

Public Health Hazards and Section 7 of the Charter

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ABSTRACT - Government decisions that give rise to a health risk to the public at large may have a very real impact on the right to life, liberty and security of the person of individuals and the public at large. Surprisingly, there has been comparatively little litigation examining whether s. 7 of the Canadian Charter of Rights and Freedoms places limits on the ability of government that create or authorize such health risks. After a review of the relevant Canadian court decisions, decisions from other jurisdictions with similar constitutional provisions and relevant international instruments, the author concludes that the scope of s. 7 does extend to protecting members of the public against government decisions that create a serious public health risk. The author then examines what types of government decisions could be vulnerable to such a challenge and concludes that government authorization of private actions that threaten public health must comply with the principles of fundamental justice. The article concludes with an examination of what "principles of fundamental justice" apply to a government decision impacting on public health. The author argues that in some cases the impact on the public's s. 7 rights is so egregious as to "shock the conscience of the nation," and will violate the principles of fundamental justice. In other cases, s. 7 will require that procedural protections be put in place to notify the public of the potential health risks, to provide the public with an opportunity to be heard, and to ensure that an unbiased decision-maker assesses the health risk and makes an informed and cautious decision.

1. INTRODUCTION

A provincial government authorizes the aerial spraying of a pesticide that is a known carcinogen. As with most carcinogens, the pesticide will increase the number of people who will contract cancer, but it is not possible to predict when, by whom or where the effects will be felt.

A beehive burner is authorized to operate next to an elementary school with a technology that produces high quantities of microscopic combusted materials, known as PM10 emissions, that are likely to cause some children to permanently develop asthma.

The Canadian Charter of Rights and Freedoms provides a legal recourse where the actions of the government will affect, or are affecting, one individual or a small number of individuals. But what about situations where, as in the above examples, the rights of many people will likely be affected, but it is not possible to know who or when? Those who suffer from cancer or asthma as a result of the government actions described above will not be identifiable until after the damage has occurred. Even then, it may be difficult to confirm that a particular case is caused by the impugned government action, even if there is clear proof that the actions resulted in some of the identified cases.

These situations can be broadly considered to be public health hazards. Most provinces have laws that give broad powers to identify and deal with health hazards, implicitly recognizing the importance of protecting the public against preventable death or sickness.¹ However, public health hazards are only rarely treated as constitutional issues. This is surprising given that personal health is absolutely essential to the exercise of any of the rights and responsibilities of a citizen.

This article will examine the potential for using s. 7 of the Charter to challenge government decisions that give rise to a public health hazard. Section 7 guarantees 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."

This article is divided into three parts.

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¹ For example, *Health Act*, R.S.B.C. 1996, c. 179, s. 1, definition of "Health Hazard" and Part IV; *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7, ss. 1, 11-15.

Part I will examine the scope of s. 7 and determine whether a government decision that gives rise to a public health risk can represent a violation of a person's right to life, liberty and security of the person. It will examine how the Canadian courts have interpreted s. 7 cases involving a risk to the public, as well as how equivalent rights contained in international instruments and the constitutions of other countries have been interpreted. Drawing on these sources this article will propose that the right to "life, liberty and security of the person" guaranteed in s. 7 is sufficiently broad to protect against general threats to public health, notwithstanding the public nature of such a right.

Part II will discuss what types of government action might give rise to a public health hazard that could be challenged under s. 7. It is well established that the Charter does not apply to entirely private disputes between individuals. Since a public health hazard will often (although not always) be caused by an individual, it is important to understand what circumstances will involve a sufficiently active government role for the Charter to apply. This article will argue that the Charter may be invoked where there is government action that authorizes or enables a public health hazard.

Part III will consider the second half of s. 7, which provides that the right to life, liberty and security of the person may be limited if done "in accordance with the principles of fundamental justice." It will examine how the principles of fundamental justice have been treated in the context of private rights, and then discuss their appropriate application to a public health hazard that is challenged under s. 7. A public health hazard challenged under s. 7 may violate the principles of fundamental justice in one of two ways. First, the hazard may represent such a serious and imminent threat to human health that its authorization under any circumstances violates the principles of fundamental justice (a violation of the "substantive" principles of fundamental justice). Second, the principles of fundamental justice have always been procedural in nature, and a hazard may offend the principles of fundamental justice simply because the government has not taken basic procedural steps to carefully assess the public health hazard, and to minimize, eliminate and/or notify the public of the hazard.

2. PART I: SECTION 7 AND PUBLIC HEALTH HAZARDS

Section 7 of the Canadian Charter of Rights and Freedoms provides:

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.²

Because the suggestion that s. 7 rights may extend to a threat to community health may be controversial, it is important to define the problem clearly.

Imagine a law that requires an individual, Ms. X, to be injected with a quantity of arsenic. Is there any doubt that Ms. X could challenge the injection of arsenic as being contrary to her right to life? Even if the quantity of arsenic were limited, unlikely to kill her or even make her very sick, it would seem reasonably clear that the injection, if involuntary, would be a violation of her right to liberty and/or security of the person.³

But what happens when the toxin is injected into the environment, rather than into Ms. X, and from there makes its way into someone's body – possibly Ms. X, possibly someone else. Then the law begins to get more complicated.

Now we are no longer dealing with the rights of an identifiable individual, but with:

- (a) the rights of an unidentifiable individual (the right to life of the person who will eventually get sick or die); and/or
- (b) the rights of all members of the community not to have to risk becoming that unidentifiable individual (the security of the person of the people who might get sick or die).

In such a case, the evidence would inevitably depend on statistical materials relating to risk and probable harm, rather than the conclusive proof of causation and harm that the courts have generally preferred. In some cases it may be possible to show how the harm could occur (method of causation) and that it is statistically probable that it will actually occur (proof of likelihood of causation). In other cases the statistical evidence may demonstrate the risk of

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 7.

³ The Courts have said that the right to refuse, for example, medical treatment, is central to security of the person: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 589 [Rodriguez].

death or sickness, but there may not be clear scientific evidence as to how the increase in risk occurs.

Must someone get sick and be able to conclusively prove the source of his or her illness before the courts will act? Or can a public minded citizen challenge a law authorizing the introduction of the toxic into the environment before harm occurs?

Clearly if the Charter is to be an effective instrument in protecting the public before harm occurs, the courts must be able to examine such questions in advance of the harm. Provided that the public minded citizen can prove that someone is likely to die or become ill, why does it matter who that person is? Similarly, the violation of security of the person occurs with the risk, and not merely when an actual impact on the right to life occurs. It would be disturbing if the violation of a right could not be prevented, but only compensated for after the fact (and even then only if it can be proved that this particular death was caused by the authorized pollution).

An objection might be raised that the Charter relates to the rights of individuals, and that this interpretation of s. 7 would introduce collective or public rights into the Charter equation. The courts have been careful to make sure that Charter rights are asserted by individuals who are actually affected by the government action complained of (unless the individual is able to bring his or her self within the public interest standing exception to that rule).⁴ This springs from a desire to have the most affected party bring a claim so that the court can have a context in which to consider the impact of the alleged Charter violation. However, it should not be taken as a rule that the Courts will never consider cases where the Charter violation affects many members of the public equally.⁵ The mere fact that the public at large may be affected does not detract from the impact of the rights violations on individual persons (whether identified or not). A review of the cases that have considered s. 7 in the context of public health hazards will demonstrate that the courts are open to this possibility.

(a) Canadian Courts on Public Health Hazards

A review of the case law demonstrates that there has been surprisingly little judicial discussion of Charter challenges based upon a collective right to life. A handful of cases, however, appear to confirm that such a challenge is possible. Most of these arose in the context of a motion by government to strike the pleadings of a public interest litigant on the grounds that s. 7 does not extend to collective risks suffered by the public. In each case the courts have either rejected, or failed to adopt, that position.

(i) Operation Dismantle

The first is the well-known case of *Operation Dismantle v. R.*⁶ In the early 1980s a coalition of peace organizations, known as *Operation Dismantle*, challenged the decision of the Canadian cabinet to allow the U.S. government to conduct tests of its cruise missile in northern Canada. *Operation Dismantle* argued that the testing of such missiles contributed to the arms race, which in turn resulted in an increased likelihood of nuclear war, which would violate the s. 7 rights of all Canadians.

An important distinction between the government action challenged in *Operation Dismantle* and the public health risks considered in this article is the uncertain and tentative nature of the risk in the *Operation Dismantle* case. *Operation Dismantle* sought to challenge a potential future disaster (nuclear war) which would have a devastating impact on public health, arising from one possible sequence of events. By contrast, a public health hazard case deals with a situation where the challenged decision will likely (or certainly) impact upon some, poses a risk to everyone, but is unlikely to impact upon the health of everyone. While not on all fours with a challenge based on a public

⁴ It is well recognized that some constitutional cases, including Charter challenges, can be brought on the basis of "public interest litigation" when the legal issue is otherwise unlikely to get before the courts: *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236. These typically involve cases where large segments of the population are equally affected or where those directly affected face some barrier that prevent them from coming to the court. Both situations certainly exist in cases involving public health hazards.

⁵ The question of rights that affect a large segment of the population arises in relation to other constitutional provisions. Aboriginal rights, under s. 35 of the *Constitution Act, 1982*, are collective by their very nature, and can be asserted either by a member of the community directly affected by the breach of an aboriginal right or by representatives of the community. In addition, rights claimed under s. 15 of the Charter, while asserted by a member of the affected class, involve the consideration of the impact of a law on an entire class of people.

⁶ [1985] 1 S.C.R. 441.

health hazard, the case does represent the highest level consideration of whether s. 7 was intended to prevent government actions that will increase the risk to life of the public at large.

Early in the proceedings the federal government made a motion to strike *Operation Dismantle's* Statement of Claim, alleging that it disclosed no reasonable cause of action. The motion came before Cattanach J. in the Federal Court, Trial Division. The motions judge declined to strike the pleadings, finding a possible cause of action by analogy to "liability from extra-hazardous activities and the escape of noxious things within the principle of *Rylands v. Fletcher* ...".⁷ Since the principle in *Rylands v. Fletcher* relates to responsibility for the consequences of the escape of toxic substances, this conclusion seems significant to this article's current discussion of public health hazards.

The appeal decision of the Federal Court of Appeal in *Operation Dismantle*⁸ does not provide clear direction on the scope of s. 7. All five judges hearing the case ruled that the pleadings should be struck. However, each judge issued a separate set of concurring reasons and relied upon different, and in some cases contradictory, grounds.

Of the five appeal court judges, only three commented on the applicability of s. 7 to situations involving risk to the public.⁹ Of these only one – Pratte J. – clearly stated that s. 7 does not extend to matters involving risk to the life, liberty and security of the person of the public at large. Instead, he concluded that s. 7 was only intended to apply to its common application in the criminal context: "The only security that is protected by [s. 7] is, in my opinion, the security against arbitrary arrest or detention."¹⁰

This is a narrow reading, and one that cannot be correct in view of subsequent decisions on the scope of s. 7. For example, subsequent court decisions have held that the criminalization of assisted suicide violates the right to security of the person for disabled persons.¹¹ Moreover, Pratte J.'s approach to the problem was not adopted by Wilson J. on appeal,¹² discussed below.

