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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

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This is an exciting time for the environmental and human rights movements. A growing majority of countries are recognizing the international human right to a healthy environment, and Canada is poised to join them. Two members of the Aamjiwnaang First Nation community are arguing in a Canadian court that the government, by granting permission for increasing pollution in their community, is violating their Canadian Charter of Rights and Freedoms rights to life and security of the person. Thus, there is a real possibility that in the next year or so, a Canadian court will recognize for the first time that the Charter includes a right to a healthy environment. This Article uses Canada's international human rights obligations and domestic Charter law to demonstrate why Canadian courts should find that the Charter rights to life and security of the person include the right to a healthy environment.

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> 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.
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> —Canadian Charter of Rights and Freedoms, Section 7

I. INTRODUCTION: POLLUTION IN THE AAMJIWNAANG FIRST NATION COMMUNITY

This is an exciting time for the environmental and human rights movements. A worldwide sea change is occurring as more and more nations recognize the human right to a healthy environment.[1] Canada is poised to join the growing majority of countries that recognize that people have a basic human right to drink water, breathe air, and occupy land that does not make them sick.[2] Two members of the Aamjiwnaang First Nation (Aamjiwnaang) community are arguing in the Ontario Superior Court of Justice that the Ontario government, by granting permission for continuing and increasing pollution in their community, is violating their Canadian Charter of Rights and Freedoms (Charter)[3] Section 7 rights to life and security of the person.[4] Thus, there is a real possibility that in the next year or so, a Canadian court will recognize for the first time that the Section 7 Charter rights to life and security of the person include a right to a healthy environment.

This Article argues that all people in Canada should enjoy a legally enforceable right to a healthy environment, defined as an environment that does not cause serious harm to human health, as part of their Section 7 Charter rights to life and security of the person. This conclusion is supported by two independent but related lines of reasoning. First, as Part II of this Article demonstrates, under current domestic law, Section 7 of the Charter should be interpreted to protect the right to a healthy environment. Second, as Part III demonstrates, under Canada's international obligations, Section 7 of the Charter should be interpreted to protect the right to a healthy environment.

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1. *See* David R. Boyd, *The Constitutional Right to a Healthy Environment*, ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV., July/Aug. 2012, at 3, 4, *available at* http://www.environmentmagazine.org/Archives/Back%20issues/2012/July-August%202012/constitutional-rights-full.html (noting that out of 193 U.N. Member States, 177 now recognize the right to a healthy environment).

2. *See id.*

3. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

4. Amended Notice of Application to Divisional Court for Judicial Review at 3, Lockridge v. Ontario (Minister of the Env't), 2012 ONSC 528 (Can. Ont. Sup. Ct. J.) (No. 528/10). The petitioners allege that the Ontario Ministry of the Environment's grant of a permit for additional pollution in Sarnia violates their rights to life and security of the person under Section 7 of the Charter. The argument made by the petitioners is narrower than, but included within, the argument made in this Article. If the existing pollution violates the Aamjiwnaang community members' right to a healthy environment, as is argued in this Article, then the grant of permission for additional pollution must also violate their right to a healthy environment, as the petitioners assert.

The consequences of a lack of a healthy environment can be devastating for any individual or group of people. However, indigenous groups are often disproportionately harmed by environmental degradation because they frequently have a deeper connection to, and dependence on, the land and environment around them. Consequently, indigenous groups are less likely than other groups to move away from pollution.[5] As one indigenous community member explains: "We've been here 6000 years. We didn't create this [environmental pollution]. We shouldn't have to leave."[6] This member's great-great-grandfather's grave is just down the road, and he values taking his children to the grave and telling them stories about the lives of their ancestors before them.[7]

Additionally, because indigenous groups often have less political and monetary power than other groups, the ability to enforce rights in courts is more important as a tool to remedy and prevent environmental harm.[8] Therefore, the situation of the Aamjiwnaang community, described below, is a particularly compelling example of what the potential consequences of living in a toxic environment can be and why a right to a healthy environment should be recognized under Section 7 and rigorously enforced.

The Aamjiwnaang community consists of 850 people near Sarnia, Ontario, Canada.[9] Currently, two girls are born for every one boy in the Aamjiwnaang community.[10] It was not always this way. Fifteen years ago the birth-sex ratio was the normal one girl for every one boy.[11] The

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5. *See* Andrew Gage, *Three Arguments for First Nation Public Nuisance Standing*, 7 INDIGENOUS L.J., no. 1, 2008, at 39, 52; J. Mijin Cha, *Environmental Justice in Rural South Asia: Applying Lessons Learned from the United States in Fighting for Indigenous Communities' Rights and Access to Common Resources*, 19 GEO. INT'L ENVTL. L. REV. 185, 187 (2007); Neil A.F. Popović, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487, 543 (1996); *see also* Dayna Nadine Scott, *Body Polluted: Questions of Scale, Gender, and Remedy*, 44 LOY. L.A. L. REV. 121, 138 (2010) ("The permanence of both the pollution and of the Aamjiwnaang First Nation on the landscape, offers a possible explanation for why we might see a disproportionate effect of chronic pollution on this community: they are grounded both spatially and historically.").

6. Telephone Interview with Ron Plain, Member, Aamjiwnaang First Nation (Apr. 23, 2007).

7. *Id.*

8. *See* Cha, *supra* note 5, at 199. While other Sections of the Charter and other provisions of law can and should be used to advance aboriginal rights to a healthy environment, this Article focuses only on Section 7.

9. *See* Constanze A. Mackenzie, Ada Lockridge & Margaret Keith, *Declining Sex Ratio in a First Nation Community*, 113 ENVTL. HEALTH PERSP. 1295 (2005), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1281269/.

10. *Id.*

11. *See id.* at 1296.

Aamjiwnaang community is experiencing the most significantly skewed birth-sex ratio and the highest rate of change in birth-sex ratio for a human population ever reported by the scientific community worldwide.[12]

Birth-sex ratios are indicators of the reproductive and general health of a community.[13] The first assumption scientists make when seeing drastically altered birth-sex ratios is that the community has been exposed to dangerous levels of chemicals.[14] Indeed, Aamjiwnaang community members live on a First Nation reserve located in what has been termed "Sarnia's Chemical Valley" and have been exposed to high levels of chemicals from the nearby petrochemical, polymer, and chemical industrial plants.[15] There are sixty-two industrial facilities located within twenty-five kilometers of the community.[16] These plants produce 40% of Canada's entire chemical output.[17] Three facilities in the Sarnia area have been identified as coming within the top ten air polluters of Ontario.[18] The World Health Organization (WHO) has identified Sarnia as having more air pollution than any other city in Canada.[19] The ground in the community is polluted with high levels of dangerous contaminants and the air "stinks."[20]

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12. *See* Devra Lee Davis et al., *Declines in Sex Ratio at Birth and Fetal Deaths in Japan, and in U.S. Whites but Not African Americans*, 115 ENVTL. HEALTH PERSP. 941 (2007), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1892130/.

13. *See* Mackenzie, Lockridge & Keith, *supra* note 9, at 1297.

14. *Id.*; *see also* Geoffrey Lean & Martin Mittelstaedt, *Pollution: Where Have All the Baby Boys Gone?*, INDEPENDENT (London) (Apr. 2, 2006), http://www.independent.co.uk/environment/pollution-where-have-all-the-baby-boys-gone-472477.html (citing Professor Shanna Swan of the University of Rochester, New York).

15. Mackenzie, Lockridge & Keith, *supra* note 9, at 1295; Elaine MacDonald & Sarah Rang, *Exposing Canada's Chemical Valley: An Investigation of Cumulative Air Pollution Emissions in the Sarnia, Ontario Area*, ECOJUSTICE 5-8 (Oct. 2007), http://www.ecojustice.ca/publications/reports/report-exposing-canadas-chemical-valley/.

16. *See* MacDonald & Rang, *supra* note 15, at 8.

17. *See id.* at 5; Lean & Mittelstaedt, *supra* note 14; *Application for Review Under Section 61 of the Environmental Bill of Rights, 1993*, ECOJUSTICE 4 (Jan. 29, 2009), http://www.ecojustice.ca/media-centre/media-release-files/HotSpot_Application_for_Review_jan_2009.pdf (application submitted by Ecojustice to the Environmental Commissioner of Ontario on behalf of Ada Lockridge and Ron Plain).

18. *See* MacDonald & Rang, *supra* note 15, at 12; *Sarnia Area Facilities Rank High in Ontario's Top 10 List of Respiratory Polluters*, POLLUTION WATCH (Mar. 1, 2005), http://www.pollutionwatch.org/pressroom/releases/20050301.jsp.

19. *See Exposure to Outdoor Air Pollution*, WORLD HEALTH ORG. [WHO] (Aug. 2011), http://www.who.int/gho/phe/outdoor_air_pollution/exposure/en/index.html.

20. Lean & Mittelstaedt, *supra* note 14. Assessments of the land and sediment on the reserve have shown high levels of many dangerous chemicals, many exceeding the guidelines of the Ontario Ministry of the Environment and Ministry of Energy, including PCBs, HCB, mirex, polycyclic aromatic hydrocarbons (PAHs), and metals (copper, nickel, lead, mercury, arsenic, chromium, manganese, and iron). *See* Mackenzie, Lockridge & Keith, *supra* note 9, at 1297.

High levels of dangerous chemicals have been found in the blood of community members.[21] According to one expert on public health, the chemicals in the air that Aamjiwnaang community members breathe "pose serious risks to [their] health."[22] The concentration of sulfur dioxide in the atmosphere exposes residents of the Aamjiwnaang community to a "significantly elevated risk of asthma, respiratory infections, chronic obstructive pulmonary disease and death from cardiovascular and respiratory disease."[23] The concentration of hydrogen sulfide in the air exposes residents to a significantly elevated risk of many health problems, including stress from the smell of rotten eggs.[24] The pollution also causes an increased risk of "death from heart attacks, cardiovascular and respiratory disease, lung cancer, diabetes and death."[25] Additionally, the pollution creates a significantly increased risk of many types of cancer.[26]

Not surprisingly, community members are suffering from many health problems at much higher than average rates.[27] More than 30% of Aamjiwnaang children have asthma (two to three times the national average),[28] 40% of Aamjiwnaang women experience miscarriages or stillbirths (at least twice the average rate),[29] and one quarter of Aamjiwnaang children have learning or behavioral disabilities (more

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21. *See Polluted Children, Toxic Nation: A Report on Pollution in Canadian Families*, ENVTL. DEF. 30 (June 2006), http://environmentaldefence.ca/reports/polluted-children-toxic-nation-report-pollution-canadian-families (testing three members of the Aamjiwnaang community and finding elevated levels of toxic chemicals in their blood).

22. *See* David O. Carpenter, Draft Report to Counsel for the Applicants Re: *Lockridge v. Ontario (Minister of the Env't)* 3 (Apr. 28, 2011) (unpublished report) (on file with author).

23. *Id.* at 8.

24. *Id.*

25. *Id.* at 9; *see also* Richard T. Burnett et al., *The Effect of the Urban Ambient Air Pollution Mix on Daily Mortality Rates in 11 Canadian Cities*, 89 CAN. J. PUB. HEALTH 152, 155 (1998) (looking at eleven Canadian cities and finding that mortality increased as air quality declined); MacDonald & Rang, *supra* note 15, at 9.

