may also be subject to judicial review when the state creates a risk of intru-

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68 Peter Hogg, *Constitutional Law*, 37-32

69 *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, per McLachlin CJ; see Hamish Stewart, *Principles of Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 56.

70 See *Irwin Toy Ltd v. Quebec (Attorney General)*, [1989] 1 SCR 927.

71 Hamish Stewart, *Principles of Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 67.

72 *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315.

73 *Godbout v Longueuil (City)*, [1997] 3 SCR 844.

74 *R v. Morgentaler*, [1988] 1 SCR 30.

75 *R v. Morgentaler*, [1988] 1 SCR 30 and *B(R) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315.

76 Hamish Stewart, *Principles of Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 83.

sion on one's physical integrity. In *Operation Dismantle v. R*,[77] for example, the Supreme Court held that the federal cabinet's decision to allow missile testing by the United States in Canada was open to challenge under s. 7. Ultimately, the Court dismissed the suit, finding that the link between the missile testing and the deprivation of the applicants' right to security of the person was speculative.[78]

In contrast, an individual's psychological integrity is engaged where "state interference with an individual interest of fundamental importance" brings about "serious psychological incursions".[79] Lamer C.J. elucidated the concept in *New Brunswick (Minister of Heath and Community Services) v G(J)*:[80]

> For a restriction of security of the person to be made out . . ., the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.[81]

The Supreme Court has found this dimension of the security of the person interest to be engaged in a variety of contexts: where a government ministry applied for an order extending removal of an applicant's children from her custody;[82] where a provision of the *Criminal Code* prohibited an applicant suffering from a degenerative disease from obtaining assistance to end her own life;[83] and where individuals suffered psychological stress because of delays in obtaining medical treatment.[84]

However, as *Operation Dismantle* illustrates, the inquiry under this prong does not end after a claimant has established that a s. 7 interest is engaged. He or she must also show that the deprivation flows from the impugned state action. In *Bedford v Canada*,[85] the Supreme Court clarified that the applicable standard of causation on a s. 7 analysis is one of "sufficient causal connection".[86] Squarely rejecting the standard suggested by the government — "active and foreseeable" and "direct" causal connection — the Court explained that substance of the sufficient causal connection test:

> [The sufficient causal connection test] is a flexible standard, which allows the circumstances of each particular case to be taken into account. . . . [The] standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant,

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77 *Operation Dismantle v. R*, [1985] 1 SCR 441.

78 *Ibid.*

79 *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44.

80 *New Brunswick (Minister of Heath and Community Services) v. G(J)*, [1999] 3 SCR 46.

81 *Ibid* at para 60.

82 *Ibid.*

83 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519.

84 *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35.

85 *Bedford v. Canada*, 2013 SCC 72.

86 *Ibid* at para 75.

> and is satisfied by a reasonable inference, drawn on a balance of probabilities. A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link. [Citation omitted.]

Once a claimant has satisfied the court that the deprivation is caused by the impugned state conduct, the inquiry moves to the principles of fundamental justice.

(iv) The Principles of Fundamental Justice

The final step of the s. 7 analysis is often the most difficult to surmount. A claimant will not succeed in making out a Charter violation unless she can show that the deprivation of her s. 7 interest runs afoul of the principles of fundamental justice.[87] These principles may be substantive or procedural in nature. The focus here is on two substantive principles that have emerged more recently in s. 7 jurisprudence: arbitrariness and gross disproportionality.[88]

As Professor Hamish Stewart has observed, arbitrariness and gross disproportionality are two of three principles — the third being overbreadth — that involve "failures of instrumental rationality".[89] That is, there is a "mismatch between the legislature's objective and the means chosen to achieve it".[90] Seeking to clarify the relationship between these principles, the Court in *Bedford* explicated the substance of the norms against arbitrariness and gross disproportionality:

> Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person. A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. . . .
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> Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure.[91]

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87 Hamish Stewart, *Principles of Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 97.

88 See Lynda M Collins, "An Ecological Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26 Windsor Review of Legal and Social Issues 7 for other relevant principles of fundamental justice in the environmental context.

89 Hamish Stewart, *Principles of Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 151.

90 *Ibid.*

91 *Bedford v. Canada*, 2013 SCC 72.

Though the bar for a showing of gross disproportionality is high, the number of people affected by the law is irrelevant: "[A] grossly disproportionate effect on one person is sufficient to violate the norm."[92]

(v) Section 1 of the Charter

After a court determines that a state action contravenes s. 7 of the Charter, the government has one last card to play: s. 1. That provision reads:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The test for justifying a state action is set out in *R v Oakes*.[93] Under *Oakes*, the government has the burden of showing that the limit on a right is "prescribed by law"; that the limit has an objective relating to "concerns which are pressing and substantial in a free and democratic society"; and that the limit is proportional, in that it is "rationally connected to the objective", impairs the right "as little as reasonably possible", and has a salutary effect on the objective that is not outweighed by its deleterious effects on the right.[94]

The Court has never found a violation of s. 7 justified under s. 1.[95] According to *Charkaoui v Canada (Citizenship and Immigration)*, a s. 7 violation can only be justified under s. 1 "in extraordinary circumstances where concerns are grave and the challenges complex."[96] However, in *Bedford*, the Court emphasized that such a finding is not out of the realm of possibility:

> It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the *Charter*. The significance of the fundamental rights protected by s. 7 supports this observation. Nevertheless, the jurisprudence has also recognized that there may be some cases where s. 1 has a role to play. Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted. [Citations omitted.]

(vi) Charter Remedies

The Charter's remedy clauses, at s. 24(1) of the Charter and s. 52(1) of the *Constitution Act, 1982*, provide the following:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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92 *Ibid* at para 122.

93 *R v Oakes*, [1986] 1 S.C.R. 103.

94 Hamish Stewart, *Principles of Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 288.

95 *Ibid* at 289.

96 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 66.