Two other judges discussed the scope of s. 7. Ryan J. did not find it necessary to make any finding about whether a risk to the personal security of the plaintiffs would constitute a violation of the security of the person, but expressed doubt on the point.¹³ Marceau J., by contrast, rejected the plaintiff's suggestion that a "collective right" might be violated by s. 7, but found that the plaintiffs could raise a valid allegation that the risk posed by the testing violated the rights of the plaintiffs "as representatives of their members." He then affirmed the motion judge's reliance on *Rylands v. Fletcher* and the "theory of hazardous activities" in finding that a valid cause of action existed.¹⁴

On appeal, the Supreme Court of Canada unanimously upheld the decision of the Court of Appeal, and struck out *Operation Dismantle's* claim, but did so on two different grounds. Dickson J., writing for the majority, found that the link between the cruise missile testing and the increased risk of nuclear war was inherently speculative, and incapable of objective proof.¹⁵ He stated that it was unnecessary to determine whether the types of deprivation of life or security of the person could be the basis of a violation of s. 7.¹⁶

Wilson J., in her concurring opinion, did examine the scope of s. 7, acknowledging the possibility that a government action might be struck down in some cases on the grounds that it posed an unacceptable risk to the public, but found

⁷ [1983] 1 F.C. 429 at 437 (Fed. T.D.).

⁸ *Operation Dismantle Inc. v. R.*, (1983), 3 D.L.R. (4th) 193 (Fed. C.A.).

⁹ Other reasons relied upon include: (a) The pleadings must allege a violation of the principles of fundamental justice to invoke s. 7: at 200-201 (per Pratte J.), at 211 (per Le Dain J.), at 217-18 (per Marceau J.) and at 227 (per Hugessen J.); (b) the matter is not justiciable: at 203 (per Ryan J.), at 210 (per Le Dain J.) and at 215 (per Marceau J.); (c) the risk to the public alleged arose from the subsequent action of third parties not bound by the Charter: at 200 (per Pratte J.) and at 227 (per Hugessen J.) (see Part II, below, for further discussion of this ground); (d) Section 7 does not represent an absolute right to be kept safe from all danger or risk: at 201 (per Pratte J.), see also Ryan J., at 206; and (e) the Charter does not apply to the exercise of Royal Prerogative power: at 224-25 (per Marceau J.).

¹⁰ Ibid. at 200.

¹¹ *Rodriguez*, supra note 3, (for the majority opinion), although the majority went on to find that the principles of fundamental justice were not violated in that case.

¹² Indeed, Wilson J., on appeal, explicitly states that she did not find it necessary to adopt Pratte J.'s approach on this point. Supra note 6 at 490.

¹³ Supra note 8 at 206.

¹⁴ Ibid. at 215-16.

¹⁵ See M. Rankin et al., "Constitutional Law – A New Basis for Screening Constitutional Questions under the *Canadian Charter of Rights and Freedoms* – Prejudging the Evidence?" [1987] 66 Can. Bar Rev. 365 for critical comment of this approach.

¹⁶ Supra note 6 at 451.

that the facts alleged by *Operation Dismantle* did not give rise to such a risk.

Wilson J. pointed out that the lawyers for *Operation Dismantle* advanced a somewhat unusual view of s. 7, in that they did not rely upon alleged violations of fundamental justice, but instead claimed a substantive right to life, liberty and security of the person. Wilson J. did not reject this approach out of hand, but held that even if the lawyers for *Operation Dismantle* were correct, the scope of the substantive s. 7 rights were not unlimited.

The concept of "right" as used in the Charter postulates the inter-relation of individuals in society all of whom have the same right. The aphorism that "A hermit has no need of rights" makes the point. The concept of "right" also premises the existence of someone or some group against whom the right may be asserted ...

The concept of "right" as used in the Charter must also, I believe, recognize and take account of the political reality of the modern state. Action by the state or, conversely, inaction by the state will frequently have the effect of decreasing or increasing the risk to the lives or security of its citizens.¹⁷

Wilson J. then found that given the importance of government actions related to the national security, s. 7 should be presumed not to apply to actions in furtherance of that goal. Consequently, she was unable to find that *Operational Dismantle* had a reasonable cause of action.

However, Wilson J., in the course of her judgment, set out three examples of circumstances where the violation of a substantive s. 7 right might occur. These include forced participation in nerve gas experiments, the seizure of people for military service without enabling legislation,¹⁸ and the testing of the cruise missile with live warheads.¹⁹ These examples appear to confirm that the scope of s. 7 may extend to situations involving a risk to members of the public. Although the decision of only one of the nine Supreme Court judges, Madame Justice Wilson's reasons continue to be an important source of authority on the scope of s. 7 rights.

(ii) Energy Probe

A second court case that has considered the collective nature of s. 7 rights is the Ontario Court of Appeal decision in *Energy Probe v. Canada (Attorney General)*.²⁰ In that case the environmental organization Energy Probe sought to challenge the *Nuclear Liability Act*.²¹ The *Nuclear Liability Act* is designed to limit the financial liability of the nuclear industry in the event of a major nuclear accident, and Energy Probe argued that the result of this reduced potential liability was to encourage the development of nuclear power plants, which, in turn, increased the risk to the public of a nuclear accident, and, therefore, violated s. 7 of the Charter (along with other sections of the Charter and *Constitution Act, 1867*).

For our purposes it is interesting to note Energy Probe was not alleging that a public health hazard did exist -- simply that the government action was creating an increased likelihood of a nuclear accident.

Relying on *Operation Dismantle*, the government of Canada asked the court to strike out Energy Probe's claim, arguing that it disclosed no cause of action. The Motions Judge agreed, but the Court of Appeal reversed the decision and upheld Energy Probe's right to bring the case. Leave to the Supreme Court was denied.

Carthy J.A., writing for the court, distinguished *Operation Dismantle*, holding that the risk to life alleged by Pollution Probe might be established:

I see a difference between the level of speculation and ability to predict a result dependent upon actions of foreign governments and the "speculation" here, which involves the impact of our tort laws upon industry and standards of care in a particular industry. If I were presented with an expert opinion which stated, "toys are safer for children today than they were 15 years ago and it is because of the increasing awareness of tort liability", I would give that prima facie credence. It might not be proved; there may be regulatory rules that have led to the apparent result but, tested as a triable issue, the nexus between the allegation and the conclusion is very different from that between testing missiles and nuclear war....

¹⁷ Ibid. at 488-89.

¹⁸ Ibid. at 473.

¹⁹ Ibid. at 490.

²⁰ (1989), 58 D.L.R. (4th) 513 (Ont. C.A.).

²¹ R.S.C. 1985, c. N-28.

I am not persuaded that the expert evidence in this case could not be translated into a finding of fact by a trial judge associating exposure to liability with standard of care for the purpose of making the declaration which is sought. ... It is therefore my conclusion that the appellants have "some chance of proving" that the Act violates rights protected by s. 7 of the Charter.²²

Carthy J.A. accepted the submissions of Energy Probe that their allegations, if proved, would "demonstrate a present risk to them and others and a threat, or perceived threat, to security of the person."²³ Therefore, he found that there was some chance that Energy Probe might be able to prove its allegations, and, after further analysis of the law around public interest standing, granted standing to bring the action.

Energy Probe's Charter challenge was less successful at trial. Wright J., of the Ontario General Division, opened his discussion of the Charter issues with an indication of dissatisfaction with the Appeal Court's decision.²⁴ Having made these preliminary comments the judge then turned to discussion of the s. 7 issues, finding that Energy Probe had failed to prove that increased use of nuclear power translated into an increased risk to security of the person or that increased liability would result in an increased standard of care.²⁵

(iii) Coalition of Citizens for a Charter Challenge

*Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*²⁶ is a third Canadian case that has considered whether a likelihood of harm to large groups within society may give rise to a violation of s. 7. The Halifax Metropolitan Authority examined options for providing waste disposal facilities for four municipalities and decided upon the construction of an incinerator. The Coalition brought a challenge to the proposed incinerator on a variety of grounds, including that the incinerator would violate s. 7 of the Charter. The Metropolitan authority challenged the Coalition's standing to bring the action, arguing that the matter was premature (because an environmental assessment still had to be done) and that s. 7 did not cover the risks alleged. Glube, C.J.T.D., granted public interest standing to the Coalition, rejecting both of these arguments.

The Coalition relies upon the philosophy that they are asserting the rights of others and raising serious issues, i.e., whether the "possibility" of harm to the health of individuals or the "possibility" of harm to the environment is an infringement of s. 7 rights. (I must comment that it must be a higher standard than "possibility" – it must reach "probability"). The Coalition also raises the issue of fundamental justice under both s. 7 and as a non-Charter issue, that is, if the Authority is going to impose on the public something which would cause them harm, then it can only be done if the Authority has observed the rules of fundamental justice ...

I find that both the Charter issues and the issue of fairness in the administrative sense are serious issues to be tried and ones which the Coalition is entitled to raise as matters of public interest.²⁷

Glube C.J.T.D.'s decision was subsequently overturned on appeal, on the sole question of prematurity. The Court of Appeal found that the court challenge should not be allowed to proceed until after the environmental assessment was complete. However, the Court said nothing to contradict the motions judge's analysis of the scope of s. 7.

(iv) Manicom

In *Manicom v. Oxford (County)*, the Ontario High Court of Justice, Divisional Court, considered a Statement of Claim concerning the construction of a landfill adjacent to the properties of the plaintiffs. The pleadings included an allegation that s. 7 of the Charter would be violated, but did not allege damage to the health or security of the person. Instead, the damages identified related entirely to damage to the plaintiffs' properties.

In striking the pleadings, Saunders J., writing for the majority, found that the failure to allege damage to health or security of the person was fatal, and that it was not a mere oversight that the plaintiffs should be given leave to

²² Supra, note 20 at 527.

²³ Ibid. at 526.

²⁴ *Energy Probe v. Canada (Attorney General)* (1994), 14 C.E.L.R. (N.S.) 245 (Ont. Gen. Div.).

²⁵ Ibid. at 261-83.

²⁶ (1993), 10 C.E.L.R. (N.S.) 257 (N.S. S.C. [In Chambers]), reversed (1993), 108 D.L.R. (4th) 145 (N.S. C.A.).

²⁷ Ibid. at 281.

remedy.²⁸

Potts J., in dissent, would have upheld the pleadings related to s. 7 of the Charter, as he accepted counsel's submissions that the Charter claim could raise questions related to the plaintiffs' personal health concerns.

[Unlike *Operation Dismantle*, t]he landowners claim that the provincial Cabinet decision to permit the construction of the waste disposal site poses a direct threat to them, a specific segment of the populace. The causal connection between the Cabinet decision and harm to the landowners is not premised on any assumptions as to what an unknown power might do. It can be proven or disproven by scientific evidence. It is primarily because of the above comments of Wilson J. that I consider it unwise to strike out the landowners' Charter claim at this stage.