26. *See* Carpenter, *supra* note 22, at 9, 11.

27. *See* Zoe Cormier, *Chemically Bonded*, ECOLOGIST, Dec. 2006/Jan. 2007, at 46, 48; MacDonald & Rang, *supra* note 15, at 9 (listing numerous health problems experienced by community members); *see also* Karen Y. Fung et al., *Impact of Air Pollution on Hospital Admissions in Southwestern Ontario, Canada: Generating Hypotheses in Sentinel High-Exposure Places*, 6 ENVTL. HEALTH 1 (2007), http://www.biomedcentral.com/content/pdf/1476-069X-6-18.pdf (finding elevated hospitalization rates in Sarnia's Chemical Valley).

28. *See* Rochelle Garner & Dafna Kohen, *Changes in the Prevalence of Asthma Among Canadian Children*, HEALTH REP., June 2008, at 45, *available at* http://www.statcan.gc.ca/pub/82-003-x/82-003-X2008002-eng.pdf.

29. *See Miscarriage*, AM. PREGNANCY ASS'N, http://americanpregnancy.org/pregnancy complications/miscarriage.html (last updated Nov. 2011).

than five times the average rate).[30] Aamjiwnaang community members have significantly elevated rates of birth defects and cancer compared with other Canadians.[31] In a 2005 study, the Ontario Medical Association found that an extra 100 deaths, 270 hospital admissions, 920 emergency visits, and 471,000 minor illness days per year can be attributed to the air pollution in the Sarnia-Lambton region.[32] The chance of dying from heart disease, atherosclerosis, and several different types of cancers is significantly greater for people living in the Sarnia region than for the average person living in Ontario.[33] The rate of hospitalization for all causes is also significantly greater for people living in the Sarnia region than for the average person living in Ontario.[34]

Canada has laws regulating the emissions of chemicals from industry, and most of the emissions permeating the air in Sarnia's Chemical Valley are from state-sanctioned industrial facilities that sought and obtained permits to pollute.[35] However, the laws regulating chemical emissions are outdated and inadequate for the protection of human health because they fail to take into account the pollutants already being emitted in any given area by other facilities before a permit is issued.[36] Thus, under current law, new permits can be granted for additional chemical emissions even when the level of pollution in a given location is already

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30. *See* Lucie Cossette, *A Profile of Disability in Canada, 2001*, STATISTICS CAN. 11, http://www.statcan.gc.ca/pub/89-577-x/pdf/4228016-eng.pdf (last visited Nov. 13, 2013).

31. *See* Carpenter, *supra* note 22, at 3, 14.

32. *See* MacDonald & Rang, *supra* note 15, at 9.

33. Great Lakes Health Effects Program, St. Clair River Area of Concern: Health Data and Statistics for the Population of Sarnia and Region (1986-1992), at 23-24, 37 (report available from Great Lakes Health Effects Program in Ottawa, Ontario).

34. *Id.*

35. *See* Scott, *supra* note 5, at 146 ("[M]ost of the pollution in Sarnia's Chemical Valley is state sanctioned. The polluters have permits to emit.").

36. *See* Carpenter, *supra* note 22, at 5, 14; Dayna Nadine Scott, *Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution*, 46 OSGOODE HALL L.J. 293, 323 (2008) ("The glaring failure of [the current] approach is that it does not consider the environment being dumped into; it does not take into account the background contaminant levels in the ambient air."); Amended Notice of Application to Divisional Court for Judicial Review, *supra* note 4, at 9 (noting that the relevant environmental law provisions do not "require consideration of cumulative effects of pollution before a control order is issued [and] when the Director approves contaminant discharges to air under the [relevant law], no consideration is given to cumulative effects from background pollutant concentrations in the air, emissions of pollutants from neighboring facilities, and emissions of other pollutants that may have similar adverse effects"); *Application for Review Under Section 61 of the Environmental Bill of Rights, 1993*, *supra* note 17, at 10 ("[E]very public body that has reviewed Ontario's air pollution permitting scheme has concluded that the system is currently flawed . . . .").

dangerous for human health.[37] In addition, there are known carcinogens being released for which no standards exist.[38] Finally, it is possible that not all environmental laws and regulations are being followed by the industry or enforced by the government. A 2005 inspection by the Ontario Ministry of the Environment found that thirty-four of the thirty-five Sarnia-area petrochemical facilities inspected were in noncompliance with one or more of the legislative or regulatory requirements.[39]

Thus, as this Article will show, the situation in Sarnia is one where the Canadian government has not met its constitutional and international obligations to protect life and security of the person from environmental harm. As Canadian environmental lawyer and scholar David Boyd notes, the constitutional right to a healthy environment has been used to "close gaps in environmental law" in other countries around the world.[40] Courts can require that new laws be enacted to fulfill constitutional obligations, while leaving it to the government to determine the details of the new laws.[41]

If the right to a healthy environment exists under Canadian constitutional law as part of the constitutional rights to life and security of the person, as is asserted here, the Divisional Court of the Ontario Superior Court of Justice, and any other Canadian court confronted with the question, should find that the Canadian and provincial governments must update their legislation and regulations to protect public health adequately. Updating legislation effectively will require using modern scientific understanding of how cumulative pollution affects health, not issuing new permits for the emission of pollutants until this is done, and ensuring that all hazardous pollutants are regulated.[42] In addition, when people's health has been damaged by environmental pollution, courts around the world have ordered monetary compensation and/or medical

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37. *See* Scott, *supra* note 36, at 329 (citation omitted) ("[E]ven if every facility that affects a community . . . has a legally adequate permit, the cumulative burden of these facilities nonetheless could create significant harm.").

38. *See* Carpenter, *supra* note 22, at 14; Amended Notice of Application to Divisional Court for Judicial Review, *supra* note 4, at 10-11 (noting that benzene emissions are not regulated).

39. *See* ENVTL. SWAT TEAM, ENVIRONMENTAL COMPLIANCE IN THE PETROCHEMICAL INDUSTRY IN THE SARNIA AREA, at ii (2005), *available at* http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_079129.pdf.

40. *See* Boyd, *supra* note 1, at 7.

41. *Id.*

42. *See Application for Review Under Section 61 of the Environmental Bill of Rights, 1993*, *supra* note 17, at 3 (noting that if environmental laws are inconsistent with Charter requirements, then the laws must be amended).

treatment under the right to a healthy environment.[43] This type of remedy may be appropriate in Canada as well.

This argument does not require the recognition of a new right under Canadian law. Rather, as one author puts it, to recognize that Canadians have the right to live in an environment that does not imperil their lives or health is simply to read existing rights in "an ecologically literate" way.[44] If the Canadian government must protect the rights to life and security of the person under domestic and international law, then surely it must protect those rights when the threats to life and security of the person come from environmental degradation.[45] A recent WHO report found that some of the most significant threats to life and health come from environmental sources.[46] Thus, in order to be fully protective of life and health, the rights to life and security of the person must protect people from environmental harm. As environmental law scholar Lynda Collins explains:

> [I]t is not necessary to formulate a new "environmental component" of the right to life in order to address lethal environmental harm. Instead, courts need only recognize that environmental harm may cause loss of life just as surely as other means. If a citizen is asphyxiated by noxious gases emanating from a government-operated incinerator, she is equally dead as if she had been shot or beaten by government agents. It would be irrational for human rights law to provide less protection in the latter scenario than it does in the former; this would, in a sense, create an environmental exemption from the right to life.[47]

The same logic applies to the right to security of the person and damage to health. In the more than forty years since the 1972 Report of the United Nations Conference on the Human Environment (Stockholm Declaration) first declared that "[m]an has the fundamental right to . . . an environment of a quality that permits a life of dignity and well-

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43. *See* Boyd, *supra* note 1, at 9 (citing decisions from Russia, Romania, Chile, Turkey, and Peru).

44. *See* Lynda M. Collins, *An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms*, 26 WINDSOR REV. LEGAL & SOC. ISSUES 7, 11 (2009).

45. *See id.*

46. *See* A. PRÜSS-ÜSTÜN & C. CORVALÁN, WHO, PREVENTING DISEASE THROUGH HEALTHY ENVIRONMENTS: TOWARDS AN ESTIMATE OF THE ENVIRONMENTAL BURDEN OF DISEASE 6 (2006), *available at* http://www.who.int/quantifying_ehimpacts/publications/preventingdisease.pdf ("[A]pproximately one-quarter of the global disease burden, and more than one-third of the burden among children, is due to modifiable environmental factors.").

47. Lynda Collins, *Are We There Yet? The Right to Environment in International and European Law*, 2 MCGILL J. SUSTAINABLE DEV. L. & POL'Y 119, 127 (2007).

being,"[48] the human right to a healthy environment has gone from being a radical, unthinkable idea to being widespread and mainstream.[49] Canada is now among a minority of nations that has not recognized a constitutional right to a healthy environment.[50] The situation of the Aamjiwnaang community and the recent court case brought by two members of the Aamjiwnaang community should change this state of affairs.[51]

The Ontario Divisional Court, and any other Canadian court presented with the question, should recognize that Aamjiwnaang community members have had their internationally and constitutionally protected rights to life and security of the person violated by the Ontario and/or Canadian governments[52] because the government has both affirmatively enabled the life- and health-threatening pollution and has failed to protect the community from serious environmental pollution.[53]

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48. United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, princ. 1, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972), [hereinafter *Stockholm Declaration*].

49. *See* David R. Boyd, *The Implicit Constitutional Right to Live in a Healthy Environment*, 20 REV. EUR. COMMUNITY & INT'L ENVTL. L., no. 2, 2011, at 171 (noting that over 100 nations have either an implicit or explicit right to a healthy environment in their constitutions); *see also infra* Part III (discussing the many times a right to a healthy environment has been recognized in international declarations and treaties, in domestic law, and in the decisions of international and domestic tribunals).

50. *See* Boyd, *supra* note 49, at 171.

51. *See* Amended Notice of Application to Divisional Court for Judicial Review, *supra* note 4.

52. The question of what the constitutional division of powers between the Ontario provincial government and the Canadian federal government is beyond the scope of this Article. For convenience, this Article shall refer to the Canadian government throughout even though responsibility may be divided between the federal and provincial governments. For more information on this topic and a discussion on the proper division of power in Canadian environmental cases, see Nathalie J. Chalifour, *Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes*, 22 NAT'L J. CONST. L. 119, 142 (2008). Either way, one or both levels of government are responsible because the federalist nature of a country is no excuse for a country to fail to fulfill its international obligations, and both federal and provincial levels of government must comply with the Charter. *See* JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 212 (2001) (describing the responsibilities federalist countries have in fulfilling their international legal obligations); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 32(1) (U.K.) ("This Charter applies (*a*) to the Parliament and government of Canada . . . ; and (*b*) to the legislature and government of each province . . . .").

53. *See infra* Part II.C. There is currently a case pending, brought by two community members, challenging the decision of the Ministry of the Environment to allow Suncor Energy Products Inc. to increase its chemical emissions. *See* Amended Notice of Application to Divisional Court for Judicial Review, *supra* note 4, at 3. The goal of the applicants in this case is to change the practices of the Ontario government going forward. *See* Manuel Riemer, Report Delivered to Counsel for the Applicants Re: *Lockridge v. Ontario (Minister of the Env't)* (Apr. 22, 2011) (unpublished report) (on file with author). However, no case has yet been brought challenging the emissions already permitted in Sarnia's Chemical Valley.