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

As Peter Hogg notes, ss. 24(1) and 52(1) generally play distinct functions: a declaration of invalidity under s. 52(1) provides a remedy for *laws* that violate a Charter right, while s. 24(1) provides redress for Charter-infringing *government acts*.[97] Remedies under s. 24(1) are considered to be personal Charter remedies, as they involve the interests of an individual. Section 24(1) remedies can take one of many forms: among others, declaratory relief, an often effective remedy in which the court declares the government to be "in default of its Charter duties;"[98] damages, where the claimant establishes that such a remedy is "functionally justified" and the court is satisfied that "countervailing considerations" do not weigh against it;[99] and supervision of court orders, a mechanism by which the court "retain[s] jurisdiction to supervise compliance with a remedial order."[100] However, as Iacobucci and Arbour JJ. observed in *Doucet-Boudreau v. Nova Scotia*,[101] no catalogue of remedies is exhaustive; s. 24(1) provides courts with the discretion to fashion remedies tailored to a case's particular circumstances:

> [Section 24] is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.[102]

(b) The Success (or Lack Thereof) of Environmental Claims Under Section 7

Though the Supreme Court has yet to articulate a distinct right to a healthy environment under s. 7, it has long recognized the immense and unique importance that the environment holds for Canadians.

As outlined in *British Columbia v. Canadian Forest Products Ltd.*:[103]

> As the Court observed in *R. v. Hydro-Québec* (1997), [1997] 3 S.C.R. 213 318 (SCC), at para. 85, legal measures to protect the environment "relate to a public purpose of superordinate importance". In *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), [1992] 1 S.C.R. 3 110 (SCC), the Court declared, at p. 16, that "[t]he protection of the envi-

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97 Hogg, Constitutional Law of Canada, at p 40-28. See also: *R v Ferguson*, 2008 SCC 6 at para 35.

98 Hogg, at 40-37; see *Canada v Khadr*, 2010 SCC 3.

99 *Vancouver (City) v. Ward*, 2010 SCC 27.

100 Hogg, at 40-44; see *Doucet-Boudreau v. Nova Scotia*, [2003] 3 SCR 3.

101 *Doucet-Boudreau v. Nova Scotia*, [2003] 3 SCR 3.

102 *Ibid* at para 59.

103 *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38.

> ronment has become one of the major challenges of our time." In *Ontario v. Canadian Pacific Ltd.* (1995), [1995] 2 S.C.R. 1031 112 (SCC), "stewardship of the natural environment" was described as a fundamental value (para. 55 (emphasis deleted)). Still more recently, in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, 2001 SCC 40, the Court reiterated, at para. 1:
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> > . . . our common future, that of every Canadian community, depends on a healthy environment . . .. This Court has recognized that "(e)veryone is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection [has] emerged as a fundamental value in Canadian society" . . ..

In light of these statements, one scholar has gone so far as to argue that the Supreme Court of Canada's "environmental ethic" places it among "the most ecologically literate high courts in the world."[104] While Canadian environmental jurisprudence lends some support to this position, my view is that, time and again, the Court's "environmental ethic" is eclipsed by the legislative failure to respond to pressing environmental issues.

Constitutionalizing environmental protections is one way to address this legislative failure, with the Charter presenting the most likely, though not only, section to achieve this result. This can occur through a constitutional amendment to the Charter or by having the courts read into an existing provision of the Charter protections for environmental rights. This paper focuses on the latter approach.

The process of reading in constitutional recognition of environmental rights is limited by the nature of the document itself, which in the case of the Charter, a document that protects the rights of the individual, is through the lens of "individual rights protections." For the specific purposes of s. 7, that lens becomes even more focused on the particular components of the provision, namely "life, liberty and security of the person." This means that the only environmental rights that can be constitutionalized under the Charter are those that can be linked to the individual rights that are currently protected in the document. In relation to s. 7, these environmental rights must implicate an individual's life, liberty or security of the person.

The relationship between human health and the environment is an obvious linkage. For instance, state authorized industrial activity that releases harmful toxins into the environment can affect the health and well-being of humans. This can occur directly, through direct toxic exposure and action of the chemical compounds, or indirectly, through the consumption of water, vegetation or animals that have been exposed to the toxins. The remedy — if the harm is found to deprive individuals of their life, liberty or security of the person interests in a manner that does not accord with the principles of fundamental justice — would focus on the source of the harms. This could involve a number of remedies, including requiring the industrial facility to comply with more rigorous environmental regulations that

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104 Lynda M Collins, "An Ecological Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26 Windsor Review of Legal and Social Issues 7 at 18 and note 58; see also Jerry V DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?" (2007), 17 JELP 159.

stop or minimize the amount of toxins released. The peripheral result of linking the environmental right — in this case, more rigorous environmental protections — to the protections afforded individuals under s. 7 of the Charter, would be to grant constitutional status to these environmental protections. This would cement environmental rights in the Charter in a very basic form, allowing for future cases to continue to define and expand upon the right.

This is likely the reason why s. 7 is not new to the environmental context. In several cases, claimants have relied — unsuccessfully — on s. 7 to challenge environmental harms. However, and fortunately for us, these claims failed because of procedural and factual deficiencies, not because the courts rejected the notion that s. 7's scope extends to harms related to the environment. The jurisprudence suggests that, provided a claim is procedurally sound and undergirded with a compelling factual record, there is no obstacle to applying s. 7 to harm emanating from the environment.

This jurisprudence is limited and has been overviewed extensively by the likes of Archibald, Collins, Gage, Vlavianos and others, with an eye towards establishing that s. 7, or the Charter more broadly, is applicable in the environmental context.[105] This paper builds on these efforts by providing a case study through which these concepts can be applied to present a more complete understanding of the challenges and opportunities s. 7 holds in environmental litigation. However, before this can occur, a brief overview of this limited jurisprudence is needed to understand how courts have approached s. 7 in the environmental realm.

Among the earliest examples of environmental claims litigated under s. 7 is *Manicom v. County of Oxford*,[106] decided three years after the Charter's adoption. There, the Ontario Divisional Court considered a s. 7 claim in the context of the construction of a proposed landfill. The plaintiffs alleged property-related harms — namely, the landfill interfered with the use and enjoyment of their property and rendered their community less desirable, thereby eroding their property values. The plaintiffs also argued that the landfill was "detrimental to the health of the [community's] inhabitants and their livestock".[107] In a 2-1 decision, the court upheld the dismissal of the plaintiffs' action. It rejected the plaintiffs' property-based claims on the basis that s. 7 does not furnish protection of property rights.[108] Notably, the court repudiated the plaintiffs' argument that the landfill was deleterious to their health because they failed to specifically plead these harms, not because such

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105 See Nickie Vlavianos, *Health, Human Rights and Resource Development in Alberta: Current and Emerging Law* (Calgary: University of Calgary, 2003), Andrew Gage, "Public Health Hazards and Section 7 of the Charter" (2004) 13 JELP 1; Nickie Vlavianos, "The Applicability of Section 7 of the Charter to Oil and Gas Development in Alberta" (2008) 17:3 Constitutional Forum Constitutionnel 123; Lynda M Collins, "An Ecological Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26 Windsor Review of Legal and Social Issues 7; Catherine Jean Archibald, "What Kind of Life? Why the Canadian Charter's Guarantees of Life and Security of the Person Should Include the Right to a Healthy Environment" (2013) 22 Tulane Journal of International & Comparative Law 1; and others.