Moreover, the landowners do not claim only that their right to life, liberty and security will be violated by the Cabinet decision; they also claim that the decision to violate these rights was not made in accordance with the principles of fundamental justice. Even if s. 7 of the Charter protects only procedural rights and not substantive rights, the claim is properly drafted. Factual allegations of procedural improprieties on the part of Cabinet have been made. I think it best to leave this claim to be decided by the trial judge after hearing the evidence and finding the facts.²⁹

(v) Other Cases

Two cases, *Locke v. Calgary (City)*³⁰ and the recent case of *Millership v. British Columbia*³¹ have considered whether public health risks posed by fluoridation of water by municipal authorities violate s. 7. In both cases the courts found that fluoridation was not shown to have significant negative health risks, and that any impact of fluoridation on the plaintiff's rights was "minimal" and "not a prima facie breach of those rights."³² Both cases seem to have accepted that a real health hazard would have given rise to a violation of the right to life, liberty and security of the person.

There is one case that may stand for the opposite conclusion. In *Kuczerpa v. Canada*³³ the plaintiff, Ann Kuczerpa, sought to sue the federal Minister of Agriculture for what was described as "a debilitating physical condition which she identifies as 'delayed neurotoxicity' and that it [was] caused by pesticide poisoning." Ms. Kuczerpa alleged that the Minister had failed to conduct sufficient studies to prevent toxic substances from being approved as pesticides and, therefore, was liable in negligence. The government sought to have Ms. Kuczerpa's pleadings struck as disclosing no cause of action, a submission with which the Court agreed.

Although apparently not a major part of her case (the trial judge fails to even mention it as an issue),³⁴ the Court of Appeal dismissed, in a single paragraph, the allegation that s. 7 of the Charter placed an obligation upon the Minister:

Nor am I satisfied that s. 7 of the Charter, which enshrines the "right to life ... and security of the person and not to be deprived thereof except in accordance with the principles of fundamental justice", should be construed as placing upon the Minister of Agriculture an obligation to refuse or to cancel a particular registration under the *Pest Control Products Act* and the regulations made there-after. In the case at bar the appellant, sometime after registration had been effected, complains that she is a victim of the use of a control product. The validity of the law under which the Minister is granted the discretion to register or to refuse the registration is not put in issue in the pleading.³⁵

It is unfortunate that the Federal Court of Appeal did not provide greater discussion of this issue. However, it is apparent that the matter was raised in the context of a claim for damages on behalf of a particular plaintiff, claiming

²⁸ (1985), 52 O.R. (2d) 137 at 145 (Ont. Div. Ct.). The author would like to thank UBC law student Cheryl Conibear for bringing this case to his attention.

²⁹ Ibid. at 155-56.

³⁰ (1993), 15 Alta. L.R. 70 (Q.B.).

³¹ 2003 BCSC 82 [*Millership*].

³² Ibid., para. 111.

³³ (1993), 152 N.R. 207 (Fed. C.A.).

³⁴ *Kuczerpa v. Canada*, (1991), 48 F.T.R. 274 (Fed. T.D.).

³⁵ Supra note 33 at 210, para. 7.

damages not in respect of a single government pesticide approval, but in respect of all of them. The court appeared to suggest that the result might have been different if the plaintiff's pleadings had been differently drafted, possibly by challenging the *Pest Control Products Act* itself.³⁶ Moreover, the plaintiff was self-represented, and the issues may not have been fully canvassed before the Federal Court of Appeal. Consequently, it seems that the Court of Appeal's statement should be confined to the facts of that case.

All of the cases discussed above, with the exception of *Kuczerpa*, seem to stand for the proposition that a risk to the health or safety of the public may constitute a violation of the s. 7 rights of life and security of the person.

(b) Comment on other Charter Litigation

It is not the purpose of this article to provide a comprehensive review of s. 7 Charter litigation. However, it is worth noting that some courts in considering the scope of s. 7 rights, and in particular of the phrase "security of the person," have interpreted the section broadly. These cases are entirely consistent with the view that s. 7 rights might extend to a right not to be exposed, through government action, to a toxic environment.

For example, in *Singh v. Canada (Minister of Employment & Immigration)*,³⁷ the concept of "security of the person" has been interpreted as including the threat of physical punishment arising from the prospect of the return of a refugee to his or her homeland. No proof was provided that punishment would occur, but Wilson J., writing for the majority, found that "security of the person" must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.³⁸

There are also cases in which "serious interference with the psychological integrity" of a person has been held to be a violation of personal security.³⁹ Where a person has a credible and real fear of his or her physical well-being and safety, personal security issues are likely to arise.

A further aspect of the concept of liberty and personal security includes control over one's own body. This basic right to autonomy has been applied in cases involving assisted suicide⁴⁰ and the right to refuse to receive blood into one's own body.⁴¹ The ability to control the introduction of toxins into a person's body flows directly from this type of personal security.⁴²

These situations are analogous to a public health hazard, with one major difference: in these cases the violation of personal security is suffered by only one person, rather than by members of a group or the public at large.

(c) The International Human Rights Context

It is well established that direction as to how the Charter should be interpreted can be taken from international

³⁶ It is not entirely clear why this would be the case. It is likely because Ms. Kuczerpa was not challenging a particular decision (pesticide approval), but rather a general failure to abide by certain standards in approving pesticides. In this context the Court's comment that the Charter did not place any obligation on the Minister "to refuse or to cancel a particular registration" should probably be viewed as obiter, as the Minister's obligation in respect to a "particular registration" was clearly not the subject matter of the case.

³⁷ [1985] 1 S.C.R. 177.

³⁸ *Ibid.* at 207; Wilson, J. noted with approval (at 208) the reasoning of Decary J. in *Collin v. Lussier*, [1983] 1 F.C. 218 (Fed. T.D.) (later dismissed on appeal [1985], 1 F.C. 124 (Fed. C.A.)) in which the applicant, a prisoner, had demonstrated a likelihood that his health would be impaired by the stress of his transfer to a maximum security prison. Decary J. had found that the likelihood of the applicants illness worsening was a sufficient basis for a s. 7 challenge.

³⁹ *New Brunswick (Minister of Health & Community Services) v. G. (J.)* [1999] 3 S.C.R. 46.

⁴⁰ Rodriguez, *supra* note 3.

⁴¹ *H. (B.) (Next Friend of) v. Alberta (Director of Child Welfare)*, [2002] 7 W.W.R. 616 (Alta. Q.B.), affirmed on appeal [2002] 7 W.W.R. 644 (Alta. C.A.) In this case it was found that s. 7 rights to liberty and security of the person were impacted, but that no violation of fundamental justice had been demonstrated. See also *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

⁴² This approach was adopted by Powers J. in *Millership*, *supra* note 31, paras. 104-105: "... the Ontario Court of Appeal has held that the right not to be subject to medical treatment without informed consent is an aspect of the "liberty" interest.... [I] find it is ... appropriate [in terms of the constitutional argument] to deal with the issue on the basis that fluoride [introduced into the public water supply] is being used as a drug or a medicine"

human rights law.⁴³ In addition, it is helpful to consider how other common law courts consider similar constitutional provisions. This section of the article considers how such international instruments and decisions have linked the right to life and the right to an environment free of health hazards.

The connection between the right to life and health hazards is explicitly mentioned in a series of international agreements⁴⁴ and in comments from international bodies.⁴⁵

Notable among statements of international tribunals is a 1982 decision of the Human Rights Committee created under the International Covenant on Civil and Political Rights (ICCPR).⁴⁶ In that case a woman identified by the initials E.H.P. brought a claim against Canada alleging "on her own behalf and ... on behalf of the present and future generations of Port Hope, Ontario, Canada" a violation of the right to life. The allegations of a violation of rights under the ICCPR arose from government caused radioactive contamination in Port Hope and the failure of the Atomic Energy Control Board and the Government of Canada to clean up the contamination.

Under the ICCPR the Human Rights Committee can only hear a complaint if all domestic avenues have been exhausted. E.H.P. had not done so and the Human Rights Committee declined to consider the merits of the case. However, in commenting on the case, and on the domestic remedies open to the complainant, the Committee noted:

... [S]ince Canada submitted its response to the communication of the author, the *Canadian Charter of Rights and Freedoms* has come into force on 17 April 1982. ... Section 7 of the Charter states that "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 principle [SIC] of fundamental justice." ... If the author believes that the Government or an agency thereof, such as the Atomic Energy Control Board, is denying her the right to life in a manner contrary to the provisions of s. 7, she can ask the Courts to remedy this situation....

The Committee observes that the present communication raises serious issues, with regard to the obligation of States parties to protect human life (article 6(1) [of the ICCPR])....⁴⁷

The decision is useful both because of the facts of the case and because of the similarity of language between Articles 6 and 9 of the Covenant⁴⁸ and s. 7 of the Charter. Peter Hogg has noted the special relevance of the ICCPR, and committee decisions, in interpreting the Charter:

Since this jurisprudence [of the Human Rights Committee] elaborates the terms of obligations at international law which have been accepted by Canada, it is as relevant to the interpretation of the Charter as the terms of the Covenant itself. ... The decisions of the Human Rights Committee of the United Nations are relevant to the interpretation of the Charter, not only because Canada is a party to the Covenant which they interpret, but also because they are considered interpretations by distinguished jurists of language and ideas that are similar to the language and ideas of the Charter. Even if Canada were not a party to the Covenant, the Committee's decision would enjoy the same kind of persuasive value for Canadian courts as the decisions of the courts of a foreign country: the search for wisdom is not to be circumscribed by national boundaries.⁴⁹

Canada is not alone in having a constitution that provides for a right to life, and the decisions of other courts,

⁴³ *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 at para. 46.

⁴⁴ For example, the *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, Article 49; *International Covenant on Economic, Social and Cultural Rights*, December 1966, v. 993 U.N.T.S. at 3, Article 27. *Stockholm Declaration of the United Nations Conference on the Human Environment*, (1973), 11 I.L.M. 1416, s. 1.

⁴⁵ *2000 Hague Ministerial Declaration on Water Security*; UNGA Res. 45/94 (1990); 1982 World Charter for Nature, Principle 23, 23 ILM (1983), 455; 1989 *Hague Declaration on the Environment*, 28, ILM (1989), 1308. *Human Rights and the Environment*: Preliminary report by Mrs. Faima Zohra Ksentini, Special Rapporteur, pursuant to Sub-Commission resolutions 1990/7 and 1990/27, U.N. ESCOR, Human Rights Commission, Sub-commission On Prevention of Discrimination and Protection of Minorities, 43rd Session, at 3, U.N. Doc. E/CN.4/Sub.2/1991/8 (1991). Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN ESCOR, 2000, UN Doc. E/C.12/2000/4, para. 51.

⁴⁶ Communication No. 67/1980: Canada. 27/10/82, CCPR/C/17/D/67/1980, (Jurisprudence).

⁴⁷ *Ibid*, paras. 7-8.

⁴⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, Articles 6, 9.