A constitutional law and human rights approach to analyzing situations such as that confronting the Aamjiwnaang community is beneficial because unlike other areas of law, such as nuisance and tort law,[54] human rights are absolute and never subject to a balancing of interests.[55] For example, a violation of a human right will not be justified by the discretion of a government official, nor proprietary or economic interests.[56] Furthermore, a constitutional and human rights approach to environmental problems will help ameliorate the condition of the First Nations and aboriginal people of Canada because indigenous peoples are often disproportionately affected by environmental pollution.[57]

II. CANADIAN JURISPRUDENCE ON SECTION 7

Section 7 of the Charter declares, "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."[58] Each interest—the right to life, the right to liberty, and the right to security of the person—is an independent interest.[59] A court may act on a violation of a Section 7 right by providing any remedy that it "considers appropriate and just in the circumstances."[60]

On a plain reading of Section 7, it seems reasonable that an individual's right to life or security of the person interests could be implicated if environmental pollution causes danger to that individual's

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54. However, that does not mean that other legal remedies should not be sought at the same time. This Article does not purport to be an exhaustive examination of the legal remedies that the people affected by these toxins may be able to pursue. Specifically excluded and beyond the scope of this Article are any remedies available under the Canadian Environmental Protection Act, the Ontario Environmental Bill of Rights, aboriginal rights, or tort law.

55. *See* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1285 (2d ed. 2002). Legislative attempts to protect the right to a healthy environment often fall short of their purported goal because they allow such defenses as due diligence and having a permit. *See, e.g.*, Elaine L. Hughes & David Iyalomhe, *Substantive Environmental Rights in Canada*, 30 OTTAWA L. REV. 229, 240 (1998-1999) (noting that many mechanisms to hold the government accountable for protecting the environment do not fully live up to their goals).

56. *See* JAMIE BENIDICKSON, ENVIRONMENTAL LAW 46 (2d ed. 2002).

57. *See* Yanomami v. Brazil, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. § 1, ¶ 3 (1984-1985) (describing the devastating effects on an indigenous group caused by a highway built through their land); Complaint for Damages Demand for Jury Trial at 1-2, Native Village of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-1138) (describing the detrimental effects of global warming on an indigenous group in Alaska); Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439, 451 (2009).

58. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 7 (U.K.).

59. Singh v. Minister of Emp't & Immigration, [1985] 1 S.C.R. 177, 205 (Can.).

60. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 24(1) (U.K.).

life or health.[61] An analysis of the Supreme Court of Canada's jurisprudence shows that the right to a healthy environment is a logical derivative of the rights to life and security of the person, and other Canadian courts addressing Section 7 claims in environmental pollution cases have implied the same.

A. The Rights to Life and Security of the Person

The rights to life and security of the person are closely related, and often, something that violates the right to life also violates the right to security of the person, and vice versa.[62] This is because protection from risk to health is protected by the Section 7 right to security of the person.[63] If a person has an increased risk of negative health effects, often they will also have an increased risk of death, and vice versa. The Canadian Supreme Court has found that at the very least, the right to life means that a person may not be deprived of their life, nor face a significant risk of loss of life, due to state action.[64]

The right to security of the person protects the right of a person as to three main aspects: (1) personal autonomy, that is, the right to make decisions about one's own body; (2) physical integrity; and (3) psychological integrity.[65] While an intrusion of any one of these three aspects can be enough to cause a security of the person violation,[66] these three aspects are often interconnected because physical harm or realistic fear of physical harm can cause severe psychological harm and is itself often caused by an invasion of personal autonomy.[67]

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61. *See supra* note 47 and accompanying text.

62. *See, e.g.*, Chaoulli v. Québec (Attorney Gen.), [2005] 1 S.C.R. 791, 850 (Can.) (McLachlin, C.J., concurring) (finding that prohibition on private health care not only violates the Section 7 right to life, but also the Section 7 right to security of the person).

63. In the environmental context, threats to life and the physical integrity (health) aspect of the right to security of the person are most often at issue.

64. Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 45 (Can.).

65. Rodriguez v. British Columbia (Attorney Gen.), [1993] 3 S.C.R. 519, 587-88 (Can.).

66. *See* New Brunswick (Minister of Health & Cmty. Servs.) v. G.(J.), [1999] 3 S.C.R. 46, 49 (Can.) (finding a violation of the right to security of the person where psychological harm, but not physical harm or personal autonomy, was implicated).

67. *See Chaoulli*, [2005] 1 S.C.R. at 848 (McLachlin, J., concurring) (finding a law that caused increased waiting times for medical treatment not only caused physical harm, but also "serious and profound effect[s] on a person's psychological integrity" in violation of the Charter right to security of the person); *Rodriguez*, [1993] 3 S.C.R. at 589 (holding that personal autonomy, physical integrity, and psychological integrity were all infringed when, due to the prohibition on assisted suicide, a woman would experience unwanted total paralysis and physical and psychological pain at the end of her terminal illness); R. v. Morgentaler, [1988] 1 S.C.R. 30, 56-57, 101 (Can.) (holding that a law making it harder for women to obtain an abortion not only violated a woman's interest in physical integrity by increasing risk of physical harm, but also

Section 7 applies even to state action that only indirectly causes the deprivation of life or security of the person.[68] In the 2002 case *Suresh v. Canada (Minister of Citizenship & Immigration)*, the Canadian Supreme Court found that government "deport[ation of] a refugee to face a substantial risk of torture" violates that refugee's rights to life and security of the person.[69] The Court wrote: "We . . . disagree with the . . . suggestion that, in expelling a refugee to a risk of torture, Canada acts only as an 'involuntary intermediary' . . . . Without Canada's action, there would be no risk of torture."[70] As the Court explained, the government is liable under Section 7 "where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation."[71]

Thus, where a government actor issues a permit that allows a contaminant to be released into the environment that results in a Section 7 deprivation to life or security of the person, the government actor should be found liable. This is because harm to life and health is an entirely foreseeable consequence of giving permission to release a harmful contaminant into the environment. The very purpose of environmental regulations that require entities to obtain permits before emitting pollutants is to prevent this type of harm.[72]

In 2005, the Canadian Supreme Court again indicated that state action that increases the chance that a person will die or experience serious health consequences infringes upon the rights to life and security of the person.[73] In *Chaoulli v. Québec (Attorney General)*, the Canadian Supreme Court considered the validity of a Québec law that made it

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violated her interest in psychological integrity because the uncertainty of treatment caused her serious psychological stress); *Morgentaler*, [1988] 1 S.C.R. at 173 (Wilson, J., concurring) (finding that a woman's interest in personal autonomy is violated by a law creating obstacles to obtaining an abortion).

68. *Suresh*, [2002] 1 S.C.R. at 36.

69. *See id.* at 13.

70. *Id.* at 36.

71. *Id.* at 35; *see also* United States v. Burns, [2001] 1 S.C.R. 283, 284-85 (Can.) (forbidding the Canadian government from extraditing a Canadian citizen to the United States without securing a guarantee that the death penalty would not be used because without the guarantee, the Canadian government would violate the Section 7 right to life).

72. For example, the long title of the Canadian Environmental Protection Act, S.C. 1999, c. 33, identifies its purpose as "pollution prevention" and "protection of the environment and human health." *See also* Collins, *supra* note 44, at 17 ("Where a government agency issues a license, permit, or certificate of approval specifically permitting a particular environmentally harmful emission, discharge, or course of conduct, there is no doubt that government action has occurred . . . .").

73. *See* Chaoulli v. Québec (Attorney Gen.), [2005] 1 S.C.R. 791, 850 (Can.) (McLachlin, C.J., concurring).

virtually impossible to access private health care in the province.[74] The majority found that the widespread waiting times in the public health care system increased the risk of health complications and death.[75] Thus, they found that the impugned law, by making it harder to access timely health care, violated the rights to life and personal inviolability under the Québec Charter of Human Rights and Freedoms, although they did not address the question of whether the law also violated the rights to life and security of the person under the Charter.[76] Three concurring Justices found that the law also violated the rights to life and security of the person under Section 7 of the Charter.[77] As one author notes, "[T]he *Chaoulli* decision suggests that government conduct resulting in health damage, including an increased risk of death or disability[,] violates the physical aspect of security of the person."[78]

The Canadian Supreme Court implied that environmental harm that increases the risk of death or health complications would violate the Section 7 rights to life and security of the person in the 1985 case *Operation Dismantle Inc. v. R.*[79] In that case, the appellants claimed that the Canadian government, by allowing the U.S. government to test cruise missiles in Canada, violated their Section 7 rights because of an increased risk of nuclear conflict.[80] The Court dismissed the claim because it found there was no sufficient link between the government's decision and an increased risk of nuclear war.[81] The Court stated that in order for the appellants to succeed in their claim, they must be able to show "a violation or a threat of violation" of their Charter rights.[82] The Court reasoned:

> Since the foreign policy decisions of independent and sovereign nations are not capable of prediction . . . to any degree of certainty approaching probability[,] the causal link between the decision of the Canadian government to permit the testing of the cruise and the results that the appellants allege could never be proven.[83]

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74. *Id.*
75. *Id.* at 818 (majority opinion).
76. *Id.* at 842.
77. *Id.* at 850 (McLachlin, C.J., concurring). The majority did not address this issue because it was unnecessary to decide the case before them. *See id.* at 791 (majority opinion).
78. Collins, *supra* note 44, at 24.
79. [1985] 1 S.C.R. 441, 443 (Can.).
80. *Id.* at 442.
81. *Id.* at 451.
82. *Id.* at 450.
83. *Id.* at 452.

However, by its reasoning, the Canadian Supreme Court indicated that if a sufficient link was shown between government action and loss of life or negative health effects, or threat thereof, then such action would be in violation of Section 7.