106 *Manicom v County of Oxford* (1985), 52 OR (2d) 137 (Div Ct).

107 *Ibid.*

108 *Ibid.*

claims are outside the scope of s. 7.[109] The dissenting judge would have allowed the claims to proceed to trial, but expressly refused to decide whether health harms come within the purview of s. 7.[110]

In other cases, challenges have foundered because of a dearth of evidence of concrete harm. For example, in *Locke v. Calgary*,[111] a plaintiff sued the City of Calgary, arguing that its water fluoridation policy violated s. 7. The Court of Queen's Bench dismissed the claim because the plaintiff failed to adduce evidence that fluoridation caused demonstrable harm and thereby deprived the plaintiff of his right to security of the person.[112] However, at no point did the court foreclose the possibility of environmental claims under s. 7. Likewise, in *Millership v. British Columbia*,[113] the British Columbia Superior Court rejected a challenge to a municipal fluoridation policy. As in *Locke*, the court seized on the paucity of evidence of actual harm — rather than the lack of a legal basis for the claims — as a reason to dismiss the claims.

The judiciary has also commented on the scope of s. 7 in the environmental realm in the context of oil and gas development in Alberta. *Graff v Alberta (Energy and Utilities Board)*[114] is a useful starting point, and involves a challenge to the provincial energy regulator's approval of a gas well near the applicants' property. Among the grounds of appeal was that the regulator erred in law by authorizing the well; the applicants argued that the well would have an adverse impact on an existing health condition of one of the residents, violating her right to life and security of the person under s. 7 of the *Charter of Rights and Freedoms*. While the Court of Appeal granted leave to appeal, it did so on grounds other than the applicant's s. 7 argument. In relation to the s. 7 claim, and other rejected grounds, the Court stated that it was not satisfied that the test for leave had been made out or that they could be subsumed under the grounds upon which leave was granted. Although not necessarily a rejection of the applicability of s. 7 in the environmental realm, the decision can neither be viewed as an endorsement.

A year after *Graff*, the Alberta Court of Appeal again considered the applicability of s. 7 in the oil and gas context with two applications challenging the provincial energy regulator's decision to approve the drilling of sour wells. The applicants argued that the decisions violated s. 7 because the drilling created serious health hazards, forcing residents to either relocate or remain in their homes and risk serious injury. In both cases, the regulator sought to have the s. 7 claims dismissed.

Neither case was ultimately litigated. In the first, *Kelly v. Alberta*,[115] the Court granted the application, finding that the applicants' s. 7 argument raised a "serious arguable point of law" and accordingly satisfied the test for leave. However, after

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109 *Ibid.*

110 "I do not think it necessary to decide today whether a threat to the health of individuals amounts to an infringement of the right to life, liberty and security of the person. This issue is best left to the trial judge."

111 *Locke v Calgary* (1993), 15 ALR 70 (QB).

112 *Ibid.*

113 *Millership v British Columbia*, 2003 BCSC 82.

114 *Graff v Alberta (Energy and Utilities Board)*, 2007 ABCA 246.

115 *Kelly v Alberta*, 2008 ABCA 52.

leave was granted, the respondent corporation, West Energy, withdrew its applications for the wells, and shortly thereafter the case was dismissed as moot.[116] In the second case, *Domke v. Alberta*,[117] the Court dismissed the application for leave because the provincial regulator had reasonably concluded that the drilling posed only minimal health and safety risks to the surrounding residents. Although *Kelly* and *Domke* came out in different ways, implicit in the analysis of both decisions is that s. 7 is an avenue available to individuals seeking redress for state action that results in environmental harms.

Recently, in *Judd v. Alberta Energy Conservation Board*,[118] the Court of Appeal had the opportunity to consider an application for leave regarding a s. 7 challenge to a regulator approval of two 1.2 km pipelines and a battery. The Court dismissed the application, but did not reach the merits of the applicant's substantive s. 7 claim — that the approval itself, rather than the process, violated his s. 7 rights — on the basis that this substantive claim was not within the applicant's Notice of Question of Constitutional Law. The Court noted that the regulator had rejected the applicant's s. 7 claim because of the absence of any "direct causal connection" between the state and the alleged injuries, but it explicitly refused to decide whether the regulator approvals constituted state action.

From *Kelly*, *Domke* and now *Judd*, it appears as if the court has accepted the applicability of s. 7 in the environmental context.[119] The court approached the s. 7 arguments brought forth by the applicants in each successive case with more substance and consideration, and in doing so, endorsed the legal merit behind the claims. However, despite what is implicitly found in the decisions, the court has yet to explicitly recognize s. 7's applicability in the environmental realm and fully delineate the scope of the right.

This may change with *Lockridge v. Director (Ministry of the Environment)*,[120] in which members of the Aamjiwnaang First Nation are contesting approval of a refinery's sulfur recovery unit on several grounds, including s. 7. The Divisional Court dismissed a motion to strike by the respondents, holding that it is not plain and obvious that a s. 7 challenge to the approval cannot succeed.[121] *Lockridge* continues to be litigated and presents an excellent opportunity for the judiciary to grapple with the extent of Charter protections in the environmental realm.

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116 See Nickie Vlavianos, "Charter and Oil and Gas Issues to Await Another Day: A Disappointing End to the Kelly Appeal?", (June 3, 2009) online: ABlawg.

117 *Domke v Alberta*, 2008 ABCA 32.

118 *Judd v Alberta Energy Conservation Board*, 2014 ABCA 41.

119 Nickie Vlavianos, "The Applicability of Section 7 of the Charter to Oil and Gas Development in Alberta" (2008) 17:3 Constitutional Forum Constitutionnel 123 at 126.

120 *Lockridge v Director (Ministry of the Environment)*, 2012 ONSC 2316.

121 *Ibid* at para 33.

IV. SECTION 7 IN ACTION: HEAVY OIL PROCESSING IN PEACE RIVER

(a) Making out the Elements of a Section 7 Claim

Here, I consider how one could make out a s. 7 claim against the Alberta government regarding heavy oil processing in Peace River.[122] However, in contrast to how s. 7 has tended to be argued in this context — on judicial review of the energy regulator's approval of an oil and gas facility or operation, as outlined in the cases above — this will take the form of a s. 7 civil claim.