⁴⁹ P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997), at s. 33.8(c) (and see that section generally).

particularly in Commonwealth countries, are also instructive in determining the scope of our s. 7.⁵⁰

The Supreme Court of India has made a long series of decisions holding that India's constitutional right to life includes a right to a clean environment.⁵¹ In the *Indian Council of Enviro-Legal Action v. Union of India et al.*, for example, the Supreme Court of India considered the case of the village of Bichhri, which had had its ground water contaminated by pollution, resulting in serious health problems for local residents:

This writ petition ... is directed against the Union of India, Government of Rajasthan and R.P.C.B. ... on the ground that their failure to carry out their statutory duties is seriously undermining the right to life [of the residents of Bichhri and the affected area] guaranteed by Article 21 of the Constitution. If this Court finds that the said authorities have not taken the action required of them by law and that their inaction is jeopardizing the right to life of the citizens of this country or of any section thereof, it is the duty of this Court to intervene.... If an industry is established without obtaining the requisite permission and clearances and if the industry is continued to be run in blatant disregard of law to the detriment of life and liberty of the citizens living in the vicinity, can it be suggested with any modicum of reasonableness that this Court has no power to intervene and protect the fundamental right to life and liberty of the citizens of this country. The answer, in our opinion, is self-evident.⁵²

Similarly, in *Zia v. WAPDA* the Supreme Court of Pakistan considered the impacts of a proposed electrical grid on the right to life. Saleem Akhtar, J., writing for the court, held that:

Any action taken which may create hazards of life will be encroaching upon the person rights of a citizen to enjoy the life according to law. In the present case this is the complaint the petitioners have made. In our view the word "life" constitutionally is so wide that the danger and encroachment complained of would impinge [upon] fundamental rights of a citizen.⁵³

The Supreme Court of Bangladesh (High Court Division) has considered the question not in relation to a toxic environment, but in relation to contamination of food. In *Farooque v. Bangladesh* the court considered whether a decision to allow the marketing of powdered milk alleged to be contaminated with radioactive material would give rise to a violation of the right to life. The court reviewed the scope of the right to life in the constitutions of several countries, and concluded:

No one has the right to endanger the life of the people, which includes their health, and normal longevity of an ordinary healthy person by marketing in the country any food item injurious to the health of the people. We are therefore, of the view that the right to life under Article 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes, amongst others, the protection of health and normal longevity of an ordinary human being.⁵⁴

This is not to say, of course, that all countries with equivalent rights to life, liberty and/or security of the person have adopted an interpretation that includes environmental protection. In the U.S., for example, the courts have insisted that additional legislation is required "to define the [environmental values the Constitution] seeks to protect."⁵⁵

⁵⁰ Increasing numbers of national constitutions explicitly provide for a right to a clean environment or impose an obligation to protect the environment on the government, thus removing the need for judicial consideration of the connection between the right to life and the environment. At last count the constitutions of some 109 nations (of 190 in the world) contained provisions of this type: Earthjustice, *Issue Paper – Human Rights and the Environment* (San Francisco: Earthjustice, 2001).

⁵¹ *M.C. Mehta v. India*, W.P. (Civil) No. 12739 of 1985 (Supreme Court of India) per Bhagwati, C.J.; *Subhash Kumar v. State of Bihar et al.*, WP (Civil) No. 381 of 1988, D/-9-1-91 (Supreme Court of India) per Kuldip Singh, J.; *Indian Council for Enviro-Legal Action v. Union of India et al.*, [1996] 5 Supreme Court Cases 281, per Kuldip Singh, J. at 298.

⁵² *Indian Council for Enviro-Legal Action v. Union of India et al.*, J.T. 1996 (2) S.C. 196 (Supreme Court of India) per B.P. Jeevan Reddy, J, at 219-20.

⁵³ *Zia v. WAPDA*, PLD 1994 Supreme Court 693. See also Human Rights Case (Environment Pollution in Baluchistan) PLD 1994 SC 102 which also held that the country's Constitutional right to life encompasses a right to a clean environment.

⁵⁴ WP 92 of 1996 (1996.07.01).

⁵⁵ *Commonwealth v. National Gettysburg Battlefield Tower Inc.* 311 A.2d 588 at 595 (Pa. 1973). See also *Robb v. Shockoe Slip Foundation* 324 S.E. 2d 674 (Va. 1985). F. Du Bois provides an analysis of the differences between the U.S. and Indian approaches in "Social Justice and the Judicial Enforcement of Environmental Rights and Duties" in A.

Nonetheless, it appears that both at international law and in the constitutional law of other Commonwealth nations, there is support for the view that a public health hazard can give rise to a violation of the right to life.

(d) Summary

A review of the cases suggests that s. 7 rights do extend to threats to the life, liberty and security of the person of members of the public. The case law has not been rigorous in differentiating between risks that violate the security of the person due to an increased risk to people, and those that violate the right to life of an as yet unidentified member of the public who will become ill or die as a result of a government action. It appears, however, that either circumstance (or more commonly both) may form the basis of a Charter challenge. This view is supported by the approach that a number of common law courts and international bodies have taken to similar constitutional and treaty provisions.

The jurisprudence suggests that when considering a public health hazard, a court is not limited to considering the impact of the action complained of on identifiable individuals (the litigants), but rather on the individuals who may or will be affected. As Carthy J.A. put it in *Energy Probe*:

There is no suggestion that these appellants have suffered any present damage or losses that could be compensable in damages, their expressed purpose being to reduce the risk of a future nuclear incident and to assure compensation if one occurs....

The appellants do not say that they suffer in a manner different from other members of the public (with the possible exception of Mr. Martin who lives closer than others to the Pickering Nuclear Station). What they do say is that the security of the person of every individual is presently being affected by the existence of the Act to the extent that it encourages and supports the development of nuclear reactors in preference to other forms of energy production. On the evidence before the court there can be no doubt that there is a risk associated with any nuclear reactor and it follows that there is an increased risk through a multiplication of reactors.

It was generally agreed that, however you categorize the various items of complaint, the appellants must bring themselves within the "public interest" exception to the general rule that public rights cannot be asserted unless the applicant or plaintiff has suffered some special damage that is not shared by all members of the public.⁵⁶

The members of the public who are eventually affected by a public health hazard authorized today will be every bit as sick, or dead, as a member of the public who is directly exposed to a toxin by the government. Can the *Charter* really insist that the victim must be identified before the Courts will intervene?

3. PART II – GOVERNMENT ACTION

There will clearly be some situations where government itself is acting to introduce a public health hazard. Indeed most of the Canadian decisions reviewed, with the exceptions of the *Operation Dismantle*, *Energy Probe* and *Kuczerpa* decisions,⁵⁷ involved situations wherein government actors were allegedly causing the risk to life and security of the person complained of. In situations where government is the primary actor in creating the public health hazard, there will be no question that s. 7 applies (assuming that the analysis in the rest of this article is sound).

On the other hand, it is well established that the Charter does not apply to common law litigation between private parties.⁵⁸ Clearly a public health hazard caused by a private actor in the complete absence of government involvement would not be a breach of the Charter (although it might raise issues at common law).

The more common situation lies somewhere in between these two extremes. Governments have passed a wide range

Boyle and M. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996) at 153.

⁵⁶ Supra note 20 at 528.

⁵⁷ Discussed in more detail below.

⁵⁸ *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

of laws regulating private actions that may result in public health hazards, including legislation regulating the introduction of toxins into the environment, requiring environmental assessments for dangerous projects, etc. This introduces an element of government action. This Part of the article will consider in more detail the application of the Charter to a government decision to authorize a private individual to take steps which will, or might, give rise to a public health hazard.

(a) The Charter and Private Parties

The scope of the Charter is defined by s. 32 of the Charter, which specifies that it applies to "the legislative, executive and administrative branches of government."⁵⁹

The Supreme Court of Canada, in *R.W.D.S.U. v. Dolphin Delivery Ltd.*, considered the meaning of s. 32, and the scope of the Charter, in the context of a labour dispute. The Union, Retail, Wholesale and Department Store Union, Local 580, was sued for secondary picketing of the plaintiff, Dolphin Delivery Ltd. R.W.D.S.U.'s lawyers argued that s. 2(b) of the Charter, freedom of expression, protected picketing, and that the section should apply to any Order issued by the Court.

MacIntyre J., with all judges concurring on this point, held that the Charter applies to government, and not to private parties acting in a purely private capacity. However, the Charter may apply in an otherwise private action where the government has intervened in some manner:

It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government. It will apply to branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative.... [The] Charter will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.⁶⁰

The rule is that the Charter will apply to private action (and its consequences) when there is a sufficient "element of government action." As Peter Hogg has put it:

Much "private" activity has been regulated by statute, or been joined by government, and if so the statutory or governmental presence will make the Charter applicable as well. ... [W]hen it is said that the Charter does not apply to "private" action, the word "private" is really a term of art, denoting a residual category from which it is necessary to subtract those cases where the existence of a statute or the presence of government does make the Charter applicable. ...⁶¹

In the case of a Charter challenge of a government permit or approval that authorizes the private creation of a public health hazard, there is a clear government action. Indeed, in most cases the Charter would be used to directly challenge the government issuance of the permit or approval, rather than the private action that results from it.

(b) Environmental Legislation that Falls Short

One reason that it seems difficult to apply the Charter to statutes regulating private action (and to permits and approvals issued under them) is because environmental and public health statutes are perceived as being enacted for the benefit of the public by a well meaning government. The Charter would not have applied if government had not passed any environmental law; so why, when government chooses to act, should it be required to make certain that a minimum level of public health protection is met? If there was no obligation to pass the legislation, could a weak piece of legislation really be challenged for failing to meet higher standards?

It is true that there is no general obligation on government to pass legislation promoting the rights enumerated in the Charter, but only an obligation not to infringe those rights.

⁵⁹ *Charter*, supra note 2, s. 32.

⁶⁰ Supra, note 58 at 598-99.

⁶¹ Hogg, supra note 49 at s. 34.2(h).

... [The courts' interpretation of the Charter] does not, on its own, oblige the state to act where it has not already legislated in respect of a certain area. One must always guard against reviewing legislative silence, particularly where no legislation has been enacted in the first place.⁶²

At the same time, the courts have been clear that once a government does legislate in an area, the scope of the legislation must be broad enough to protect the Charter rights. To continue the above quote:

By the same token, it must be remembered why the Charter applies to legislation that is underinclusive. Once the state has chosen to regulate a private relationship, such as between employer and employee, I believe it is unduly formalistic to consign that relationship to a "private sphere" that is impervious to Charter review.⁶³

Similarly, in *Vriend v. Alberta*,⁶⁴ the *Individual Rights Protection Act of Alberta* was challenged under s. 15 of the Charter because, while it prohibited private actors from discriminating against several disadvantaged groups, it did not protect gays and lesbians from discrimination. Alberta argued that its legislature had made a deliberate choice not to legislate in respect of discrimination against gays and lesbians. However, Cory J., writing for a unanimous court on this point,⁶⁵ wrote:

The IRPA is being challenged as unconstitutional because of its failure to protect Charter rights, that is to say its underinclusiveness. The mere fact that the challenged aspect of the Act is its underinclusiveness should not necessarily render the Charter inapplicable.... [W]here, as here, the challenge concerns an Act of the legislature that is underinclusive as a result of an omission, s. 32 should not be interpreted as precluding the application of the Charter.⁶⁶

Commenting on the private/public distinction the Court noted:

The respondents' submission has failed to distinguish between "private activity" and "laws that regulate private activity". The former is not subject to the Charter, while the latter obviously is. It is the latter which is at issue in this appeal.⁶⁷

It is useful to consider that, despite the perception that environmental and public health legislation is intended to protect the public, this is only one side of the coin. In reality most of the so-called environmental legislation functions not only to benefit the public, but to provide private actors with a right to carry out certain action that may cause a public health hazard. Under many statutes, once a plan or permit is issued or approved by government the private party must follow the plan or permit as approved.⁶⁸ This strengthens the relationship between the government and private action, but also could allow the private party to raise an argument of statutory authorization in defence of any nuisance suit brought by affected members of the public.