That same year, in the case *Manicom v. County of Oxford*, the then-Ontario High Court of Justice considered a case where the plaintiffs claimed that a government decision to allow a private landfill in their neighborhood violated their Section 7 interests because their property values would be reduced.[84] The majority dismissed the case because property interests are not protected under Section 7, but they noted that if the plaintiffs had claimed damage to their health, the claim may have succeeded.[85] The dissenting judge accepted the oral argument made by the plaintiffs' counsel that the landfill would cause harm to the plaintiffs' health and found a Section 7 violation.[86]

In the 1994 case *Energy Probe v. Canada (Attorney General)*, the General Division of the then-Ontario Court of Justice also indicated that environmental harm could violate Section 7 rights to life and security of the person.[87] In that case, the plaintiffs claimed that the Canadian law limiting the liability of damages for a nuclear accident resulted in an increased danger to people living nearby and therefore violated their Section 7 rights.[88] The court found that the plaintiffs had not proven a sufficient link between the challenged law and an increased risk to the lives or health of the plaintiffs.[89] However, the court, by its reasoning, implied that if a sufficient link was shown, the act would be in violation of Section 7.[90]

Therefore, looking at the current Canadian jurisprudence, it appears that in the right circumstances, a Canadian court should find that environmental harm causing risk to life or health of individuals violates Section 7 of the Charter.[91] Thus far, the main obstacle plaintiffs have found in succeeding with such a claim is proving a sufficient link between the harm alleged and an increased risk to life and health.[92] However, in the case of the pollution in the Aamjiwnaang community,

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84. (1985), 52 O.R. 2d 137, 144, 146 (Can. Ont. H.C.J.).
85. *See id.* at 145.
86. *Id.* at 156 (Potts, J., dissenting).
87. (1994), 17 O.R. 3d 717 (Can. Ont. Gen. Div.).
88. *Id.*
89. *See id.* at 732.
90. *See id.* at 742.
91. *See* Collins, *supra* note 44, at 42 (noting that the there is no doctrinal problem with applying Section 7 to environmental claims).
92. *See id.*

the pollutants being emitted and the amounts being emitted are known to increase the risk of serious health problems and death significantly.[93] Furthermore, the government will not be able to prove that these risks are not materializing into actual health problems because the Aamjiwnaang community members are experiencing serious negative health problems.[94]

B. Limits on Section 7 Rights

Section 7 of the Charter declares, "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*."[95] Thus, a person's right to life or security of the person under the Charter may be deprived if done so in accordance with the principles of fundamental justice.[96]

In addition, Section 1 declares, "The [Charter] 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."[97] Thus, an individual's right to life or security of the person under the Charter may also be deprived if done so through "reasonable limits prescribed by law."[98]

1. Principles of Fundamental Justice

In deciding whether a principle of fundamental justice will justify an infringement of a person's Section 7 rights to life, liberty, or security of the person, a court will look to whether the principle is a "basic [tenet] of our legal system."[99] For example, the Canadian Supreme Court has found that protection of a child's life and health is a basic tenet of the Canadian legal system.[100] Thus, the Court found that a law allowing the removal of a child from their parents' custody if necessary to give life-saving medical treatment complies with the principles of fundamental justice and does not violate any parental liberty interest that may exist in

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93. *See supra* notes 21-26 and accompanying text.
94. *See supra* notes 28-34 and accompanying text.
95. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 7 (U.K.) (emphasis added).
96. *Id.*
97. *Id.* § 1 (emphasis added).
98. *Id.*
99. *In re* B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 503 (Can.).
100. B.(R.) v. Children's Aid Soc'y of Metro. Toronto, [1995] 1 S.C.R. 315, 319 (Can.).

making medical decisions for one's own child under Section 7 of the Charter.[101]

The Canadian Supreme Court has also found that the principle of the sanctity of life is a basic tenet of the Canadian legal system.[102] Thus, the law forbidding assisted suicide complies with the principles of fundamental justice because it protects life and protects the "vulnerable who might be induced in moments of weakness to commit suicide."[103] Consequently, the Court found that the prohibition on assisted suicide was valid, even though it prevented a pain-ridden and terminally ill patient from choosing when to die and thereby infringed her security of the person interests in autonomy over her body and being free from physical and psychological pain.[104]

In these examples, a Section 7 right was justifiably infringed upon in order to protect life or health of other human beings. By contrast, it is difficult to imagine a situation where environmental harm is necessary to protect the life or health of a human being. The opposite is the case. Removing the environmental harm will protect life or health of a human being, which itself has been found by the Canadian Supreme Court to be a principle of fundamental justice.[105]

2. Section 1 of the Charter

If a measure infringes upon a Section 7 right and is not in accordance with the principles of fundamental justice, the government may still attempt to justify its actions under Section 1 of the Charter. Section 1 allows the government to infringe upon a right if the government is justified in doing so and the infringement is reasonable.[106] The test interpreting Section 1, promulgated in *R. v. Oakes*, requires that the government demonstrate four things in order to justify a Charter right infringement: (1) the governmental objective must be pressing and

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101. *Id.* at 370-71, 374; *id.* at 392 (L'Heureux-Dubé, J., concurring and dissenting) (agreeing with the reasoning of the plurality on Section 7); *id.* at 428 (Sopinka, J., concurring) (agreeing with the plurality that no breach of fundamental justice had occurred, but finding it unnecessary to decide whether parents have a Section 7 liberty interest in making medical decisions for their children).

102. Rodriguez v. British Columbia (Attorney Gen.), [1993] 3 S.C.R. 519, 605 (Can.).

103. *Id.* at 595.

104. *Id.* at 589, 608.

105. *See Children's Aid Soc'y of Metro. Toronto*, [1995] 1 S.C.R. at 319, 370-71, 374, 392, 428; *Rodriguez*, [1993] 3 S.C.R. at 589, 595, 605, 608.

106. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.) ("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.").

substantial; (2) the means chosen must be rationally connected to the objective (not unfair, arbitrary, or based on irrational considerations); (3) the means chosen must impair "as little as possible" the right or freedom in question; and (4) there must be proportionality between both the effects of the measures and the objective and between the deleterious and salutary effects of the measures.[107]

Section 7 violations are unlikely to be saved by Section 1.[108] The Canadian Supreme Court has stated, "Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[109] There are two reasons for this. First, Section 7 rights are fundamental rights that only very rarely may be overridden by other societal interests.[110] Second, rarely, if ever, will a violation of a principle of fundamental justice be justified in a free and democratic society.[111]

Thus, it seems unlikely that the government would be able to justify complicity in causing environmental harm under the principles of a fundamental justice analysis or under a Section 1 analysis. Possible arguments that could be made by the government are that if industries are shut down, people will lose their jobs and money will be lost. However, the Canadian Supreme Court has held that monetary considerations will only rarely justify Charter infringements under Section 1.[112] Furthermore, other remedies may be found that do not require the industries to shut down and/or people to lose their income. For example, the government could require the industries to clean up the existing pollution and to use technology that reduces the pollution in the future, or the government could create a compensation fund for any people who may lose their jobs. Finally, even though the Charter may allow Section 7 infringements, such infringements are likely to violate international law, as explained below.[113]

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107. [1986] 1 S.C.R. 103, 105-06 (Can.); *see also* Dagenais v. Canadian Broad. Corp., [1994] 3 S.C.R. 835, 840 (Can.).

108. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 900-01 (4th ed. 1997).

109. *In re* B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 518 (Can.).

110. *See* New Brunswick (Minister of Health & Cmty. Servs.) v. G.(J.), [1999] 3 S.C.R. 46, 92 (Can.).

111. *See id.*

112. *See* Newfoundland (Treasury Bd.) v. Nfld. Ass'n of Pub. & Private Emps., [2004] 3 S.C.R. 381, 383-84 (Can.).

113. *See infra* Part III.

C. Government Liability Under Section 7

As discussed above, under current jurisprudence, Canadian courts should find the government liable under Section 7 for environmental harm caused by positive actions of the government.[114] Although current jurisprudence has not yet reached the question, any court presented with the issue should find that the government is also liable under Section 7 when it fails to protect people from environmental harm caused by third parties.

1. The Government Is Liable Under Section 7 When It Is the "But-For" Foreseeable Cause of Environmental Harm

Charter claims may only be brought against the government, not private actors.[115] Thus, Charter claims may be brought against the Executive, Legislative, and Administrative Branches of government.[116] Many, if not most, environmental harms would not occur but for positive government action. For example, the government requires permits to be obtained before an individual or company may release harmful contamination into the air, water, or land, and government agencies issue permits for many types of activities that cause environmental harm.[117] As the Canadian Supreme Court explained in *Suresh*, the government is liable under Section 7 when the government affirmatively enables harm to occur and when that harm foreseeably causes a breach of a Section 7 right to life or security of the person.[118] Even though the government does not act directly to release harmful pollution into the environment,

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114. *See supra* Part II.A.

115. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 32 (U.K.) ("This Charter applies . . . to the Parliament and government of Canada . . . and . . . to the legislature and government of each province."); Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 574 (Can.) (holding that the Charter can only be applied against government actors).

116. *See* Eldridge v. British Columbia, [1997] 3 S.C.R. 624, 643-44 (Can.).

117. *See, e.g.*, Province of Ontario Environmental Protection Act, R.S.O. 1990, c. E.19, § 14 (Can.) ("[A] person shall not discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment [without authorization]."); Province of British Columbia Oil and Gas Commission Act, R.S.B.C. 1998, c. 39 (Can.) (requiring British Columbia governmental actors to regulate all oil and gas activities occurring within the province and the Oil and Gas Commission to approve all such activities); Province of Nova Scotia Gas Plant Facility Regulations, R.S.N.S. 1989, c. 147, § 6-7 (Can.) (requiring that a company in Nova Scotia must obtain a permit to construct a gas facility and a license to operate it).

118. Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 13, 35-36 (Can.); *see also* United States v. Burns, [2001] 1 S.C.R. 283, 284-85 (Can.); Collins, *supra* note 44, at 17-18 ("Where a government agency issues a license, permit, or certificate of approval specifically permitting a particular environmentally harmful emission, discharge, or course of conduct, there is no doubt that government action has occurred.").

the government action in granting the permit enables the Charter violation.[119]

2. The Government Should Also Be Found Liable Under Section 7 When It Neglects To Affirmatively Protect Section 7 Environmental Rights

One scholar notes that the question of whether Canada has positive obligations in the environmental context is largely moot because "governments at all levels in Canada have thoroughly and vigorously occupied the [environmental] field through comprehensive environmental Acts and agencies" and that therefore this scheme must comply with Charter guarantees.[120]

However, although most environmental harm can be attributed to government action because the government has occupied the field of environmental regulation, it is possible that environmental harm may occur that cannot be attributed to the Canadian government's direct or indirect actions. For example, global warming, caused mainly by greenhouse gas emissions from countries other than Canada, could cause flooding of coastal towns and cities within Canada. Pollution from a factory located within the United States, located very close to the Canadian border, could travel into Canada and imperil life or health within Canada. Finally, Canada's environmental regulations, by failing to regulate certain chemicals harmful to human health, could be seen as a failure to act, rather than affirmative action. There is a good case to be made that even in the face of this type of environmental harm, the Canadian government has affirmative duties to protect the life and health of individuals located within Canada.

These duties would require, in the case of a flood, the government to respond adequately to protect life and health after a flood event or to respond beforehand by issuing warnings and evacuation procedures. In the case of pollution emanating from outside the country, the government could fulfill its duty by adequately monitoring the pollution, warning individuals affected, providing alternate temporary living arrangements for individuals affected, and pursuing negotiations and international legal remedies to halt the pollution. In the case of outdated regulations, the government's affirmative duty would be to provide laws that regulate pollutants in a way that is safe for human health. If the government

119. *See* Collins, *supra* note 44, at 17.
120. *See id.* at 33-34.

neglects its affirmative duties, then redress should be provided by the courts.[121]

Canadian jurisprudence thus far has not explicitly recognized a positive governmental obligation to protect the Section 7 rights to life or security of the person.[122] Instead, Section 7 has been interpreted as restricting the ability of the state to infringe upon these rights.[123] However, the Canadian Supreme Court has noted that the Charter should be treated as a "living tree" and that in the right circumstances, Section 7 could be interpreted to place a positive obligation on the government.[124]

The Canadian Supreme Court has also recognized that Charter rights and freedoms should be interpreted in a purposive and generous, not legalistic, manner in order to "secur[e] for individuals the full benefit of the *Charter*'s protection."[125] Canadian Supreme Court Justice Arbour has pointed out that denying the positive governmental obligation to protect Section 7 rights would be to "deny any real significance to the *Charter* guarantee[s]."[126]

Justice Arbour has analyzed Section 7 and found, "[E]very suitable approach to *Charter* interpretation . . . mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension."[127] She pointed out that the Charter imposes numerous positive obligations on the government, including obligations to ensure the rights to vote, the right to trial within a reasonable time, the right to trial by jury in certain cases, the right to an interpreter in penal proceedings, and the right to minority language education.[128] Indeed, in the very context of the right to life, the Canadian Supreme Court has recognized that the state has a positive duty to intervene when a child's rights to life and health are in jeopardy.[129]

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121. Doe v. Bd. of Comm'rs of Police (1990), 74 O.R. 2d 225, 236 (Can. Ont. H.C.J.) (finding that government inaction may breach Section 7 when harm results from government failure to warn about foreseeable assault).