An application for judicial review involves a court reviewing the administrative decision of a delegated decision maker. On an application for judicial review, the emphasis is on the nature of the decision: whether it was procedurally fair, or depending on the standard of review, correct or reasonable. There is no evidence to suggest that the regulator breached these administrative law principles. For all we know, the regulator allowed for adequate resident participation in the decision making process, and made an appropriate decision on the basis of the evidence before it and the scope of its jurisdiction. There is nothing to suggest that the regulator was aware of the evidence heard at inquiry or that informed the inquiry's findings when the approvals were issued. The AER inquiry report also suggests that the harms experienced by residents are the result of state action that extends beyond the actions of the regulator, and to the statutes that empower its function and the environmental regulatory regime that informs its duty.[123] Finally, it is likely too late to even bring a judicial review of the approvals, as heavy oil facilities in the Peace River region were first authorized prior to 2008, with evidence of harms emerging in 2014. For these reasons, it is my view that a civil claim is an appropriate method through which to argue a s. 7 violation in this context.

(i) Two Theories of State Conduct

A claimant could target two state actions in the context of a s. 7 claim: the AER approvals of heavy oil processing facilities in Peace River, or the provincial air quality monitoring framework (AAAQO).

A. AER Approvals

No case has decided whether AER approvals for oil sands operations are state conduct for the purpose of a s. 7 suit. As noted, in *Judd v. Alberta Energy*

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122 I take for granted that any potential claimant would be a natural person, and therefore omit a discussion of standing.

123 While empowering statutes and policies can be subject to judicial review in certain instances, violations that flow from them can be subject to separate civil actions against the state in Canada. This occurred most recently in *Ernst v EnCana Corporation*, 2014 ABQB 672, a civil claim against the Province of Alberta for being "negligent in its administration of the environmental regulatory regime." The Province of Alberta brought forth an application to strike the plaintiff's claim, which the court dismissed on the grounds that a reasonable cause of action had been pled. This decision indicates that claimants are not limited to challenging statutes and policies related to the province's energy regulator exclusively through judicial review.

Conservation Board, the Alberta Court of Appeal declined to decide this issue. However, it commented that the AER and its regulatory scheme provided a benefit to the applicants. In the words of the Court, "[a]bsent those laws, the risk of harm would be greater."[124]

While one could view this statement as indication that the Court views the AER and its regulatory function as a means to prevent residents from experiencing harm, and therefore never a source of harms, this is an inaccurate reading of *Judd*. In *Judd*, the Court's description of the benefits provided by the AER is made in the context of the applicant's failure to demonstrate that the regulator's conduct created or increased the risk of injury.[125] Moreover, the Court prefaced its comments by stating that "it is conceded that an increased risk of injury created by the law or administrative action engages the security of the person protection guaranteed by Section 7 of the Charter."[126] A complete reading of *Judd* makes clear that the Court is inclined to recognize that the AER's conduct can constitute state action for the purposes of the Charter. However, on the evidence before the Court in that particular case, the applicants failed to establish harm or increased risk of injury.

In my view, a regulatory approval is a clear exercise of a statutory power or discretion — a well-established category of state action. Professor Hamish Stewart says that these cases "arise where a statute, the constitutional validity of which is not itself in issue, grants an official a discretionary power to do something that affects an applicant's constitutionally protected interest."[127]

One might argue that extending "state conduct" to this context empties the concept of any meaning. After all, nearly all private activities are, to some extent, regulated by law. However, the state's involvement here is particularly pronounced. The AER is a creature of statute. Another statute — the *OSCA* — vests it with the power to issue approvals. The *OSCA* also bars oil sands operations without approval and confers a wide discretion on the AER to grant (or refuse to grant) approvals. Given this process, an approval means that the AER — and thereby the state — put its imprimatur on a given oil sands scheme or operation. As outlined below, it is likewise clear that the AER approvals are a cause of harm suffered by Peace River residents.

B. The Underinclusiveness of the Air Monitoring Regime

Another way to ground state action is to challenge the underinclusiveness of Alberta's odour management framework. Drawing on the reasoning set out in *Chaoulli*, *Vriend* and *Dunmore*, Alberta engaged the Charter rights of residents when it decided to regulate emissions and odours released by heavy oil operators through the AAAQOs. Since the province decided to regulate air contaminants from heavy oil operations, it is obligated to do so in a Charter compliant manner. However, failure to put in place a robust air quality regime that was responsive to Peace River's unique geology and heavy oil excluded area residents from accessing

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124 *Judd v Alberta Energy Resources Conservation Board*, 2014 ABCA 41 at para 63.

125 *Ibid.*

126 *Ibid.*

127 Hamish Stewart, *Principles of Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), at 26.

the same protections that the AAAQOs provide other Albertans. This exclusion caused residents to experience harm and constitutes state action for the purposes of a s. 7 Charter claim.

(ii) The Rights to Liberty and Security of the Person

A. Security of the Person

The AER approvals cause deprivations of the right to security of the person by compromising residents' physical and psychological integrity. The harms of which residents have complained — headaches, nosebleeds, nausea, memory loss, and insomnia — are real and serious. They are not *de minimis* harms. They satisfy the test set out in *Operation Dismantle*; that is, the approvals create a serious risk of intrusion on physical integrity. The state conduct also has a "serious and profound effect" on psychological integrity, bringing about harms that go well beyond "ordinary stress and anxiety". There can be no doubt that the AER approvals, without which the CHOPS facilities in the Peace River region could not operate, are the source of the deprivation of the security of the person interest.

It is immaterial the harms here are most "directly" occasioned by industrial activities. As noted above, *Bedford* rejected the notion that there is a direct causal connection required between the state conduct and the deprivation; rather the claimant must simply show that, on a balance of probabilities, one could draw a reasonable inference that the government action is a cause of the harm. Here, as in *Bedford*, the injuries to the claimants are most "directly" linked to third parties, and the government action is neither the only nor (arguably) the dominant source of the harm.

Admittedly, the evidence here is weaker than it was in *Bedford*; the inquiry report found a mere "possible" link between the odours and adverse health symptoms of residents. However, *Bedford* is clear that sufficient causal standard admits of flexibility. In the environmental context, sources of harm can often be hard to isolate, and conclusions are in many cases only tentative. As argued below, the application of s. 7 in the environmental realm calls for a lower standard of causation, one consistent with the precautionary principle.