In addition, many environmental statutes have an actual or de facto effect on the common law related to public nuisance. There is ample case law that the public at large has a right not to be exposed to toxic or noxious substances or other situations impacting on public health. In such cases the Attorney General, someone authorized by him or her, or a person specially affected by the public nuisance, can sue the offender in public nuisance, and can receive relief – on behalf of the public – from the courts.⁶⁹ However, where the government has authorized the public nuisance, it would be difficult (both in practice and in law) for the government to initiate or authorize public nuisance proceedings in common law. It is well established that legislation that modifies the common law will

⁶² *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, at para. 29 [Dunmore]. Nonetheless, the courts in other cases have stopped short of saying that the Charter never gives rise to a positive duty to legislate in an area: "... [A] situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required.": *Haig v. Canada*, [1993] 2 S.C.R. 995 at 1035.

⁶³ *Dunmore*, *ibid.*, para. 29.

⁶⁴ [1998] 1 S.C.R. 493.

⁶⁵ Although Major J., dissented on the appropriate remedy, and L'Heureux-Dubé J. wrote a concurring opinion, both appear to adopt Cory's reasons on this question.

⁶⁶ *Ibid.*, para. 61.

⁶⁷ *Ibid.*, para. 66.

⁶⁸ For example, *Pesticide Control Act*, R.S.B.C. 1996, c. 360, s. 6.

⁶⁹ A. Linden, *Canadian Tort Law* (6th Ed.) (Toronto: Butterworths, 1997), at 525-30. For a more detailed discussion of environmental public nuisances, see J. McLaren, "The Common Law Nuisance Actions and the Environmental Battle", 10(3) *Osgoode Hall L.J.* 505.

amount to government action in what may otherwise be a private dispute.⁷⁰

Finally, environmental and public health legislation can provide a private individual who creates a public health hazard with a public legitimacy and a real or perceived government endorsement of the hazard. In *Dunmore*, the Supreme Court of Canada suggested that an under-inclusive state action might be challenged on Charter grounds if the action "substantially orchestrates, encourages or sustains the violation of fundamental freedoms [by a private actor]."⁷¹

(c) The Public Risk Cases and Government Action

Three of the cases reviewed in Part I involve a risk created by a private actor (in the case of *Energy Probe* and *Kuczerpa*) or by another nation's government (in the case of *Operation Dismantle*). These cases provide little direction on what type of government involvement will give rise to a Charter challenge on a question of public health. *Energy Probe* appears to accept without consideration that third party actions arising from government action can form the basis of a challenge to the government action,⁷² while *Kuczerpa* does not consider the question.

Operation Dismantle dealt with a government decision to authorize the U.S. (a third party, not bound by the Charter) to test cruise missiles in Canada, and at no time does any level of Court appear to have suggested that the Charter did not apply because the actual testing would be carried out by the U.S.⁷³

While these public risk cases do not add much to the above discussion, one example used by Wilson J. in her judgment in *Operation Dismantle* does involve government regulation of private action, and is, therefore, worth discussing further:

It may be argued, for example, that the failure of government to limit significantly the speed of traffic on the highways threatens our right to life and security in that it increases the risk of highway accidents. Such conduct, however, would not, in my view, fall within the scope of the right protected by s. 7 of the Charter.⁷⁴

It may be that Wilson J.'s example is limited by the fact that earlier in her judgment she had assumed, without deciding that s. 7 had substantive content separate from, and irrespective of, the "principles of fundamental justice."⁷⁵ However, the example does deal with government regulation of private action so as to avoid public risk, and it is, therefore, arguably analogous to the public health hazard situations this article considers.

Unfortunately, Wilson J. is unclear as to why this type of risk should not be governed by s. 7 of the Charter, but other public risks should be. The use of a single example, however, should not be used to suggest that there will be no situations involving the regulation of private parties that will give rise to s. 7 challenges of this type.

One feature that distinguishes the public traffic issue from most of the private regulation considered in this article is the legality of the private action in the absence of government regulation; the use of an individual's private vehicle, by itself, does not ordinarily give rise to an actionable public nuisance at the speeds authorized by government. It is a restriction on private activity that would otherwise be entirely legal, as well as socially accepted. If this distinction is correct, then a government decision to authorize high speed races in a residential neighbourhood (a blatantly

⁷⁰ *Blainey v. Ontario Hockey Assn.* (1986), 26 D.L.R. (4th) 728 (Ont. C.A.), cited with approval in *R.W.D.S.U.*, supra note 58 at 601. See also *Coates v. Citizen (The)*, (1988), 85 N.S.R. (2d) 146 (N.S. T.D.).

⁷¹ Supra note 62, para. 26.

⁷² Supra note 20.

⁷³ However, two of the judges of the Federal Court of Appeal did find that the pleadings were invalid because the harm complained of would depend upon subsequent action by third parties (the reaction of other national governments to the testing), who were not bound by the Charter: supra note 8, per Pratte J., at 201; also Hugessen J., at 227. In light of decisions holding that the Charter did apply to the deportation of immigrants or prisoners to other countries (*Singh*, supra note 37 at 206-207; *Suresh*, supra note 43), it seems likely that the comments of the two Federal Court of Appeal judges are limited to the uncertainty that existed in that case regarding the reaction of foreign powers to the proposed cruise missile testing. Indeed, this is the issue that the majority of the Supreme Court of Canada eventually grounded its decision on: "Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation ...": supra note 6 at 452.

⁷⁴ Supra note 6 at 489.

⁷⁵ Supra note 6 at 488. This distinction will be discussed in more detail in Part III of this article.

negligent action) might well give rise to a Charter challenge, even if the exercise of government discretion in assigning appropriate speed limits within a reasonable range (at least according to Wilson J.) did not.

The courts will need to better define whether and how government regulation of public health hazards can violate s. 7 of the Charter. However, taken as a whole the jurisprudence suggests that if a government has chosen to legislate for the purpose of protecting public health (including providing for the issuance of permits, licences, approvals or other authorizations), it must do so in a manner that protects the public's right to life, liberty and security of the person, or ensures that those rights are only interfered with in accordance with the principles of fundamental justice.

4. PART III – FUNDAMENTAL JUSTICE AND PUBLIC HEALTH HAZARDS

To this point this article has only considered the scope of the right to life, liberty and security of the person as it relates to public health hazards, and the government approvals that might give rise to a violation of s. 7. However, s. 7 has two parts. If it is correct that government authorization of a public health hazard may violate the right to life, liberty and security of the person, then the next step is to consider what it means to authorize a public health hazard "in accordance with the principles of fundamental justice."

The case law surrounding what is meant by "principles of fundamental justice" arose almost entirely in the context of individual rights. What would the principles of fundamental justice look like where the directly affected parties cannot be determined in advance? Or where the loss of liberty and security of the person applies to everyone who comes into contact with the toxic environment? Can the government be excused from abiding by the principles of fundamental justice simply because the affected parties cannot be identified?

Peter Hogg notes that "When the Charter was adopted in 1982, the phrase 'the principles of fundamental justice' did not have a firmly established meaning in Anglo-Canadian law."⁷⁶ This contrasts with other terms, such as natural justice or due process, which could have been used, and which arose largely in the context of individual rights.

However, if a threat to the public at large can give rise to a violation of the right to life, liberty and security of the person, then it seems that the principles of fundamental justice must have something to say about these types of violations. The principles of fundamental justice may be manifested in different ways when we talk about a threat to the public than they would be in relation to individual rights.

Unfortunately, the case law on public health and s. 7 rights provide little direction on what fundamental justice looks like in such cases. In *Operation Dismantle* the lawyers for the plaintiffs were explicitly not alleging that the principles of fundamental justice were being violated, instead arguing that a sufficiently serious violation of the right to life could not be justified under the principles of fundamental justice.⁷⁷ In other cases there are occasional references to the principles of fundamental justice, but the cases do not clearly spell out what those principles involve in this type of litigation.

The clearest statement on fundamental justice in a public safety context may be found in *Millership*, in which Powers J. found that even if the right to security of the plaintiff were violated, the principles of fundamental justice were not:

Although the petitioner and many others may disagree with public water fluoridation it is certainly not done in an arbitrary fashion. It is for the purposes of improving the public dental health, and even if it prevents only one fewer cavity per person over a large population, it could represent tens of thousands or hundreds of thousands of cavities.

Public water fluoridation is not the only source of fluoride today, and people who receive fluoride as a result of a halo effect or through the use of dental products also experience a reduction in dental cavities. These are factors which have been considered by the Federal Provincial Territorial Subcommittee and the research that they have reviewed in determining the recommended optimal levels and maximum allowable concentrations of fluoride. This information is available to communities who are then able to debate the issues, and determine for themselves as a community whether the fluoridation of water is beneficial or

⁷⁶ Hogg, supra note 49 at s. 44.10(a).

⁷⁷ Supra note 6 at 487-88. Wilson J.'s discussion of these submissions will be considered below under in the discussion of "substantive principles of fundamental justice."

otherwise. This is certainly not an arbitrary process.⁷⁸

Power J. seems to point to the necessity of an informed evaluation of health effects and the importance of public debate about the issues involved,⁷⁹ as well as the need that the process not be arbitrary. Arbitrariness is also mentioned as a key aspect of the principles of fundamental justice by Marceau J., one of the Federal Court of Appeal Judges in *Operation Dismantle*.⁸⁰

More conventional Charter cases do not clarify the principles of fundamental justice that protect the public or an unknown victim. The Supreme Court of Canada has stated, in Reference re s. 94(2) of the *Motor Vehicle Act (British Columbia)*, that "the principles of fundamental justice are to be found in the basic tenets of the legal system."⁸¹ Lamer J., in the majority decision, goes on to offer the following useful overview:

The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent *principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.*

Consequently, the principles of fundamental justice are to be found in *the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system...*

Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7. [Emphasis added]⁸²

Peter Hogg argues that the Court has not provided clear direction as to what the "basic tenets of the legal system" are:

... [S]ubsequent decisions have not succeeded in giving better definition to the basic tenets of the legal system. On the contrary, later decisions have demonstrated that there is little agreement as to what are the basic tenets of the legal system or even as to the sources from which the basic tenets might be derived.⁸³

The Supreme Court has given other formulations of the scope of the fundamental principles of justice, including that they involve "striking the right balance between the accused's interests and the interests of society"⁸⁴ and must be "fundamental" in the sense that they would have general acceptance among reasonable people.⁸⁵ In addition, it appears that moderately different tests may apply depending upon the context.⁸⁶

Despite the uncertainty about the meaning of "fundamental justice," the Supreme Court of Canada has cautioned against creating principles of fundamental justice that merely reflect the court's opinion on a particular social issue. Nonetheless, in doing so it has affirmed that respect for human life is a major factor in considering such principles:

The principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute. While the principles of fundamental justice are concerned with more than

⁷⁸ Supra note 31, paras. 115-16; The decision must be read in context of the fact that it dealt with what the court seemed to believe was a comparatively benign substance (Power J. had already found that Mr. Millership's s. 7 right to security of the person had not been infringed) and that the case was argued by a self-represented litigant.