122. *See id. But see* Irwin Toy Ltd. v. Québec (Attorney Gen.), [1989] 1 S.C.R. 927, 1003 (Can.) (recognizing that rights included in Section 7 may include such positive economic rights as the right to food and that international covenants should be looked at to determine what rights Section 7 includes).

123. Gosselin v. Québec (Attorney Gen.), [2002] 4 S.C.R. 429, 619 (Can.) (Arbour, J., dissenting).

124. *Id.* at 491-92 (majority opinion).

125. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 344 (Can.).

126. *Gosselin*, [2002] 4 S.C.R. at 619 (Arbour, J., dissenting).

127. *Id.* at 624.

128. *Id.* at 621.

129. *See* Winnipeg Child & Family Servs. v. K.L.W., [2000] 2 S.C.R. 519, 570 (Can.) ("[I]n cases of imminent danger, the child's right to life and health, and the state's duty to

As Justice Arbour noted, the plain reading of Section 7 imposes positive obligations on the government because the language reads, 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."[130] The wording is not everyone has "the right *not to be deprived* of life, liberty and security of the person except in accordance with the principles of fundamental justice," which would more convincingly require positive state action before a Section 7 violation could be found.[131]

Furthermore, the Canadian government already engages in positive actions to protect Charter rights.[132] The Canadian government defends life and security of the person rights by protecting people from assault and murder (committed by nongovernmental agents) by civil redress in the courts and criminal law prohibitions on assault and murder.[133] The government could decide to repeal the criminal code prohibitions, thus allowing people to hurt others without consequences. However, if it did so, then surely the government would be in violation of Section 7 because of its failure to positively protect people within its jurisdiction from murder and assault.[134] Similarly, requiring the government to positively protect the right to a healthy environment could be as simple as recognizing the right and providing redress and compensation for individuals in cases where the right to a healthy environment has been violated.[135] When looking at international law, discussed below, the conclusion that Canada has positive obligations to protect the life and security of the person interests of its people becomes even more compelling.

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intervene to protect that right, are so compelling as to justify *post facto* assessment of state action.").

130. *Gosselin*, [2002] 4 S.C.R. at 613 (Arbour, J., dissenting) (emphasis added).

131. *Id.* at 616.

132. *See* Hughes & Iyalomhe, *supra* note 55, at 245.

133. *See id.*

134. Öneryildiz v. Turkey, 2004-XII Eur. Ct. H.R. 79, 116 (noting that under the European Convention, the right to life requires "criminal penalties [to be] applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of [a competent] investigation").

135. *See* Hughes & Iyalomhe, *supra* note 55, at 245. Note, however, that it is likely that the government also has a duty under international law to proactively make sure that such harm does not recur. See *infra* Part III.A for a discussion of Canada's treaty obligations.

D. Application of Canadian Law to the Aamjiwnaang First Nation Community

The situation of serious environmental pollution affecting the lives and health of the Aamjiwnaang community is almost entirely due to direct or indirect government action.[136] Presumably, each polluting facility was given and is continuously given permission by a government entity to build and/or emit pollutants.[137] This type of pollution is attributable to the government because the government's positive actions are the cause of the harm.[138] Even if some of the pollution is arguably not caused by government action, but rather government inaction in the case of not updating the laws and regulations to account for modern scientific understandings and circumstances, the government should still be found liable.[139]

However, some of the pollution may be caused by illegal emissions, legal emissions, unregulated emissions, emissions coming from the United States,[140] and/or lack of government enforcement of environmental laws and regulations. Any of this pollution that causes harm to the Aamjiwnaang people's health should also be attributed to the government under Section 7 because the government's failure in its affirmative duty to protect its peoples' life and security of the person rights has resulted in a Section 7 cognizable harm.[141]

Under the analysis discussed above, the people of the Aamjiwnaang community have clearly had their Section 7 Charter rights to life and security of the person violated. The Aamjiwnaang face a significantly elevated risk of a number of serious diseases and death due to the chemicals found in the air of their community.[142] Additionally, they are suffering from a number of serious health problems at much higher rates than the average Canadian.[143]

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136. The precise percentage of the harm that is caused by government action as opposed to government inaction would be a factual determination that is outside the scope of this Article.

137. *See supra* note 35 and accompanying text.

138. *See supra* Part II.C.1.

139. *See supra* Part II.C.2. However, a better case would be made that outdated laws and regulations, or laws that do not take into account modern scientific understandings about the cumulative effect of chemical emissions, should be seen as positive government action. *See* Collins, *supra* note 44, at 18 (noting that such nonprotective regulations are positive government actions).

140. It is likely that some of the emissions affecting the Aamjiwnaang community come from the United States. *See* MacDonald & Rang, *supra* note 15, at 6 (noting that there are sixteen American facilities releasing toxic substances located within twenty-five kilometers of Sarnia).

141. *See supra* Part II.C.2.

142. *See supra* notes 21–26 and accompanying text.

143. *See supra* notes 28–34 and accompanying text.

However, there is no scientific study definitively linking the elevated rate of health problems to the pollution,[144] so theoretically the health problems could be caused by factors other than the pollution, such as if there were an unusually high rate of smoking in the community or distinctive genetic factors. While a study definitively linking the pollution to the health problems would be ideal to prove causation in court, it is not necessary because proving a significantly increased risk of health problems is sufficient to show a Section 7 violation. As the Canadian Supreme Court has noted, if government action results in a substantial[145] or increased[146] risk to life or health, or causes a threat of violating these interests,[147] then the Section 7 rights to life and security of the person are violated.[148] Only if Aamjiwnaang community members were not experiencing elevated rates of negative health problems could the government plausibly argue that the significantly elevated risk of disease and death caused by the pollution in the area has not manifested itself into actual disease and death in the community. However, that is not the case because community members *are* experiencing many serious health problems at much higher than average rates.[149]

Additionally, the psychological health of Aamjiwnaang community members has been severely affected. Community members worry about the health risks from being exposed to so many chemicals, and many are acutely aware of the fact that their very lives are threatened.[150] One community member describes throwing up and crying when she found out that the heavy pollution in the area was the likely cause of the skewed birth-sex ratio in her community.[151] As one expert on indigenous people's mental health explains:

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144. However, the study on sex ratios did compare the Aamjiwnaang birth-sex ratio to a control First Nation community from a "genetically similar, yet geographically distinct" band and found that the control group had a similar sex ratio to the general Canadian population, while the Aamjiwnaang sex ratio was drastically different from both the control group and the rest of Canada. *See* Mackenzie, Lockridge & Keith, *supra* note 9, at 1296.

145. Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 13 (Can.) (holding that a substantial risk of torture violates Section 7).

146. Chaoulli v. Québec (Attorney Gen.), [2005] 1 S.C.R. 791, 820 (Can.) (noting that medical delays causing additional risks to health would violate the Section 7 security of the person interest); *id.* at 846 (McLachlin, C.J., concurring) (noting that an increase in the risk of death by 5% within six months of surgery is significant for purposes of Section 7).

147. Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441, 443 (Can.) (finding that claimants must show "a violation or a threat of violation" of their Charter rights in order to succeed).

148. *See, e.g.*, *id.*; *Chaoulli*, [2005] 1 S.C.R. at 820; *Suresh*, [2002] 1 S.C.R. at 13.

149. *See supra* notes 28–34 and accompanying text.

150. MacDonald & Rang, *supra* note 15, at 8 (noting that fear is the most commonly reported impact of the pollution).

151. *See* Lean & Mittelstaedt, *supra* note 14.

> Being historically, psychologically, spiritually, and culturally connected to one's land while being unable to preserve the land or protect one's self or community from increased risk of physical and psychological harm would create immeasurable stress for people in Aamjiwnaang. The individual and community stresses would be cumulative and compounding for a cultural group which is committed to staying as a collective on the land and who therefore do not experience mobility as a realistic option for protection of themselves and their children. Both the decision to stay and the decision to go would reasonably be expected to present tremendous internal conflict and stress for individual members of a First Nation community and the collective as a whole.[152]

This expert notes, "[T]he people of Aamjiwnaang are exposed to chronic social stress in the form of sirens, noxious smells, evacuation orders, and elevated levels of fear and worry about their health and safety."[153]

The Canadian Supreme Court has held that a violation of the psychological integrity aspect of an individual's right to security of the person occurs when state action has "a serious and profound effect on a person's psychological integrity."[154] This effect "need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety."[155] Thus, it is likely that under Section 7, not only have Aamjiwnaang community members had the physical integrity aspect of their right to security of the person violated by the pollution, they have also had the psychological integrity aspect violated.

III. INTERNATIONAL LAW ON THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT

As described in Part II, there are good reasons, solely based on domestic law, why Canadian courts should find that the Charter rights to life and security of the person require the government to protect the right to a healthy environment. When looking at international law, this conclusion becomes even more compelling.

Canadian courts have held that domestic law should be interpreted as much as possible to conform to Canada's treaty obligations, even when the treaty obligations have not been implemented into domestic

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152. *See* Terry Mitchell, Report Delivered to Counsel for the Applicants Re: *Lockridge v. Ontario (Minister of the Env't)* 9 (Apr. 26, 2011) (unpublished report) (on file with author).

153. *See id.* at 11; *see also* Riemer, *supra* note 53, at 12 (finding that "the likelihood that this environmental stressor [, Sarnia's Chemical Valley,] will cause psychological distress is high").

154. New Brunswick (Minister of Health & Cmty. Servs.) v. G.(J.), [1999] 3 S.C.R. 46, 49 (Can.).

155. *Id.*

legislation.[156] Additionally, customary international law is automatically part of the common law of Canada,[157] and courts should strive to find no contradiction between customary international law and domestic law.[158] Canada does not have a free-standing right to a healthy environment in its Charter. However, because the right to a healthy environment is a human right existing under international treaty law and international customary law, Canadian courts should interpret the Charter rights to life and security of the person in accordance with this international human right.[159]

Today, international law pervades many areas of law that used to be solely within the province of national governments, such as human rights and environmental law.[160] Canada is a party to approximately 4000 international treaties, including 40 on human rights.[161] Therefore, Canadian courts must not only take account of fundamental principles of Canadian society when reaching decisions, but also fundamental principles of the international community.[162] As noted by one Canadian Supreme Court Justice:

> The *Charter* conforms to the spirit of [the] contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law [are] relevant and persuasive sources for interpretation of the *Charter*'s provisions.[163]

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156. *See* Pushpanathan v. Canada (Minister of Citizenship & Immigration), [1998] 1 S.C.R. 982 (Can.) (interpreting a national act to ensure that it does not violate an international treaty); Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3 (Can.) (same); Slaight Commc'ns Inc. v. Davidson, [1989] 1 S.C.R. 1038 (Can.) (holding that when courts interpret the Charter, they should regard Canada's international human rights treaty obligations); Irwin Toy Ltd. v. Québec (Attorney Gen.), [1989] 1 S.C.R. 927 (Can.) (recognizing that international covenants should be looked at to determine what rights Section 7 includes); Nat'l Corn Growers Ass'n v. Canada (Imp. Tribunal), [1990] 2 S.C.R. 1324 (Can.).