B. Liberty

The deprivation of the liberty interest under s. 7 requires the state to restrict an individual's ability to make decision over matters that are "fundamentally or inherently personal," undermining what it means to enjoy individual dignity and independence.[128] In *Godbout v Longueuil (City)*, the Supreme Court struck down a municipal by-law preventing permanent employees of the City of Longueuil from living outside of the municipality. It did so after finding that "choosing where to establish one's home is . . . [a] private decision going to the very heart of personal or individual autonomy," warranting protection under s. 7's liberty interest:

> Some people choose to establish their home in a particular area because of its nearness to their place of work, while others might prefer a different neighbourhood because it is closer to the countryside, to the commercial

128 *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66.

> district, to a particular religious institution with which they are affiliated, or to a medical centre whose services they require. Similarly, some people may, for reasons dearly important to them, value the historical significance or cultural make-up of a given locale, others again may want to ensure that they are physically proximate to family or to close friends, while others still might decide to reside in a particular place in order to minimize their cost of living, to care for an ailing relative or, as in the case at bar, to maintain a personal relationship. In my opinion, factors such as these vividly reflect the idea that choosing where to live is a fundamentally personal endeavour, implicating the very essence of what each individual values in ordering his or her private affairs; that is, the kinds of considerations I have mentioned here serve to highlight the inherently private character of deciding where to maintain one's home. In my view, the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so.
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> .....
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> To my mind, the ability to determine the environment in which to live one's private life and, thereby, to make choices in respect of other highly individual matters (such as family life, education of children or care of loved ones) is inextricably bound up in the notion of personal autonomy I have been discussing. To put the point plainly, choosing where to live will be influenced in each individual case by the particular social and economic circumstances of the person making the choice and, even more significantly, by his or her aspirations, concerns, values and priorities. Based on all these considerations, then, I conclude that choosing where to establish one's home falls within that narrow class of decisions deserving of constitutional protection.[129]

Accordingly, the liberty interest under s. 7 includes the right to determine where to live, free of government action restricting that choice.

In the Peace River context, there is ample evidence to suggest that odours and the resulting health effects have forced some residents from their homes. Constant episodes of disorientation, headaches, nausea, nosebleeds and other symptoms make it impossible for residents to continue to live in the community. Being forced out of one's home due to serious physical and psychological health effects brought on by state sanctioned industrial activity would likely constitute a deprivation of the liberty interest protected under s. 7.

(iii) The Principles of Fundamental Justice: Arbitrariness and Gross Disproportionality

A. Gross Disproportionality

The relevant principle of fundamental justice depends on the impugned state action. If the targeted state conduct is the AER approval, the applicable principle would be gross disproportionality. The purpose of a regulatory approval in this context is obvious: allow for the development or operation of an oil processing facility. The AER's decision is therefore subject to challenge on the basis that its effects are grossly disproportionate in relation to its purpose. The economic benefits of heavy

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129 *Ibid* at paras 66 and 68.

oil processing in Peace River are significant, but the activity takes an enormous toll on the surrounding populations in the form of serious and frequent health problems. The approvals could achieve their objective in a way that mitigates these effects. The AER inquiry heard considerable testimony to this effect, which will be examined more closely below in relation to s. 1's applicability on these facts.

B. Arbitrariness

If the underinclusiveness of Alberta's odour management framework is the state action, then the prohibition against arbitrariness is the more appropriate principle of fundamental justice to raise. There must be some rational connection or consistency between the objective behind the state action and the s. 7 interests it deprives. Absent this connection, the law is arbitrary, and therefore, cannot be maintained. The most extreme form of an arbitrary law is where adherence to the law creates the same harms the law was designed to prevent.[130]

The AAAQOs are air quality objectives and guidelines developed under the *Alberta Environmental Protection and Enhancement Act* (*EPEA*).[131] The purpose of the AAAQOs can be interpreted from the *EPEA*, which consists of the protection of the environment and human health by regulating air contaminants.[132] Yet, the AAAQOs do not include odour-based threshold limits for most air contaminants. In fact, industrial operations are *permitted* to discharge emissions at levels detectable to human populations by smell, as the health-based thresholds are generally set higher than odour-based thresholds. Neither do the AAAQOs regulate off-lease hydrocarbon odours. Considering the unique composition of heavy oil in the Peace River region and special extractive techniques employed, there is a greater likelihood that residents can be exposed to off-lease odours that travel beyond batteries and well-sites. In fact, toxicological experts retained by the inquiry noted the presence of hydrocarbon odours off-site when conducting field visits to the impacted communities.

Gaps in the AAAQOs ability to regulate hydrocarbon odours allows for heavy oil operators in Alberta to discharge odours and induce the types of adverse health effects Peace River residents have experienced. From this perspective, the AAAQOs seem to be arbitrary, as they create the same harms that the objectives are designed to protect.

(iv) Section 1

While it may be argued that limiting the liberty and security of the person interests of residents is necessary for encouraging greater oil sands development, which in turn enhances the economic well-being of the Alberta and Canada, it is hard to imagine that this justification would be upheld under s. 1. Clearly, the limit

130 *Bedford v Canada*, 2013 SCC 72, at paras 98–100.

131 Alberta Environment, *Alberta Ambient Air Quality Objectives and Guidelines Summary* (August 2013), online: <http://environment.gov.ab.ca/info/library/5726.pdf>.

132 *Environmental Protection and Enhancement Act*, RSA 2000 c e-1, 2 and Province of Alberta, *Lower Athabasca Region Air Quality Management Framework* (Alberta: Province of Alberta, August 2012) at 12, online: <http://environment.alberta.ca/documents/LARP_Framework_AirQuality_FINAL.pdf>.

is prescribed by law, and pursues an objective that can be considered pressing and substantial in a free and democratic society. However, the limit cannot be considered proportional,[133] even though it may be rationally connected to its overarching objective.