⁷⁹ Power J.'s reasoning seems slightly problematic in that there is no guarantee in the legislation that members of the public will be given any opportunity to "debate the issues" as members of a community. In reality government officials often make this type of decision without providing notice to the public or an opportunity for public discussion.

⁸⁰ *Operation Dismantle*, supra note 8 at 217.

⁸¹ [1985] 2 S.C.R. 486 at 503 (per Lamer J.). See also at 512 (per Lamer J.) and at 530 (per Wilson J.).

⁸² Ibid. at 512-13.

⁸³ Hogg, supra at note 49 at s. 44.10(b).

⁸⁴ *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at 152, per McLachlin J. See Professor Hogg, supra note 49 at s. 44.10 for a discussion of how this aspect of fundamental justice arose and for his critical comment on it.

⁸⁵ *Rodriguez v. Canada*, supra note 3 at 607.

⁸⁶ The test of whether a decision "shocks the conscience" has been used in the context of extradition cases (infra note 89), and is discussed below in relation to substantive rights.

process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people.... To the extent that there is a consensus, it is that *human life must be respected* and we must be careful not to undermine the institutions that protect it. [Emphasis added]⁸⁷

Such statements, and particularly the importance attached to respect for human life, seem to suggest that principles of fundamental justice that apply to public health hazards will evolve.

(a) Substantive Principles of Fundamental Justice

Although the principles of fundamental justice are usually thought of in terms of procedural protections, the Canadian courts have recognized that under certain circumstances they may extend to preventing the government from carrying out a particularly egregious act, no matter how the decision to commit the act was made.

We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures and ... "the history of liberty has largely been the history of observance of procedural safeguards." *This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees.* Rather, the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor L. Tremblay has written, "future growth will be based on historical roots" ...

Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves. [Emphasis added]⁸⁸

One clear example of such substantive rights may be seen in the cases involving extradition of prisoners to other countries where they might face cruel and unusual punishment. In *United States v. Burns*, the Supreme Court considered the case of two Canadian citizens charged with three counts of aggravated first degree murder who were to be extradited to the U.S. to face possible death penalty charges. In considering whether the Minister of Justice should have sought assurances that the death penalty would not be imposed, the Court explained that, at least in the context of extradition cases, a decision that "shocks the conscience" in depriving life, liberty or security of the person can be considered a violation of the principles of fundamental justice, but that:

... the phrase "shocks the conscience" and equivalent expressions are not to be taken out of context or equated to opinion polls. The words were intended to underline the very exceptional nature of circumstances that would constitutionally limit the Minister's decision in extradition cases. The words were not intended to signal an abdication by judges of their constitutional responsibilities in matters involving fundamental principles of justice.⁸⁹

The concept of "shock to the conscience" arises in the context of individual rights, rather than collective ones. Surely, as progressively more people are affected by the health hazard created by government, the conscience should be more shocked, not less.

Wilson J., in her decision in *Operation Dismantle*, spends some time examining what the content of an absolute right to life, liberty and security of the person -- one that could not be infringed even in accordance with the principles of fundamental justice -- might look like. This discussion arose because, as noted, the lawyers for *Operation Dismantle* were not alleging a violation of the principles of fundamental justice. Nonetheless:

The appellants' submission ... touches upon a number of important issues regarding the proper interpretation of s. 7. Even if the section gives rise to a single unequivocal right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, there nonetheless remains the question whether fundamental justice is entirely procedural in nature or whether it has a substantive aspect as well. This, in turn, leads to the related question whether there might not be certain deprivations of life, liberty or personal security which could not be justified no matter what procedure was employed to effect them. These are among the most important and difficult questions of

⁸⁷ *Rodriguez*, supra note 3 at 607-608.

⁸⁸ Supra note 81 at 512-13.

⁸⁹ [2001] 1 S.C.R. 283 at para. 67.

interpretation arising under the Charter but I do not think it is necessary to deal with them in this case.⁹⁰

Wilson J. goes on to decide the case assuming, without deciding, that there is an independent substantive right to life, liberty and security of the person – one which is not limited by the principles of fundamental justice. It is in this context that she explains the necessity of balancing between the right of the state and the right of the individual: "In my view, even an independent, substantive right to life, liberty and security of the person cannot be absolute."⁹¹

Wilson J.'s analysis of the balance between the rights of the individual versus the rights of others (and subsequently the state) bears a noticeable resemblance to MacLachlin J.'s statement (already quoted) that the principles of fundamental justice involve the question of how to "strike the right balance between the accused's interests and the interests of society."⁹²

Wilson J. sets out three scenarios in which a substantive s. 7 protection might apply.⁹³ Two of these – involving nerve gas testing on a particular population⁹⁴ and testing the cruise missile with live warheads⁹⁵ – seem more in the nature of a substantive prohibition against posing a public health hazard.

Wilson J. never set out the standards which she applied in determining that these cases do not strike an appropriate balance between the rights of the individual and of the state. However, it is likely that the same result would be reached if one asked whether the situations "shocked the conscience" – the test used in extradition cases.⁹⁶

The "conscience shocking" situations considered by Wilson J. in *Operation Dismantle* did not involve a certainty of loss of life, but rather a loss of liberty or security of the person to some group. Consider again the scenario in which it can be shown, on a balance of probabilities, that at least one person will die as a result of the introduction of toxins into the environment. Is that sufficiently serious to "shock the conscience" no matter what procedural assurances are in place? As we have seen a major purpose of the principles of fundamental justice is respect for human life.

It is important to note that a decision that the government could not proceed without violating s. 7 would not necessarily mean that the government action was unconstitutional. There is still the possibility that an action that killed or injured people, thereby violating s. 7, could be justified under s. 1 of the Charter. However, in that case the onus would shift to government to demonstrate the need for an unidentified person to die.

This approach is attractive. If a person has successfully demonstrated that a toxin will likely kill a person – not an easy task -- should he or she need to go on to demonstrate that the procedural steps taken, or social good to be achieved through the death, are not sufficient to "balance" the loss of a life? The government has better access to information about procedural steps and social good, and it makes some sense that the onus should shift once proof of a loss of life has been demonstrated.

However, it will ultimately be up to the courts to decide where the line should be drawn -- at what point the violation of the right to life, liberty and security of the person cannot be violated notwithstanding the procedural protections. Even if the courts decide that a likelihood of one death will not, in itself, be a violation of the substantive principles of fundamental justice, there must be some point where the health risks to which a government is exposing the public will "shock the conscience."

(b) Procedural Fundamental Justice

While the existence of a substantive element of the "principles of fundamental justice" remains controversial, the procedural protections associated with this phrase are well established. In the context of individual rights they would include the right to a fair hearing, the presumption of innocence, the right to know the case against oneself and a

⁹⁰ Supra note 6 at 487-88.

⁹¹ Ibid at 488.

⁹² Supra note 84.

⁹³ One of these examples – press gang tactics during peace time and without legislation – would appear to fall within the mainstream judicial understanding of the right to liberty and security of the person: supra note 6 at 473.

⁹⁴ Ibid.

⁹⁵ Ibid. at 490.

⁹⁶ In *Operation Dismantle*, Wilson J. did not need to apply the principles of fundamental justice. However, in light of subsequent cases that affirm that the principles of fundamental justice may include certain substantive prohibitions on interference with the right to life, liberty and security of the person, it is at least arguable that her approach can be adopted in such cases.

host of other well recognized legal requirements.

If the analysis in Part I of this article is correct, however, there may also be procedural aspects of the principles of fundamental justice that are tailored to environmental and public health problems.

Although not generally framed as constitutional issues, the difficulties inherent in protecting public rights are not new. The federal and provincial governments have given considerable thought to these questions, and a wide range of environmental statutes provide for public consideration of the impact of environmental decisions before they happen. The courts have had an opportunity to comment on some of these procedures in the context of those statutes.

The Honourable Mr. Justice Gonthier of the Supreme Court of Canada, in a speech to a gathering of judges from around the world known as the Global Judge's Symposium, has highlighted the importance of the procedures set out in these types of statutes:

Thus, national environmental governance has an essentially procedural component. If it is open, transparent and participatory, based on the full access to information and justice that underpins effective public participation, it has more chance for success. In Canada, the Access to information Act, provides a right of "access to information in records under the control of a government institution", including information pertaining to environmental matters.⁹⁷

Gonthier J. then went on to discuss other procedural components to environmental governance, including environmental assessment legislation, class actions and the right to request an investigation of environmental offences – all features of various statutes passed by the federal and provincial governments.

Further direction on what procedural protections for collective rights are required can, to a degree, be modeled after the private right protection, adjusted for the number of people affected. It has long been recognized that s. 7 procedural protections will often be closely based upon such private rights. As Professor Peter Hogg writes:

... [Section] 7 goes far beyond natural justice, which is a requirement that administrative tribunals observe rules of procedural fairness. This requirement attaches only where a decision-maker has a power of decision over life, liberty or security of the person. Where this is so, s. 7 will impose rules of procedural fairness on the decision-maker. Those rules are probably the same as those that would be required by the common law....⁹⁸

While there has been some limited recognition in the common law that statutes should be presumed not to interfere with public rights generally,⁹⁹ the courts have been reluctant to find a common law right of fairness owed to the public at large in respect of government decisions affecting public rights. However, the courts have not yet had an opportunity to rule on the constitutional procedural requirements, if any, arising from a government decision that will likely impact upon public health.

International Context

International environmental law is increasingly recognizing the crucial role that procedural rights play in protecting the public right to a healthy environment. The 1992 Rio Declaration, for example, did not directly address the issue of a substantive right to the environment, but nonetheless made strong statements about the procedural rights that states should implement:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access

⁹⁷ Remarks by the Honourable Mr. Justice Charles D. Gonthier delivered to United Nations Environment Programme Global Judges Symposium, Johannesburg, South Africa, August 19, 2002, available at <http://www.unep.org/dpdl/symposium/Documents/Country_papers/GONTHIER.doc>.

⁹⁸ Hogg, supra note 49 at 44.20.