157. *See In re* Powers of Ottawa & Rockcliffe Park, [1943] S.C.R. 208, 209 (Can.) (finding that because customary international law grants certain sovereign and diplomatic immunities to foreign states exempting them from local taxation by a receiving or host state, Ontario may not tax the property belonging to foreign states); *see also* R. v. Hape, [2007] 2 S.C.R. 292, 316 (Can.) (stating that customary international law is automatically adopted as Canadian law unless Canadian legislation is explicitly contrary); Bouzari v. Islamic Republic of Iran (2004), 71 O.R. 3d 675, 690 (Can. Ont. C.A.).

158. *See* Jose Pereira E Hijos, S.A. v. Canada (Attorney Gen.), [1997] 2 F.C. 84, 100 (Can.).

159. *See* Collins, *supra* note 44, at 20.

160. *See* Claire L'Heureux-Dubé, *From Many Different Stones: A House of Justice*, 41 ALBERTA L. REV. 659, 662 (2003).

161. *Id.*

162. *Id.* at 663.

163. *In re* Pub. Serv. Emp. Relations Act, [1987] 1 S.C.R. 313, 348 (Can.) (Dickson, C.J., dissenting).

A. Canadian Treaty Commitments Affecting Positive Governmental Obligations

Under international treaty law, Canada has negative *and positive* obligations to protect the rights to life and security of the person as well as other rights related to the protection of a healthy environment. Canada is a party to the widely ratified International Covenant on Civil and Political Rights (ICCPR).[164] The ICCPR requires states parties to protect the rights of their citizens to life and security of the person.[165]

The ICCPR requires that states take positive action to ensure that the rights contained within it are fulfilled.[166] Article 2(1) requires governments to ensure the protection of rights.[167] Therefore, the ICCPR on its face requires more than that a government simply refrain from acting in ways that would violate the rights therein.

The ICCPR created the United Nations Human Rights Committee (UNHRC)[168] to make reports, comment on, and adjudicate disputes arising under the Covenant.[169] The UNHRC agrees that the obligations contained in the ICCPR are both negative and positive.[170] It has opined that states parties may be in violation of their duties under the ICCPR not just for violations by their agents, but also for acts of private persons, where the state fails to take appropriate measures to prevent the harm.[171] The UNHRC notes:

> [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities . . . . There may be circumstances in which a failure to ensure Covenant rights . . . would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[172]

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164. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171. This convention has 167 parties.

165. *Id.* art. 6.

166. *Id.* pmbl.

167. *Id.* art. 2.

168. *See id.* art. 28.

169. *Id.* art. 40.

170. Human Rights Comm., General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

171. *Id.* ¶ 8.

172. *Id.*

The UNHRC indicated in the 1984 decision *E.H.P. v. Canada* that Canada has positive obligations to prevent environmental harm under both the ICCPR and the right to life found in Section 7 of the Charter.[173] In that decision, an individual on behalf of herself and others in Port Hope, Ontario, asserted that the storage of nuclear waste in the community, mostly on private dumpsites, threatened their right to life.[174] The UNHRC found that a valid claim had been stated and that the claim "raise[d] serious issues with regard to the obligation of states parties to protect human life," but dismissed the case because the petitioner had failed to exhaust domestic remedies.[175] The UNHRC specifically noted that the petitioner could "invoke the Canadian Charter of Human Rights and Freedoms which explicitly (Section 7) protects the right to life."[176] This decision, finding that the Charter protects environmental depravations of life and that Canada has an obligation to protect life threatened by environmental degradation, should be accorded significant weight by Canadian courts.

Thus, if there was any doubt as to whether Section 7 rights to life and security of the person require the Canadian government to take positive action to prevent harm to a person even when that harm comes from nongovernment actors, this doubt should be laid to rest by looking at Canada's international treaty commitments. Because Canadian law requires that courts interpret domestic law, including the Charter, in accordance with treaty obligations whenever possible, Canadian courts should find that the government has positive obligations under Section 7.

B. Positive Governmental Obligations as Customary International Law

Although the 1948 Universal Declaration of Human Rights[177] was not originally considered binding on states, it is now widely accepted as a binding document because it represents customary international law.[178] Article 12 states: "No one shall be subjected to arbitrary interference

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173. Human Rights Comm., Communication No. 67/1980, U.N. Doc. CCPR/C/17/D/67/1980 (Oct. 27, 1982), *reprinted in* 2 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 20 (1990), *available at* http://www.worldcourts.com/hrc/eng/decisions/1982.10.27_EHP_v_Canada.htm [hereinafter Human Rights Comm. Decision, E.H.P. v. Canada].

174. *Id.* ¶ 1.

175. *Id.* ¶ 8.

176. *Id.*

177. Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

178. *See, e.g.*, Daniel Barstow Magraw, *Louis B. Sohn: Architect of the Modern International Legal System*, 48 HARV. INT'L L.J. 1, 7 (2007).

with his privacy, family, home or correspondence . . . . Everyone has the right to the protection of the law against such interference or attacks."[179] Governments clearly have positive obligations under this provision.

In interpreting a similar provision in the European Convention on Human Rights and Fundamental Freedoms (European Convention),[180] the European Court of Human Rights (ECHR) found that environmental pollution can infringe upon the human rights to family and home.[181] Therefore, customary international law should be interpreted as placing a positive obligation on governments to protect people from environmental harm.

In addition, the UNHRC is not the only international tribunal to have found that governments have positive obligations to protect people from environmental harm. In the case *Öneryildiz v. Turkey*, the ECHR found that government inaction in failing to prevent a municipal waste dump explosion that resulted in the deaths of several people was a violation of the right to life contained in the European Convention.[182] "Article 2 [the right to life] does not solely concern deaths resulting from the use of force by agents of the State but also . . . lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction."[183] Thus, there is a strong case to be made that under customary international law, there are positive obligations on governments to protect their people from environmental harm.[184]

C. Canadian Treaty Commitments Affecting the Right to a Healthy Environment

Another widely ratified treaty that Canada is party to is the International Covenant on Economic, Social and Cultural Rights (ICESCR).[185] Under article 12 of the ICESCR, everyone has a right to

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179. Universal Declaration of Human Rights, *supra* note 177, art. 12.

180. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

181. *See* Tătar v. Romania, No. 67021/01 (Eur. Ct. H.R. Jan. 27, 2009), http://echr.ketse.com/doc/67021.01-en-20070705/view/ (finding that Romania's failure to protect the applicants from health risks caused by a mining accident amounted to a violation of the European Convention article 8 rights to private and family life); Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1994).

182. 2004-XII Eur. Ct. H.R. 79, 110.

183. *Id.*

184. *Cf.* Collins, *supra* note 44, at 32-33 ("At international law, it is clear that the right to life . . . carries with it an affirmative state duty to protect life within its borders, including through adequate environmental regulation where necessary.").

185. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

"the enjoyment of the highest attainable standard of physical and mental health" and states parties are required to "[improve] all aspects of environmental . . . hygiene."[186] The concept of "environmental hygiene" includes "the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health."[187] The U.N. Committee on Economic, Social, and Cultural Rights is clear that under the treaty, states parties have positive obligations to protect people from environmental harm:

> The right to health, like all human rights, imposes [an] obligation to . . . prevent third parties from interfering with [it and] to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right . . . . [A] State [must] take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This [includes] enact[ing and] enforc[ing] laws to prevent the pollution of water, air and soil . . . .[188]

Other provisions of the ICESCR relevant to the right to a healthy environment include provisions requiring states to work at reducing levels of stillbirth and infant mortality and creating an environment for the healthy development of children.[189] Article 10 recognizes the importance of the family and requires states parties to protect a mother's health for a reasonable period of time before and after childbirth.[190] Thus, because domestic law, including Charter provisions, should be interpreted to comply with these treaty obligations, the Section 7 rights to life and security of the person should be interpreted to include the right to a healthy environment—one that does not endanger a person's life, health, or family.

D. The Right to a Healthy Environment as a Customary International Norm

The right to a healthy environment is an emerging, if not established, norm of customary international law. The Canadian Supreme Court has held that domestic law, including the Charter, should

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186. *Id.* art. 12.

187. *See* Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14 (2000): The Right to the Highest Attainable Standard of Health, ¶ 15, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

188. *Id.* ¶¶ 33, 51.

189. International Covenant on Economic, Social and Cultural Rights, *supra* note 185, arts. 10, 12.

190. *Id.* art. 10.

be interpreted as much as possible to conform to customary international law.[191]

The Canadian Supreme Court has found that evidence of a norm of customary international law can be found if (1) there are multilateral instruments expressing the norm, (2) the weight of domestic practices around the world respects the norm, (3) international authorities respect the norm, and (4) academics deem the norm to be an emerging, if not established, norm of customary international law.[192] An analysis of these indicators of customary international law reveals that the right to a healthy environment is a norm of customary international law. Therefore, in order to conform to customary international law, Canadian courts should recognize that the rights to life and security of the person under Section 7 include the right to a healthy environment.

1. Multilateral Instruments Express the Right to a Healthy Environment

Multilateral instruments include nonbinding declarations and binding conventions to which Canada may or may not be a party.[193] Two widely attended international environmental conferences produced declarations supporting a human right to a healthy environment. The Stockholm Declaration[194] of 1972 states that each person "has the fundamental right to . . . adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."[195] The Rio Declaration on Environment and Development[196] of 1992 states: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[197]

Additionally, 115 countries have signed legally binding regional agreements that explicitly recognize the right to a healthy environment.[198]

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191. *See supra* notes 157–158 and accompanying text.

192. Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 40-41 (Can.).

193. *See id.*

194. *Stockholm Declaration*, *supra* note 48. The Stockholm Declaration was given 103 affirmative votes, 12 abstentions, and no negative votes. This document is not a treaty and so is not considered binding. *See* Shawkat Alam, *The United Nations' Approach to Trade, the Environment and Sustainable Development*, 12 ILSA J. INT'L & COMP. L. 607, 612 (2006).

195. *Stockholm Declaration*, *supra* note 48, princ. 1.

196. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), Annex 1 (Aug. 12, 1992). The U.N. Conference on Environment and Development was held in Rio de Janeiro in 1992 and was attended by 178 nations and 100 heads of state. The conference produced the Rio Declaration on Environment and Development.

197. *Id.*

198. *See* Boyd, *supra* note 49, at 171.

These agreements include (1) the African Charter on Human and Peoples' Rights, which states: "All peoples shall have the right to a general satisfactory environment favorable to their development,"[199] (2) the Additional Protocol to the American Convention on Human Rights, which states: "Everyone shall have the right to live in a healthy environment,"[200] and (3) the Arab Charter on Human Rights, which states: "Every person has the right to . . . a healthy environment."[201] These multilateral instruments clearly express the idea that there is a basic human right to a healthy environment.