The inquiry heard testimony from multiple experts on how heavy oil development could occur in the Peace River region without the need to discharge odours at detectable levels. For instance, by having Alberta adopt an odour management framework akin to what is in place in Ontario, Quebec, Manitoba, and Saskatchewan. Frameworks in these jurisdictions impose a sensory-based ambient limit on odours, allowing for enforcement on the basis of quantitative methodology.[134] This would allow the Province to determine odour perception thresholds and set ambient odour objectives for multiple chemicals, preventing odours to be discharged from heavy oil processing facilities at detectable levels.[135]

Prior to the inquiry, Alberta released *Directive 060: Upstream Petroleum Industry Flaring, Incinerating, and Venting* in draft form.[136] The directive is specifically designed to tackle odours from heavy oil operations in Peace River. The inquiry determined that the adoption of this directive, along with the implementation of a "play-based" regulatory approach to heavy oil processing in the region, are effective ways to "address the 'gap' identified in the current regulatory framework" that allows odours to be detected by residents.[137]

It is difficult to see how the province's conduct, as it was at the time of the inquiry, impairs the s. 7 rights of residents "as little as reasonably possible." Through the inquiry, and the acceptance of its findings, the Province of Alberta acknowledged that it could implement measures to address the current regulatory gap and prevent odours from being discharged a detectable levels. There is no evidence to suggest that following this course of action would cripple development in the Peace River region by preventing the extraction and processing of heavy oil deposits. These measures can protect residents from the harms that flow from being exposed to hydrocarbon odours and continue to allow for heavy oil development to occur. In other words, there is an opportunity to address the harms while still achieving the objectives behind the state action.

However, even if the court found that s. 7 deprivations impaired the rights of residents as little as reasonably possible, it is difficult to imagine that the salutary effects of the state action would be found to exceed the deleterious effects experienced by residents. From my perspective, the effects of the state action are so se-

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133 The arguments made under s 1 would tend to mirror the arguments made at the principles of fundamental justice stage of the analysis, as the focus in both instances is on the proportionality of the government conduct in relation to the harms inflicted on claimants.

134 Alberta Energy Regulator, *Report of Recommendations on Odours and Emissions in the Peace River Area* (March 31, 2014), online: Alberta Energy Regulator <http://aer.ca/documents/decisions/2014/2014-ABAER-005.pdf>, at paras 189 and 190.

135 *Ibid.*

136 *Ibid* at paras 183–85.

137 *Ibid* at iv.

vere that it makes the impairment unjustifiable. Residents have experienced serious adverse health effects. Multiple families have moved away to escape the odours and the various health symptoms associated. Protections against these types of serious harms are constitutionalized under the Charter, unlike the economic interests the state action is intended to pursue. For this reason, the objectives behind the state action are not proportional to the deleterious impacts on the liberty and security of the person interests of residents.

(v) Remedies

Recently, in *Ernst v Alberta (Energy Resources Conservation Board) (Ernst)*,[138] the Alberta Court of Appeal held that remedies under s. 24(1) of the Charter, or personal Charter remedies, are not available against the Energy Resources Conservation Board (ERCB), due to the existence of a statutory immunity clause that bars such claims. The claimant had sought Charter damages in the amount of $50,000.00 for the violation of her s. 2(b) freedom of expression rights, which she claimed resulted from the ERCB no longer accepting her communications over a perceived threat.[139] However, the statutory immunity clause did not bar remedies under s. 52(1) of the *Constitution Act, 1982*, or general Charter remedies, including declarations of invalidity or the remedy of extension.[140]

REDA, which is the AER's empowering statute that replaced the ERCB with the AER, includes a similar statutory immunity clause to what was considered in *Ernst*. And given the court's ruling in *Ernst*, it is likely that personal Charter remedies cannot be awarded against the AER. As a result, residents would likely be limited to seeking relief in the form of a declaratory judgement stating that the AAAQOs are unconstitutional. While declaratory judgments are limited in scope, they can often spur broader government action to address the Charter violation, which in this case is Alberta's odour management framework.

An extension could be another possible remedy if the underinclusiveness of Alberta's odour management framework is found to constitute state action. The court could declare the AAAQOs to be invalid and require the Province to redraft the regulations in a manner that limits odour discharges from heavy oil operations in the Peace River region to non-detectable levels. This may be the preferred remedy for residents, as it provides a solution that directly addresses the source of their harms.

However, based on *Ernst*, residents may be barred from bringing a Charter action against the AER. As noted above, *Ernst* suggests that residents are prevented from obtaining Charter remedies under s. 24(1) against the AER and are only entitled to s. 52(1) remedies. Section 24(1) provides remedies for any Charter-infringing *conduct*, while s. 52(1) provides remedies against Charter-infringing laws. The AER is a creature of statute that carries out legislative functions delegated to it by the Province; it does not create law, but rather implements it. Therefore, Charter actions can never be successful against the AER, as there are no remedies available

138 *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285.

139 *Ibid* at para 3.

140 *Ernst v EnCana Corporation*, 2013 ABQB 537 at paras 69–89.

for Charter rights that have been breached by the regulator's conduct.[141] This makes the AER immune from Charter actions.

While this is one interpretation of *Ernst*, another interpretation is that the case does not fully address the question of whether the s. 24(1) remedies are barred against the AER. First, *Ernst* dealt with a challenge against the ERCB and its empowering statute, and not the AER and *REDA*. Second, the challenge dealt with Charter damages and not other remedies available under s. 24(1). In fact, both the Queen's Bench[142] and Alberta Court of Appeal decisions seem to conflate Charter damages and s. 24(1) relief as being the same, when in reality damages are simply one type of remedy available under the provision. Wittman CJ bases his entire rationale for barring the Plaintiff's claim on case law and policy reasons that are applicable in the context of Charter damages, but not necessarily for s. 24(1) remedies such as declaratory relief.[143] The Alberta Court of Appeal engages in the same sort of narrow analysis, setting out why administrative bodies should not be liable for damages on public policy grounds of certainty and respecting the discretion of administrative decision-makers.[144] The Court then states this reasoning to mean that the ERCB is also immune from all s. 24(1) remedies, when it is unclear whether the same policy reasons identified would apply in the context of a claim for declaratory relief under s. 24(1).

Moreover, as noted by the Alberta Court of Appeal, limits on s. 24(1) remedies do not offend the rule of law if alternative avenues of meaningful redress are available, specifically judicial review of the regulator's administrative decisions.[145] However, it is unlikely that residents are able raise these arguments on judicial review at this time, as the AER enforces strict timelines to challenge a review and considerable time has passed since approvals were issued. Are residents then left with no redress against the AER, if they failed to raise s. 7 Charter arguments on evidence that they were unaware of at the time of the regulator's decisions and harms that occurred after the approvals were made? One would hope not, but this remains unclear from *Ernst*.