⁹⁹ *Thomson v. Halifax Power Co.* (1914), 16 D.L.R. 424 (N.S. C.A.).

to judicial and administrative proceedings, including redress and remedy, shall be provided.¹⁰⁰

After considering the status, at international law, of different types of rights to the environment (including the right to one which does not impact negatively on human health), Professor Alan Boyle wrote:

The narrowest but strongest argument for a human right to the environment focuses not on environmental quality and solidarity, but on procedural rights, including access to environmental justice and participation in environmental decision-making. This approach rests on the view that environmental protection and sustainable development cannot be left to governments alone but require and benefit from notions of civic participation in public affairs already reflected in existing civil and political rights. At its broadest, it can be represented as the application of arguments for democratic governance as a human right to environmental matters.¹⁰¹

The Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur to report on the relationships between human rights and the environment. The resulting report, by Rapporteur Ksentini, (the Ksentini Report)¹⁰² highlighted both substantive and procedural rights to the environment, and made several specific recommendations that procedural rights be recognized, including rights to:

- information concerning the environment;
- receive and disseminate ideas and information;
- participation in planning and decision-making processes, including prior environmental impact assessment;
- freedom of association for the purpose of protecting the environment or the rights of persons affected by environmental harm; and
- effective remedies and redress for environmental harm in administrative or judicial proceedings.¹⁰³

Similarly, the *Aarhus Convention*, sponsored by the United Nations Economic Commission for Europe, outlines specific rights to:

- access to information on environmental issues;
- participation in environmental decision-making; and
- access to Justice to ensure that environmental rights are upheld.¹⁰⁴

Possible Procedural Protections

At the core of the procedural principles of fundamental justice, whether in the context of individual rights or public health risks, stand the concepts of procedural fairness and non-arbitrariness. Legislatures and nations, through statutes and international agreements, have already identified public decision-making principles and processes that are necessary for balanced, open and fair environmental and public health decisions.

The exact approaches to be taken will likely depend upon the individual case, and the following are not intended to be a comprehensive list of principles of fundamental justice that may arise in the context of collective rights. However, this list does draw from rights and principles that are well established in international and national public health law:

- (i) the right to notice and information regarding public health hazards; ("Notice and Information")

¹⁰⁰ *Declaration of the UN Conference on Environment and Development*, UN DOC.A/CONF.151/26/Rev.1, 1992, Article 10; see also Agenda 21, ch. 23.

¹⁰¹ A. Boyle, "Role of International Human Rights Law in the Protection of the Environment" at 43, in Boyle et al., supra note 55 at 59; see also J. Cameron et al., "Access to Justice and Rights" at 129-52, and at 134, of the same book: "We can already perceive a broad consensus on the validity of a right to access of information and decision-making procedures and there is something approaching an international consensus that the citizen must be given rights that can be directed at global environmental protection."

¹⁰² Supra note 45.

¹⁰³ Ksentini Report, as summarized by A. Boyle, supra note 101 at 61.

¹⁰⁴ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*, June 25, 1998, 38 I.L.M. (1999) 515.

- (ii) the right to participate in an appropriate decision-making process; ("Right to be Heard")
- (iii) a cautious approach to decisions posing risks to human life; ("Precautionary Principle")
- (iv) an informed Assessment of risks; ("Informed Assessment"); and
- (v) safeguards to ensure that any assessment does not create a conflict of interest against protection of human health and security of the person. ("Conflicts of Interest")

Each of these procedural requirements, together with how they have been articulated in legislation, international law and the courts, will be considered in turn.

(i) Notice and Information

Notice is one of the most basic requirements of procedural fairness in the context of the common law, because it is necessary before a member of the public can exercise a right to be heard.

Notice where the public at large is affected poses a special problem – it is prohibitive and impractical to serve notice on everyone who might be potentially affected by a sweeping decision. Environmental legislation and policy have attempted to address this problem through a variety of means, including requirements that notice be published in a newspaper,¹⁰⁵ signs be posted in the area where the risk arises,¹⁰⁶ notice be published in the Gazette (provincial or federal depending on the legislation)¹⁰⁷ or notice be published in a central registry or a web page.¹⁰⁸

The more serious the potential risk to human health posed by a government decision, the greater the efforts that should be made to notify the public.¹⁰⁹ In the author's experience publication in the Gazette or in a central registry are not by themselves the most effective mechanisms for public notice because of the relatively small number of people who access those sources (although the idea of a registry is interesting for information disclosure more generally).

In the private law context, the right to security of the person clearly extends to having control over what may enter and affect one's body. At the public level, therefore, fundamental justice likely includes a right to know of, and have information to assess, the risks associated with an action, so that members of the public may take steps that might mitigate any risk themselves. This would require access to technical expertise, as well as basic disclosure of the existence of a risk.

The reasons of the European Court of Human Rights in *Guerra and Others v. Italy*¹¹⁰ are instructive. The case concerned a factory located one kilometre away from the town of Manfredonia, Italy, which was producing fertilizers and various high risk compounds. In the process, various toxic substances were released. The residents of Manfredonia were not informed of the risks. The court ruled:

The Court reiterates that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely [contrary to Article 8 of the European Convention on Human Rights and Additional Protocols]¹¹¹ ... In the instant case the applicants waited, right up until the production of fertilizers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live

¹⁰⁵ For example, *Operational Planning Regulation*, BC Reg. 107/98; *Pesticide Control Act Regulation*, B.C. Reg. 319/81, amended to 1997, s. 16(2)- (4); *Local Government Act*, R.S.B.C. 1996, c. 323, ss. 6.4, 187, 892; *Public Notification Regulation*, B.C. Reg. 202/94, Schedule A.

¹⁰⁶ *Public Notification Regulation*, *ibid.*

¹⁰⁷ *Canadian Environmental Protection Act*, S.C. 1999, c. 33, s. 9(2); *Waste Management Act*, R.S.B.C. 1996, c. 482, s. 15; *Public Notification Regulation*, *ibid.*

¹⁰⁸ *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 55; *Canadian Environmental Protection Act*, *ibid.*, ss. 12-13.

¹⁰⁹ See *Public Notification Regulation*, *supra* note 105 for an interesting attempt to enshrine this principle.

¹¹⁰ European Court of Human Rights (116/1996/735/932) February 19, 1998.

¹¹¹ Article 8 provides: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory ... The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention.¹¹²

Notice, therefore, must occur at two points: (1) prior to a decision likely to affect the public health; and (2) after such a decision is made so that the public may take preventative or mitigative measures.

Closely related to the right to notice is the right to the information necessary to respond to the public health hazard. This is necessary both to participate in a meaningful way in decisions and to take appropriate measures to mitigate any risk.

The importance of disclosure of information in the context of environmental impact assessments was discussed by the Supreme Court of Canada in *Atomic Energy of Canada Ltd. v. Sierra Club of Canada* as follows:

This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.¹¹³

(ii) Right to be Heard

In the case of private rights, the requirement that an affected party be given a fair hearing has always been central to the concept of procedural fairness, and it makes sense that the public should have an opportunity to raise their concerns about a potential public health hazard that may affect them before the hazard occurs.

In case law related to procedural fairness it is well established that the exact nature of the right to be heard will depend upon the "consequences and nature of the inquiry",¹¹⁴ and more generally, on the circumstances. The opportunity for written submissions or other communications may be sufficient in some cases.¹¹⁵

Environmental statutes frequently do provide for an opportunity for public concerns to be heard through either a public oral hearing,¹¹⁶ a written hearing,¹¹⁷ or through a designated period when the proposed decision will be available for review and comment.¹¹⁸ Other forms of consultation might be possible, and might be mandated by the principles of fundamental justice in particular cases.

The Supreme Court of Pakistan, in considering the constitutional obligations related to developing an electricity grid, and allegations of a resulting threat to life, noted that public consultation had not occurred. The comment was not in the context of a final judgment and the court did not directly tie the requirement of public consultation to the constitutional requirement, but it was significant that the court stated:

While making such a plan, no public hearing is given to the citizens nor any opportunity is afforded to the residents who are likely to be affected by the high tension wires running near their locality. It is only a one-sided affair with the Authority which prepares and executes its plan. Although WAPDA and the government may have been keeping in mind the likely dangers to the citizens health and property, no due importance is given to seek opinion or objections from the residents of the locality where the grid station is

¹¹² Supra note 110, para. 60.

¹¹³ [2002] 2 S.C.R. 522, at para. 84. See supra note 97 for Gonthier J.'s comments on the importance of Access to Information Legislation. Access to information is also identified in the Aarhus Convention, supra note 104, Article 4 and the Ksentini Report, supra note 45, Appendix, para. 15 as crucial to public environmental rights.

¹¹⁴ *Canada (Canadian Transportation Accident Investigation & Safety Board), Re* (1993), 16 Admin. L.R. (2d) 15 (Fed. T.D.).

¹¹⁵ *Islands Protection Society v. British Columbia (Environmental Appeal Board)*, (1988), 25 B.C.L.R. (2d) 307 (S.C.).

¹¹⁶ *Local Government Act*, R.S.B.C. 1996, c. 323, s. 890; *Health Act*, R.S.B.C. 1996, c. 179, ss. 58-59.

¹¹⁷ B.C.'s Environmental Appeal Board, for example, has jurisdiction to hold either written or public hearings: Environmental Appeal Board Procedure Regulation, B.C. Reg. No. 1/82 as amended, s. 4(2).

¹¹⁸ *Forest Practices Code*, R.S.B.C. 1996, c. 159, s. 39.

constructed or from where the high tension wires run. In [the] USA [a] Public Service Commission ... hears objections and decides them before giving permission to construct such a power station. No such procedure has been adopted in our country.¹¹⁹

It is likely that some requirement of public consultation or an opportunity for public hearing will generally be part of the principles of fundamental justice where a government decision is likely to pose a significant risk to public health.

However, it is not enough that the public be able to participate – it must be meaningful participation. Put another way, the decision-making must be structured so that it can address the public's concerns about a possible public health hazard and take steps accordingly.

(iii) Precautionary Principle

The Precautionary Principle has recently received attention in Canada's environmental law community because of the judgment of Madam Justice L'Heureux-Dubé, for the majority, in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*. The Court, in the context of finding that the municipality of Hudson had the authority to regulate pesticides, stated:

The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations.... The principle is codified in several items of domestic legislation: see for example the *Oceans Act*, S.C. 1996, c. 31, Preamble (para. 6); *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33, s. 2(1)(a); *Endangered Species Act*, S.N.S. 1998, c. 11, ss. 2(1)(h) and 11(1).

Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment" ... As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" The Supreme Court of India considers the precautionary principle to be "part of the Customary International Law" ... In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.¹²⁰

The judgment of the Supreme Court of Canada in the Hudson decision was specifically in relation to the authority of the municipal government, and did not comment on the obligation, if any, of the municipality to exercise the precautionary principle. Nor did it consider the constitutional dimension of the precautionary principle. However, it does demonstrate that the courts are very much alive to the prominence of this principle in avoiding unforeseen environmental and health consequences.¹²¹

Madam Justice L'Heureux-Dubé's comments on the widespread use of the principle suggests that it has reached the point where the principle meets the test in *Rodriguez* and has "general acceptance among reasonable people."¹²²

¹¹⁹ Zia, supra note 53, para. 11.

¹²⁰ [2001] 2 S.C.R. 241, paras. 31-32 [Hudson].