There are other multilateral instruments that do not expressly protect the human right to a healthy environment, but imply such a right based on other provisions. For example, the Universal Declaration on Human Rights protects the right to "a standard of living adequate for the health and well-being of [people] and of [their] famil[ies]."[202] Additionally, "Motherhood and childhood are entitled to special care and assistance."[203] Thus, this multilateral instrument also supports the proposition that in order to comply with customary international law, countries must affirmatively protect their citizens from ill health caused by environmental harm.

2. Domestic Practices Respect the Right to a Healthy Environment

Another important element in identifying a norm of customary international law is to determine whether the norm is widespread in state practice.[204] Since the Stockholm Declaration first recognized a right to a healthy environment, legal recognition of the right to a healthy environment has spread rapidly and is now widespread throughout the world.[205] Out of 193 U.N. Member States, 177 nations recognize the right to a healthy environment somewhere in their laws—whether in their constitutions, statutory laws, court decisions, or ratifications of

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199. African Charter on Human and Peoples' Rights art. 24, *adopted* June 27, 1981, 1520 U.N.T.S. 217.

200. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) art. 11, *adopted* Nov. 17, 1988, 28 I.L.M. 161.

201. League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 8903 (2005) (entered into force Mar. 15, 2008). A translation is also available in English. *Arab Charter on Human Rights*, UNIV. MINN. HUMAN RIGHTS LIBRARY, http://www1.umn.edu/humanrts/instree/loas2005.html (last visited Nov. 22, 2013).

202. Universal Declaration of Human Rights, *supra* note 177, art. 25.

203. *Id.*

204. *See* Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 40-41 (Can.); CURRIE, *supra* note 52, at 163.

205. *See* Boyd, *supra* note 49, at 171.

international agreements.[206] This right has been instrumental in securing improved environmental conditions for people around the world.[207]

a. Many Nations Recognize a Constitutional Right to a Healthy Environment

As of 2012, ninety-two countries have an explicit constitutional right to a healthy environment.[208] Of these ninety-two, the courts of at least eight countries found an implicit constitutional right to a healthy environment within other constitutional provisions prior to the explicit right being incorporated into the constitution.[209] Additionally, in at least twelve other countries without an explicit constitutional right to a healthy environment, courts have found that the right is implicit in other provisions of the constitution, including in the rights to life and/or health.[210]

For example, India protects the right to life in Article 21 of its Constitution.[211] The Supreme Court of India has recognized that this right includes the right to a healthy environment, explaining that a "hygienic environment is an integral facet of [the] right to [a] healthy life and it would be impossible to live with human dignity without a humane

206. *See* Boyd, *supra* note 1, at 4; DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT 1 (2012).

207. *See* Boyd, *supra* note 1, at 4.

208. *See id.* at 6.

209. *See* Boyd, *supra* note 49, at 171.

210. *Id.* at 172. Cases around the world have recognized a right to a healthy environment contained within a constitutional right to life. *See, e.g.*, A.P. Pollution Control Bd. v. Nayudu, No. 368-371 (India Dec. 22, 2000), http://dspace.judis.nic.in/bitstream/123456789/15423/1/17451.pdf (stating that India recognizes the right to a healthy environment as part of the right to life and citing cases from Europe, Brazil, Columbia, South Africa, and the Philippines to support the proposition that the right to a healthy environment is implicit in the international human right to life); Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd., No. FHC/B/CS/53/05 (Nigeria F.H.C. Nov. 14, 2005), http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf (finding that the constitutional right to life includes the right to a healthy environment); West Pak. Salt Miners Labour Union (CBA) Khewra, Jhelum v. Dir., Indus. & Mineral Dev., (1994) SCMR 2061 (Pak.), http://www.globalhealthrights.org/wp-content/uploads/2013/02/SC-1994-Salt-Miners-v.-Director-Industries-and-Mineral-Development.pdf (finding that the right to life includes the right to have unpolluted water); Balegele v. DSM City Council, No. 90/1991 (Tanzania H.C. 1991), *in* 1 CASEBOOK ON ENVIRONMENTAL LAW 192 (Kenneth Kakuru & Irene Ssekyana eds., 2009), *available at* http://greenwatch.or.ug/files/downloads/CasebookonEnvironmentallaw.pdf (citing the Tanzanian constitutional right to life in an order to cease pollution); *see also* HUNTER, *supra* note 55, at 1359, 1362, 1364-65 (citing laws from countries including India, Tanzania, Colombia, Pakistan, Bangladesh, Nepal, Ecuador, and Costa Rica that recognize that the right to life includes the right to a healthy environment).

211. *See* INDIA CONST. art. 21.

and healthy environment."[212] In the 1995 case *Virendra Gaur v. State of Haryana*, the Court held that a municipal government could not build on public park land.[213] The Court reasoned:

> [The] right to life . . . include[s] [the] right to life with human dignity [and] encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, [and] sanitation without which life cannot be enjoyed. Any contra acts or actions [that] would cause environmental pollution[,] ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. . . . [T]here is a constitutional imperative on State Government and the municipalities, not [only] to ensure and safe-guard [the] environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment.[214]

Similarly, the Federal High Court of Nigeria, in interpreting its country's constitutional right to life found that the right "inevitably includes the right to [a] clean, poison-free, pollution-free healthy environment."[215] The High Court of Kenya has found that "[e]very person in Kenya is entitled to a clean and healthy environment" as part of customary international law and that "the denial of [a] wholesome environment is a deprivation of [the constitutional right to] life."[216]

Thus, many countries around the world have come to the logical conclusion that because a healthy environment is necessary to support a healthy life, the fundamental right to life implicitly includes a right to a

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212. Chinnappa v. Union of India, No. 202 (India Oct. 30, 2002), http://judis.nic.in/supremecourt/imgs1.aspx?Filename=18743 (ordering the winding down of mining activities in a national park and noting that Indian courts have interpreted the scope of the right to life expansively to forbid actions of both state and citizen that disturb the environmental balance); *see also* Indian Council for Enviro-Legal Action v. Union of India, No. 36 (India July 18, 2011), http://dspace.judis.nic.in/bitstream/123456789/28198/1/38261.pdf (finding that the national government's failure to control an industry's release of toxic chemicals violated the citizens' right to life); *A.P. Pollution Control Bd.*, No. 368-371 (finding that a government violates the right to life when it issues permits that cause dirty water); Vellore Citizens Welfare Forum v. Union of India, (1996) 5 S.C.R. 241 (India), *available at* http://judis.nic.in/supremecourt/imgs1.aspx?File name=15202 (ordering various tanneries to close and pay compensation to people who had been harmed by the discharge of untreated effluents into agricultural areas and local drinking water supplies and citing the constitutional protection of life).

213. No. 9151 (India Nov. 24, 1994), http://judis.nic.in/supremecourt/imgst.aspx?File name=19651.

214. *Id.*

215. *Gbemre*, No. FHC/B/CS/53/05, at *29, http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf (finding that industrial gas flaring was hazardous to health in the petitioner's community, striking down the regulations authorizing the flaring, and ordering the respondents to cease their flaring operations in the petitioner's community).

216. *See* P.K. Waweru v. Kenya, No. 118 (Kenya H.C. Mar. 2, 2006), http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=732107914213572552476 52 (finding that the government must provide a residential complex with an adequate wastewater treatment system).

healthy environment. This supports the proposition that the right to a healthy environment is part of customary international law.[217]

b. Many Nations Recognize the Right to a Healthy Environment in Their Laws

Out of 193 U.N. Member States, 177 nations recognize the right to a healthy environment somewhere in their laws—if not in their constitutions, then in statutory law, court decisions, or ratifications of international agreements.[218] For example, the right to a healthy environment exists explicitly in the African, Inter-American, and Arab human rights systems.[219] Additionally, many subnational governments also recognize the right to a healthy environment. For example, the constitutions of several states in the United States incorporate environmental rights.[220] Likewise, several provinces and territories in Canada protect environ-mental rights.[221]

Even in those countries where the right to a healthy environment is not explicitly enunciated, state practice often protects the right. For example, in *Oposa v. Secretary of the Department of the Environment & National Resources*, the Philippines' natural forest cover was being cut down to the detriment of the plaintiff's health.[222] The plaintiff asserted the right to a "balanced and healthful ecology."[223] The Supreme Court of the Philippines agreed and noted that a basic human right such as a right

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217. *See* Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 40-41 (Can.).

218. *See* Boyd, *supra* note 1, at 4.

219. *See supra* notes 199-201 and accompanying text.

220. *See, e.g.*, HAW. CONST. art. XI, § 9 (right to clean and healthy environment); ILL. CONST. art. XI, § 2 (right to healthy environment); MASS. CONST. art. XCVII (right to clean air and water, right to conservation); MONT. CONST. art. II, § 3 (right to healthy environment); PA. CONST. art. I, § 27 (right to clean air; pure water; and preservation of natural, scenic, historic and aesthetic values of environment); R.I. CONST. art. I, § 17 (right to use and enjoyment of natural resources); TEX. CONST. art. 16, § 59 (right to preservation of natural resources); *see also* Neil A.F. Popović, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338, 355-56 (1996) (noting that the constitutions of thirty-one states make some mention of the environment); BENIDICKSON, *supra* note 56, at 48-49.

221. *See, e.g.*, Province of Northwest Territories Environmental Rights Act, R.S.N.W.T. 1990, c. 83, pmbl. (Can.) ("[T]he people . . . have the right to a healthy environment."); Nunavut Act, S.C. 1993, c. 28, §§ 7, 29 (Can.) (incorporating the laws of the Northwest Territories); Yukon Environment Act, R.S.Y. 2002, c. 76, § 6 (Can.) (recognizing the right to a "healthful natural environment"); *see also* BENIDICKSON, *supra* note 56, at 56-59.

222. No. 101083 (Phil. July 30, 1993), http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/31418.

223. *Id.*

to a healthy environment need not be written in the constitution to be protected.[224]

As the Indian Supreme Court has recognized, in common law countries, "the right of a person to [a] pollution free environment is a part of the basic jurisprudence of the land."[225] It is ancient law that one cannot cause a nuisance to another.[226] This law includes the prohibition on polluting the environment to the detriment of a neighbor's health.[227] Thus, a perusal of state practices shows that around the world, countries are currently protecting the right to a healthy environment.

3. International Authorities Recognize the Right to a Healthy Environment

In addition to multilateral instruments and domestic practices, international authorities also support the proposition that the right to a healthy environment is a part of customary international law. International tribunals and judges have recognized the human right to a healthy environment. The International Court of Justice case *Gabčíkovo-Nagymaros Project* concerned a disagreement between Hungary and Slovakia over a treaty they had signed about the development of a river that touches both countries.[228] The majority opinion, while not reaching the question of whether there is an international human right to a healthy environment because the parties had not raised it, noted that "newly developed norms of environmental law" were relevant for treaty implementation.[229] Judge Weeramantry, in his concurring opinion, recognized: "The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself."[230] Similarly, the UNHRC acknowledged the possibility that environmental degradation could violate the international human right to life.[231]

In *Ostra v. Spain*, the ECHR considered a situation in which a private toxic waste treatment facility operated twelve meters from the

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224. *Id.*

225. Vellore Citizens Welfare Forum v. Union of India, (1996) 5 S.C.R. 241 (India), *available at* http://judis.nic.in/SupremeCourt/imgs1.aspx?filename=15202.