Finally, procedural issues may have prevented the court in *Ernst* from thoroughly examining whether s. 24(1) Charter remedies are barred against the ERCB. As Koshman notes:

> There are two ways to read the Court of Appeal decision in this case. It may be that the Court believed that Ernst's failure to meet the procedural requirement to give notice to government of a constitutional challenge to section 43

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141 There is no Charter remedy available against the AER in the civil context, although Charter arguments can be raised on judicial review of an AER decision. However, as outlined above, restricting the Charter's scope to arguments that solely can be raised on judicial review of the AER decisions limits what types of violations can be raised and when. Often, decision makers and claimants are not aware of Charter violations until well after a decision is made and impacts felt.

142 *Ernst v EnCana Corporation*, 2013 ABQB 537.

143 *Ibid* at paras 81–89.

144 *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 at paras 23–30.

145 *Ibid* at para 30.

> of the *ERCA* was fatal. However, the Court used the language of "constitutional legitimacy" throughout its reasons on section 43, suggesting that it might have been pronouncing on the constitutionality of the section in spite of the failure to give notice. I am inclined to read this case in the former sense, i.e. as not having actually decided the constitutionality of section 43. This would be in keeping with the usual consequence of the failure to give notice, which was not appealed here. Furthermore, the Court did not undertake the usual steps in a constitutional analysis, i.e. by reviewing whether section 43 breached any of Ernst's *Charter* rights, and if so, whether it could be upheld as a reasonable limit on those rights under section 1 of the *Charter*.[146]

The court may not have actually examined constitutionality of the statutory immunity clause in *Ernst*, as the Plaintiff failed to provide adequate notice to the Province of this argument. This would mean that the question of whether s. 24(1) Charter remedies are barred by the statutory immunity clause found in the *REDA* remains unaddressed.

In the event that s. 24(1) remedies are available to residents for the AER's Charter infringing conduct, then the court would have considerable flexibility in crafting a remedy that is appropriate and just in the circumstances. This could involve amending or revoking a government approval until certain conditions were satisfied, or even barring the AER from issuing any more approvals for heavy oil processing in Peace River on the same conditions. However, the uncertainty created by *Ernst* casts a shadow over the availability of Charter remedies against the AER.

V. CONSTITUTIONAL FOUNDATION OF THE PRECAUTIONARY PRINCIPLE

It is worth pausing to consider the benefits of bringing environmental claims under s. 7. When plaintiffs can avail themselves of common law causes of action and environmental legislation, one might ask what value the Charter adds for challenges to activities that result in environmental harms.

The answer is two-fold. As a conceptual matter, a s. 7 claim recognizes the distinct role and responsibility of governments in sanctioning activities that create environmental and health harms. Current statutory and common law causes of action permit claimants to seek redress from private actors, but there are few mechanisms for seeking accountability on the state's part. Section 7 fills that gap.

As a practical matter, suing under s. 7 can often be more advantageous than doing so under existing common law or statutory causes of action. For example, claimants often rely on the doctrine of public nuisance where there is injury or interference with public rights.[147] However, standing rules impose a strict limit on these claims: one can sue in public nuisance only with the consent of the Attorney

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146 Jennifer Koshan, "The Charter Issue(s) in Ernst: Awaiting Another Day", (27 October 2014) online: ABlawg: The University of Calgary Faculty of Law Blog on Developments in Alberta Law.

147 Nathalie J Chalifour & Gavin Smith, "The Pursuit of Environmental Justice in the McLachlin Court," in Sanda Rogers & Sheila McIntyre, eds, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (LexisNexis, 2010).

General or if one has suffered "special damages". Some case law suggests that a claim in private nuisance will not preclude one in public nuisance,[148] but the general rule remains that, in the absence of the Attorney General's consent, one must have suffered a special or distinct form of harm to bring a public nuisance claim.

As for statutes, the bulk of environmental legislation provides procedural — rather than substantive protection. For example, legislation in Ontario — the *Environmental Bill of Rights, 1993* — largely focuses on the right to participate in environmental decision making in the province. The statute refers to the people's "right to a healthful environment", but this language is found in the preamble and does not have the full force of an actual legislative provision. Similarly, on the federal level, the *Canadian Environmental Protection Act* concentrates on public participation, provides for an environmental registry for matters under the statute, and creates reporting responsibilities on the part of government agencies. These rights are not trivial — procedural requirements give effect to democratic values and often produce better outcomes than processes without public input. However, without a substantive dimension, the decisions ultimately remain entirely in the government's hands.

Tort law provides another traditional common law remedy. Claimants who have suffered physical injury or property damage will often sue a defendant in negligence. However, a claimant may encounter difficulty in establishing all the elements of negligence, particularly causation. Even where there the evidence indicates a link between the defendant's conduct and the harm to the claimant, the claim will founder unless the claimant can show that it is more likely than not that his or her particularly injury flowed from the defendant's activities. However, as the case above illustrates, such evidence can be elusive where health or environmental harms are involved. In contrast, the causation standard for a s. 7 claim — one of sufficient causal connection — reflects something closer to the precautionary principle.

The precautionary principle is a contested concept. The principle's definition is debated frequently among academics, with some arguing that it should be ignored due to a lack of coherence and feasibility.[149] However, within Canadian environmental law, the principle has standing. The principle is referenced in multiple statutes[150] and has been addressed by courts on numerous occasions.[151] For the purposes of this discussion, the precautionary principle is defined as the duty to not approve or engage in activity that causes serious adverse environmental effects, even if it is not possible to guarantee that these effects will occur. This definition is consistent with most iterations of the principle.[152]

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148 Jamie Benidickson, Environmental Law, 4th ed (Ottawa: Irwin Law, 2013) at 119.

149 Chris Tollefson & Jamie Thornback, "Litigating the Precautionary Principle in Domestic Courts" (2008) 19 JELP 37.

150 *Ibid* at 45–46.

151 The most famous being *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40.

152 For more developed formulations of the precautionary principle see Per Sandin, "The Precautionary Principle and the Concept of Precaution," (November 2004) 13:4 Environmental Values 461.

The precautionary principle holds continued relevance to environmental advocates as it can be used to curb the discretion governments have over approving or engaging in activity that is harmful to the environment. However, this principle has received limited adherence in Canada. As outlined above, many environmental statutes refer to the precautionary principle, but they tend to provide no substantive basis to enforce it. Moreover, courts have interpreted the federal government's commitment to international laws and treaties that seek to implement the principle as non-binding.[153] In relation to the common law, Doelle and Tollefson observe that the:

> [precautionary principle] has been at the centre of ongoing debates about the adequacy of the common law in dealing with environmental cases, especially in response to scientific uncertainty and the burden of proof in tort cases involving risk of harm resulting from contamination.[154]

Causation under tort law generally requires for harm to have occurred before a claim can be made. This prevents claimants from asserting rights in relation to prospective harms that may or may not materialize, which the precautionary principle seeks to protect against. For this reason, the precautionary principle appears to be at odds with common law standards, particularly in relation to tort law. However, causation under s. 7 is distinct from causation in the tort setting, and provides the basis to constitutionally entrench the precautionary principle.