¹²¹ Some court and tribunal decisions have recently declined to hold that there is a positive duty to apply the precautionary principle, absent a specific legislative requirement: *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)*, (2002), 45 Admin. L.R. (3d) 161 (B.C. S.C.); *Wier v. MoF, B.C. Environmental Appeal Board*, Decision No. 2001PES003(a). However, in these cases the question of whether fundamental justice might provide a legal basis for such a requirement does not appear to have been argued or considered. See also Australian judgments of *Friends of Hinchinbrook Society Inc. v Minister for Environment & Others* (No. 2) [1997] 69 F.C.R. 28 (F.C.A.) and *Jeffrey Nichols v. Director General National Parks and Wildlife Service*, [1994] NSWLEC 155 (September 29, 1994). See, however, infra note 127, for cases in which common law courts have held that there is a positive duty at common law to apply the precautionary principle.

¹²² Supra note 3 at 607.

A precautionary approach in respect of decisions likely to impact on human health or security of the person is consistent with the shifting of onus and the burden of proof required by the principles of fundamental justice arising from the violations of an individual's s. 7 rights. Section 11(d) of the Charter entrenches the common law "presumption of innocence."¹²³ Similarly, offences of a criminal nature and/or involving the possibility of jail time impose additional burdens of proof on the Crown.¹²⁴

Similarly, it is reasonable to expect that the standard of proof the government must apply in making a decision which may violate a constitutional right to life and security of the person in the context of public health hazards should be higher than a balance of probabilities, and that harm should be presumed unless proved otherwise. In cases involving serious risk to public health, care should be taken even where there is not conclusive proof of imminent harm.

The view of the precautionary principle as an aspect of "fundamental justice" is supported by Courts in countries that have recognized a constitutional right to life. The Supreme Court of India, for example, has for a number of years interpreted the right to life and liberty in that country's constitution to include a right to a healthy environment and has more recently held that the precautionary principle is part of the law of India:

We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays Principle" are essential features of "Sustainable Development". The "Precautionary Principle" – in the context of the municipal law – means:

(i) Environmental measures – by the State Government and the statutory authorities – must anticipate, prevent and attack the causes of environmental degradation.

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The "onus of proof" is on the actor or the developer/industrialist to show that his action is environmentally benign....

The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty.¹²⁵

In *Zia v. WAPDA* the Supreme Court of Pakistan discussed with approval the precautionary principle in considering the application of its Constitution to the potential effects of electromagnetic radiation on human health and development. The Court, relying on Article 9 of its Constitution, which provides that "no person shall be deprived of life or liberty save in accordance with the law," required further research of the impact of a proposed electrical grid prior to allowing the project to proceed. Saleem Akhtar, J., in issuing the Order, provided this elaboration of the precautionary principle:

There is a state of uncertainty and in such a situation the authorities should observe the rules of prudence and precaution. The rule of prudence is to adopt such measures which may avert the so-called danger, if it occurs. The rule of precautionary policy is to first consider the welfare and safety of the human beings and the environment and then to pick up a policy and execute the plan which is more suited to obviate the possible dangers or make such alternate precautionary measures which may ensure safety. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence and precaution.¹²⁶

It is worth noting that some common law courts have imposed a duty on government to apply the precautionary

¹²³ Charter, supra note 2, s. 11(d).

¹²⁴ The principles of fundamental justice enshrine the common law requirement that a criminal offence be proven beyond a reasonable doubt: *R. v. Arp*, [1998] 3 S.C.R. 339. In addition, quasi-criminal offences involving the potential of jail time will generally require proof of a mental element (mens rea) regardless of whether such proof is required by the legislation in question: *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154.

¹²⁵ *Vellore Citizens Welfare Forum vs. Union of India*, WP 914/1991 (1996.08.28) (Tamil Nadu Tanneries case), paras. 11-13. Articles 47, 48-A and 51-A(g) of the Constitution, which create non-binding duties related to public health and the environment, are also quoted. See also *A.P. Pollution Control Board v. Nayudu*, Civil Appeal Nos. 368-371 of 1999, commenting on the problems of scientific uncertainty in such cases.

¹²⁶ Supra, note 53.

principle even in the absence of a constitutional requirement to protect the right to life.¹²⁷

The three-part articulation of the precautionary principle used by the Supreme Court of India seems particularly useful in attempting to articulate both the substantive and procedural requirements of s. 7 of the Charter. Although the specifics might need to be adjusted for the Canadian context, the decision provides some direction for both a substantive approach to government action and decision-making and a procedural approach to weighing the evidence concerning potential harm.

(iv) Informed Assessment

Environmental Assessment legislation, both federally and provincially, is probably among the most well known environmental legislation in Canada. The Supreme Court of Canada has described the environmental impact assessment process in favourable terms as follows:

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D.P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., *Environmental Rights in Canada* (1981), 245 at 247:

The basic concepts behind Environmental Assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision-making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M.I. Jeffery, *Environmental Approvals in Canada* (1989), at 1.2, [SS] 1.4; D. P. Emond, *Environmental Assessment Law in Canada* (1978), at 5. In short, environmental impact assessment is simply descriptive of a process of decision-making.¹²⁸

In the same case it was noted that "the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality...."¹²⁹ The recognition of the connection of the environmental assessment to community livelihood and health must be considered significant.

At the international level the *Ksentini* report recognized that public participation in environmental decisions must include: "the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions."¹³⁰

Similarly, the courts of other countries that have recognized the right to a clean environment as part of their right to life have frequently issued orders requiring further research and assessments, often by independent scientific bodies, before the Court proceeds with a decision.¹³¹

¹²⁷ *Leatch v. National Parks and Wildlife Service* (1993) 81 LGERA 270 (NSW LEC): "[T]he precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out ...". Also *Greenpeace v. Minister of Fisheries*. CP 492/93, November 27, 1995 (unreported) (N.Z. High Court). See P. Stein. "A Cautious Application of the Precautionary Principle," (2000) 2 *Envtl. L. Rev.* at 1-10 for an overview of cases which have applied the precautionary principle throughout the commonwealth. See also *Bolton v. Forest Pest Management Institute*, (1985), 66 B.C.L.R. 126 (B.C. C.A.), per Macfarlane, J.A., which, while not discussing the precautionary principle seems to take a precautionary approach in the context of an injunction application related to the testing of pesticides.

¹²⁸ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 71.

¹²⁹ *Ibid.* at 37.

¹³⁰ *Supra* note 45, Appendix, para. 18.

¹³¹ The Courts of India have frequently ordered investigations to be conducted by the National Environmental Engineering Research Institute (NEERI). See, for example, *Vellore Citizens Welfare Forum v. Union of India*, *supra* note 125 at para. 7 reporting an earlier order in the same matter dated October 20, 1995. Similarly, the Supreme Court of Pakistan, by the consent of the parties in *Zia*, ordered a body called NESPAC to "to examine and study the scheme, planning, device and technique employed by WAPDA and report whether there is any likelihood of any hazard or adverse effect

In the context of s. 7 rights, good planning will likely require (1) early identification of potential threats to public or individual health and (2) the gathering of information on which an informed assessment of such threats can be made; and (3) decision-making aimed at preventing the public health hazard. If prevention is not possible and there are strong reasons to proceed with the government action then, and only then, should there be efforts to mitigate the potential s. 7 violation.

The exact nature of the public health assessment required by fundamental justice likely depends upon the degree of the risk, or the severity of the impact, to s. 7 rights. However, the environmental assessment model does point to key features of the type of informed decision that is essential to protecting s. 7 rights.

(v) Conflicts of Interest

In the context of private rights the rule against bias is viewed as fundamental to procedural fairness. It is accepted that a decision-maker should not, or even appear to, derive any personal benefit from a particular decision.

In the context of a general public health hazard there may be situations where an allegation of bias could arise. Presumably the same rule against bias would apply with equal vigour where the public or individual right to health is threatened.

A more widespread problem, however, in the context of public decision-making, is institutional in nature. Where a single statutory decision-maker has a responsibility for pursuing potentially conflicting objectives – for example the protection of public health and the promotion of economic development – there exists the potential for the appearance of something resembling bias – although it is perhaps more accurately referred to as conflict of interest.

It is in part for this reason that many environmental statutes do create independent agencies, tribunals or other structures to ensure that institutions exercise their powers in a fair and unbiased manner. Environmental assessment statutes, to resolve this problem, may provide for an independent office to oversee the process,¹³² an independent appeal body¹³³ or a watchdog office,¹³⁴ all of which are designed to provide a level of institutional independence.

The Supreme Court of Pakistan's reasons in *Zia* seems to underscore both the need for an environmental assessment of major initiatives, and the value of institutional independence in such an assessment:

Being a developing country we will need many such grid stations and lines for transmission of power. It would, therefore, be proper for the Government to establish an Authority or Commission manned by internationally known and recognized scientists having no bias and prejudice to be members of such Commission whose opinion or permission should be obtained before any new grid station is allowed to be constructed. Such Commission should also examine the existing grid stations and the distribution lines from the point of view of health hazards and environmental pollution. If such a step is taken by the Government in time much of the problem in future can be avoided.¹³⁵

Respect for the rule of law will be undermined if government decision-makers are seen as making decisions which trade off human health for other government goals. As has been said repeatedly in the context of procedural fairness, "Justice must not only be done; it must be seen to be done."

5. CONCLUSION

The Charter is a comparatively recent innovation in Canadian law, and the Canadian courts continue to struggle to come to grips with how far the protected rights extend. A review of the case law, as well as other authority, strongly supports the view that the rights guaranteed in s. 7 include a right not to be exposed to the significant risks to human health arising from a public health hazard.

on health of the residents of the locality", supra note 53, para. 16, and also para. 11, quoted infra note 135 in relation to the need for a process that eliminates conflicts of interest.

¹³² *Canadian Environmental Assessment Act*, S.C. 1992, c. 37; *Environmental Assessment Act*, R.S.B.C. 1996, c. 119.

¹³³ *Environmental Management Act*, R.S.B.C. 1996, c. 118; *Pesticide Control Act*, R.S.B.C. 1996, c. 360, s. 15; *Waste Management Act*, R.S.B.C. 1996, c. 482, s. 44; *Water Act*, R.S.B.C. 1996, c. 483, s. 40; *Health Act*, R.S.B.C. 1996, c. 179, s. 8(4)-(5).

¹³⁴ *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, Part 8.

¹³⁵ Supra note 53, para. 11.

Section 7 rights, however, may be infringed "in accordance with the principles of fundamental justice." What the courts have yet to consider is whether a different conception of "principles of fundamental justice" is required where, as with a public health hazard, the government action threatens the rights of individuals who cannot be identified in advance of the harm, or of the public generally.

A review of both environmental and public health legislation, and of the substantive and procedural principles of fundamental justice guaranteed in cases involving individual rights, are a useful starting point for attempts to develop new conceptions of principles of fundamental justice that provide appropriate protection to collective s. 7 rights. The principles reviewed in this article appear to receive some support from the decisions of the Canadian courts, as well as of other jurisdictions. However, this is only a first step in exploring the idea of protection of public rights under s. 7 of the Charter.