226. *Id.*

227. *Id.*; *see also* Duntley v. Barr, 805 N.Y.S.2d 503, 505 (City Ct. 2005) (finding a valid case of nuisance when cigarette smoke infiltrated an apartment because of the health hazards).

228. 1997 I.C.J. 7, 11 (Sept. 25).

229. *Id.* at 67.

230. *Id.* at 91 (Weeramantry, J., concurring).

231. *See* Human Rights Comm. Decision, E.H.P. v. Canada, *supra* note 173.

plaintiff's home, causing illness to a woman and her daughter.[232] The court found that government inaction was the cause of the damage suffered and that this government inaction violated the woman's right to family and home.[233] Therefore, the court found that the government must compensate the woman and her daughter for the harm they had suffered.[234] Thus, Spain was found to have breached an affirmative duty to ensure the right to a healthy environment, even though this right is not explicitly stated in the European Convention.[235]

The ECHR again recognized that environmental harm can result in the deprivation of human rights protected by the European Convention in the 2004 case *Öneryildiz*.[236] There, the applicants alleged that Turkey was responsible for the deaths of their family members who were killed by a methane explosion at a municipal waste dump.[237] The ECHR found that Turkey had violated the right to life because although the Turkish government was aware of the risk of a methane explosion, it failed to take adequate measures to protect human life.[238] The ECHR found that the right to life contained in the European Convention places a positive obligation on states to protect life:

> The positive obligation to take all appropriate steps to safeguard life for the purposes of [the right to life] entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.[239]

Thus, this case supports the proposition that under customary international law, states are required to have environmental legislative and regulatory schemes that are protective of the human rights to life and health.

The Inter-American Commission on Human Rights (IACHR) has also found a linkage between human rights and the environment. The Yanomami Indians of Brazil brought a complaint to the IACHR against the Brazilian government alleging breaches of the American Declaration of the Rights and Duties of Man (American Declaration).[240] They

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232. 20 Eur. Ct. H.R. 277, 279 (1994).
233. *Id.* at 287-88.
234. *Id.* at 288.
235. *Id.* at 290-91; *see also* HUNTER, *supra* note 55, at 1303.
236. Öneryildiz v. Turkey, 2004-XII Eur. Ct. H.R. 79, 116.
237. *Id.* at 110.
238. *Id.* at 118-19, 122.
239. *Id.* at 115.
240. Yanomami v. Brazil, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser. L./V/11.66, doc. 10 rev. ¶ 1 (1984-1985); *see also* Richard Desgagné, *Integrating Environmental Values into the European Convention on Human Rights*, 89 AM. J. INT'L L. 263, 266 (1995).

accused the government of allowing the construction of a highway through the land where they lived, permitting the exploitation of the land's resources, authorizing an invasion of the land by people carrying contagious diseases, and not providing essential medical care to the persons made sick.[241] The IACHR found that the Brazilian government had violated the Yanomami's rights to life, liberty, personal security, health, and well-being.[242]

The IACHR again signaled that the right to a healthy environment is protected by the American Declaration rights to life and health in the 2010 case *Mossville Environmental Action Now v. United States*.[243] In that case, the petitioners alleged that government-permitted pollution had severely and negatively impacted their health.[244] The IACHR found that a valid claim had been stated and that it had jurisdiction to consider the claims.[245] However, the IACHR dismissed the case because it found that the petitioners had failed to exhaust domestic remedies.[246] Thus, many international tribunals have indicated that a right to a healthy environment exists in international law.

4. Academic Writings Recognize the Right to a Healthy Environment

Due to the reasons articulated above, many academics who have considered the question regard the right to a healthy environment as an emerging, if not established, norm of customary international law.[247] This is not surprising considering that every year more countries add or find

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241. *See Yanomami*, 7615 Inter-Am. Comm'n H.R. ¶ 3.

242. *Id.* ¶ 8.

243. *See* Petition 242-05, Mossville Envt'l Action Now v. United States, Inter-Am. Comm'n H.R., Report No. 43/10 (2010), http://www.cidh.org/annualrep/2010Eng/USAD242-05EN.DOC.

244. *See id.* ¶ 2.

245. *See id.* ¶¶ 23-24.

246. *Id.* ¶¶ 35-36.

247. *See* Collins, *supra* note 47, at 152 (stating that international environmental human rights law is firmly entrenched); James E. Hickey, Jr., *The Environmental Implications of the Discovery and Delivery of New Energy Resources in the Canada/U.S. Context*, 28 CAN.-U.S. L.J. 209, 216 (2002) (stating that the ability of Canada and the United States to drill for oil may be restricted by the international human right to a healthy environment); Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215, 217 (1996) (noting that the international human right to a healthy environment is derivative of other human rights); John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 309 (2000); James T. McClymonds, *The Human Right to a Healthy Environment: An International Legal Perspective*, 37 N.Y. L. SCH. L. REV. 583, 584 (1992); Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 1, 2 (2001); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 103-04 (1991).

the right to a healthy environment in their constitutions, more tribunals and court decisions affirm the right, and more international documents are generated recognizing the right.[248]

For example, the scholar John Lee, after looking at state practice, international declarations and treaties, and decisions of international tribunals, concludes that a "right to a healthy environment . . . has been developing as a principle of customary international law."[249] He notes that principle 1 of the Rio Declaration captures the ideals of a human right to a healthy environment by stating, "[H]uman beings are . . . entitled to a healthy and productive life in harmony with nature."[250] He finds it significant that although written in a nonbinding legal document, this principle was accepted by almost every nation in attendance without reservation:

> The language of Principle 1 of the Rio Declaration was reproduced verbatim, and accepted without reservation by 179 nations at the 1994 U.N. Conference on Population and Development; by 186 nations at the 1995 World Summit for Social Development; by 175 nations at the 1996 Second Conference on Human Settlements (Habitat II); and by 17 nations at the OAS-sponsored 1997 Hemispheric Summit on Sustainable Development.[251]

He finds the fact that almost every single nation made this statement, albeit a nonbinding statement, at least three times is significant because it indicates consistent and widespread state practice, which contributes to the development of a customary international law.[252] Looking at the decisions of international tribunals and citing *Ostra* and *Yanomami*, Lee concludes that the trend is moving towards recognition of a right to a healthy environment.[253] Lee also notes that by the end of 1998, fifty nations had explicitly recognized the right to a healthy environment in their constitutions and that this is evidence of widespread state practice.[254] In the thirteen years since Lee's article was published, the case for widespread state practice has only grown stronger and ninety-two countries now explicitly recognize a constitutional right to a

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248. *See* Boyd, *supra* note 1, at 13 ("The right to live in a healthy environment continues to gain recognition. New constitutions incorporating the right to a healthy environment were enacted in Kenya and the Dominican Republic in 2010, and in Jamaica, Morocco, and South Sudan in 2011.").

249. Lee, *supra* note 247, at 339.

250. *Id.*

251. *Id.* at 308-09.

252. *Id.* at 309.

253. *Id.* at 311.

254. *See id.* at 314.

healthy environment.[255] Lee concludes that "an environmental violation is also a human rights violation when '*as a result of a specific course of action, a degraded environment occurs, with either serious health consequences for a specific group of people or a disruption of a people's way of life*.'"[256]

Similarly, scholar Lynda Collins finds that there is "strong evidence of the emergence of the right to [a healthy] environment as a principle of customary international law."[257] She suggests that this right be termed the right to a "healthy and ecologically balanced" environment in order to encompass protection for both human and ecosystem health.[258] In any event, she suggests that the term "healthy environment" should encompass both human and ecosystem health.[259] While this is a wider definition than has been suggested here, and the arguments for a right to healthy ecosystems are outside the scope of this Article, her formulation of the right is consistent with the arguments made here. She notes that the substantive and freestanding right to a healthy environment overlaps with other human rights, such as the rights to life and health, but that the freestanding right to a healthy environment should go beyond already existent rights to provide intergenerational equity, aesthetic protection, and the Precautionary Principle.[260] In conclusion, Collins states that there is an "actual or imminent emergence of a substantive right to environment as a principle of customary international law, [and] the evidence that the right to environment has now emerged as a principle of customary international law is very strong."[261]

Many other scholars agree.[262] The Canadian Supreme Court has noted, "Peremptory norms develop over time [and] it is often impossible to pinpoint when a norm is generally accepted."[263] The case for an international human right to a healthy environment as a rule of customary international law grows stronger every year as more and more constitutions, court decisions, treaties, and other legal documents recognize the right. Therefore, if the right does not already exist as a norm of customary international law, it is imminently emerging.

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255. Boyd, *supra* note 1, at 6.
256. Lee, *supra* note 247, at 332.
257. Collins, *supra* note 47, at 136.
258. *Id.* at 137.
259. *Id.*
260. *Id.* at 148, 152.
261. *Id.*
262. *See supra* note 247 and accompanying text.
263. Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 38 (Can.).

Thus, all four indicators of customary international law[264]—multilateral instruments, domestic practices, international authorities, and academics—support the existence, or at least the imminent emergence, of a right to a healthy environment as part of customary international law. Therefore, Canadian courts should interpret the rights to life and security of the person to be in conformity with this customary international law by recognizing a right to a healthy environment as part of the Section 7 rights to life and security of the person.[265]

E. Application of International Law to the Aamjiwnaang First Nation Community

The Aamjiwnaang community members' rights to life and security of the person are not simply domestic constitutional rights; they are also international human rights. Canadian courts are obligated to interpret Charter provisions in accordance with international law. As shown above, under international law, Canada is obligated to positively protect the right to a healthy environment. Thus, Canadian courts should interpret the Charter rights to life and security of the person as including the right to a healthy environment.

Aamjiwnaang community members are being exposed to profound negative psychological effects and a serious risk of ill health and death due to pollution that the government can take action to prevent. Because the Canadian government is failing to take the required action to prevent the harm, any court faced with the question, including the Ontario Divisional Court adjudicating the current Charter challenge by two Aamjiwnaang community members, should find that the government is in violation of Section 7.

IV. CONCLUSION

This is an exciting time for the environmental and human rights movement. Two members of the Aamjiwnaang community are arguing in a Canadian court that the government, by granting permission for increasing pollution in their community, is violating their Charter rights to life and security of the person. Thus, Canada is poised to join the

264. As enunciated by the Supreme Court of Canada. *See id.* at 40-41.

265. *See* R. v. Hape, [2007] 2 S.C.R. 292, 316 (Can.); Jose Perira E Hijos S.A. v. Canada (Attorney Gen.), [1997] 2 F.C. 84 (Can.); *In re* Powers of Ottawa & Rockcliffe Park, [1943] S.C.R. 208, 209 (Can.); Bouzari v. Islamic Republic of Iran (2004), 71 O.R. 3d 675, 690 (Can. Ont. C.A.).

growing majority of countries that recognize the international human right to a healthy environment.

The example of pollution in the Aamjiwnaang community has been used because indigenous people are often disproportionately affected by environmental harm and because the recent court case brought by two Aamjiwnaang community members raises these issues. This Article has shown that the rights to life and security of the person guaranteed in the Charter should be interpreted as including the right to live in a healthy environment, meaning one that does not cause serious health risks to human beings. This argument is based on the plain reading and domestic interpretation of the Charter, as well as Canada's international obligations.