Causation under s. 7 can be represented in the following manner:

X = Harm

Y = Activity Causing Harm

Z = State Action

The relationship between Y and X, where Y causes X, is the first element that must be established. The relationship can be broad, set out in general terms, however, Y must cause or be capable of causing X. This element tends to be uncontroversial and adduced primarily through social and legislative facts presented by the litigants. In *Bedford*, Y corresponded with predators who target sex workers, while X was the multitude of harms sex workers experience as a result.

In order for the relationship between Y and X to be subject to Charter scrutiny, state action or Z must either allow or encourage Y to cause X. Claimants must demonstrate that Z is a real — not speculative — source of Y causing X. However, Z does not have to be "the only or the dominant cause of the prejudice suffered by the claimant."[155] A claimant merely has to establish that Z allows or encourages Y to cause X on a balance of probabilities. As noted above, factors in each particular case are relevant to determining whether a "sufficient casual connection" exists for Z to allow or encourage Y to cause X. The Supreme Court in *Bedford* found a sufficient casual connection between criminal code prohibitions against operating a common bawdy-house, living on the avails of prostitution and communicating for the purposes of prostitution in public, and the harms predators inflicted on sex

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153 *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40.

154 Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials*, 1st ed (Toronto: Thomson/Carswell, 2009) at 25.

155 *Bedford v Canada*, 2013 SCC 72 at para 76.

workers. Namely, that the prohibitions made it easier for predators to target sex workers, as it prevented them from taking reasonable measures to ensure their safety.

Unlike causation in the tort context, claimants under s. 7 are not required to prove that they suffered harm directly. This is often done by demonstrating that Y causes X to a class of persons that the claimant belongs to, and Z makes it more likely for the claimant to suffer X as a result of their membership in the class. Again, in *Bedford*, the claimants — Terri-Jean Bedford, Amy Lebovitch and Valerie Scott — did not allege that they directly suffered the harms alleged as a result of the criminal code prohibitions. Rather, they successfully argued that the criminal code prohibitions allowed predators to target sex workers with greater impunity, and as sex workers and former sex workers who plan on returning to the profession, they faced increased risks. This, the Court found, deprived them of their security of the person interest under s. 7.

In *Bedford*, the claimants had not directly experienced the harms alleged. This was also the case in *Canada (Attorney General) v PHS Community Services Society (Insite)*.[156] There, the Supreme Court held that the federal government's failure to provide a safe injection facility an exemption from criminal prohibitions on drug related offences would cause the facility to close. Closure of the facility created the real possibility that clients would suffer serious harms, and as a result, deprived the claimants — current and former clients — of the protections afforded them under s. 7. The harms here were prospective, as the facility was in operation at all stages of litigation.

Section 7 confers protections from potential harms that have not occurred and may never materialize, and is therefore, wholly consistent with the precautionary principle. It places the onus on the state to justify activity that not only causes harm, but increases the risk of it as well. In the environmental context, s. 7 imposes a constitutional duty on the state to ensure that the environmental impacts of industrial activity it authorizes or contemplates does not violate the life, liberty or security of the person interests of any person in a manner that does not accord with the principles of fundamental justice. The provision also provides individuals a method to ensure that governments carry out this duty. And while s. 7 narrows the precautionary principle through the lens of individual rights protections, it still provides the ability to constrain the state's ability to engage in environmentally destructive activity.

It is worth emphasizing that extending s. 7 to the environmental context is a modest step. It does not risk opening the floodgates of litigation or undermining the policymaking role of the executive and legislative branches with respect to environmental issues. First, a claimant must show a demonstrable level of harm; the injury or likelihood of injury cannot be minimal and must go beyond mere anxiety about physical harm or environmental degradation. Second, not every injury will give rise to a s. 7 claim; the principles of fundamental justice impose a significant hurdle on prospective plaintiffs. Third, s. 1 remains an "escape hatch" for courts that are hesitant to interfere with government decision making where the environmental issue is complex, and the impact of court intervention would be significant or would do

156 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

more harm than good. Fourth, as noted above, remedies under the Charter are flexible; the court may address a s. 7 violation with anything from a declaration to a revocation of an approval.

At least one major drawback is that, in many cases, a claimant cannot hope to succeed without a strong evidentiary record. In the case of heavy oil processing in Alberta, claimants are fortunate to have an inquiry report that establishes a link between industrial activities and their health issues. In other cases, however, claimants must hire experts and engage in their own fact finding — a process that can be time-consuming and expensive.

The caveat to that point is that courts may be shifting the evidentiary burden in these cases onto the government. As the Chief Justice noted in *Bedford*, a claimant can establish that a law or action is grossly disproportionate simply by showing that the law or act has such an effect on him or her. At the same time, *Bedford* noted that a s. 7 violation may sometimes be saved under s. 1 (even though there is no case to date in which that has occurred). The government is in a better position than a claimant is to marshal social and legislative fact evidence. The effect of *Bedford*, then, is to lower the bar for a s. 7 violation, while expanding the government's role under s. 1 to justify the violation.

VI. CONCLUSION

As noted at the outset, the notion of amending the *Charter of Rights and Freedoms* to add a right to a healthy environment is currently in vogue.[157] The basis for this position is that governments in Canada require a constitutional imperative to fully embrace their roles as environmental stewards, and the Charter, in its current form, does not compel them to meaningfully carry out this duty. However, it is my view that existing s. 7 jurisprudence already provides constitutional grounding for requiring governments to adhere to the precautionary principle, as well as a valuable opportunity for environmental advocates to entrench environmental rights in the Charter.

What is lacking is the ability to effectively raise s. 7 in the environmental context to bridge these two areas of law. The example of heavy oil processing in Peace River, Alberta and the adverse impact it has on residents provides an outline on how a s. 7 environmental claim can be argued. It is my hope that this article will inspire environmental advocates to actively seek out similar factual scenarios and force courts to subject them to the rigours of a s. 7 analysis, and one day, move the idea of constitutionalized environmental rights in Canada from the hypothetical realm to reality.

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157 See *The Blue Dot Tour* led by the David Suzuki Foundation, online: <www.bluedot.ca>.