2019

# Environmental Justice and the Hesitant Embrace of Human Rights

Dayna Nadine Scott
*Osgoode Hall Law School of York University*, dayscott@yorku.ca

## Source Publication:
Human Rights and the Environment : Legality, Indivisibility, Dignity and Geography. Edward Elgar Pub., 2019.

**Environmental Justice Movements and the Hesitant Embrace of Human Rights**

*Dayna Nadine Scott*

*Associate Professor, Osgoode Hall Law School and the Faculty of Environmental Studies, York University Canada**

**Abstract:** This chapter explores some of the tensions inherent in employing 'rights strategies' in environmental justice movements. Using the example of a judicial review application brought by Indigenous environmental justice activists in Canada demonstrates the symbolic power of using rights-based language for environmental justice, but also underscores the serious procedural, logistical and resource barriers that frustrate these groups in their attempts to deploy litigation tactics. Legal scholars need to think critically about 'rights-talk' and confront the hard questions about its utility for advancing environmental justice. In working with communities, we must learn to listen to what communities want before we default to 'rights' and other legal tools often ill-fitted to the task.

**Key words:**

Environmental law; environmental justice; rights; pollution; activism; Indigenous communities; toxics; social movements; environmental racism; intersectionality; vulnerability; community based participatory research

Scholarship on "environmental justice" emerged from grassroots movements oriented towards amplifying the voices of poor and racialized communities in land-use and environmental decision-making venues. Those venues have typically applied legal norms and protocols that result in these already-marginalized communities bearing more than their "fair share" of environmental harms and burdens. While the aims and scope of the movement have expanded over time, the emphasis on the grassroots has remained, producing a situation in which environmental justice activists often harbour an abiding distrust of law and legal institutions. But

mainstream environmentalists have largely refused to veer away from the litigation and law reform tactics they have favoured over the past three decades. These tactics have delivered gains towards wilderness protection, species preservation and other clean air and water goals, but rarely to the benefit of disadvantaged and historically oppressed people. As a result, environmental *law*, even in its recent turn towards human rights, is embraced with serious hesitation by environmental justice activists.

This chapter explores some of the tensions inherent in employing 'rights strategies' in environmental justice movements. Using the example of a judicial review application brought by Indigenous environmental justice activists in Canada demonstrates the symbolic power of using rights-based language for environmental justice, but also underscores the serious procedural, logistical and resource barriers that frustrate these groups in their attempts to deploy litigation tactics. This leads to the conclusion that environmental justice movements are right to approach law reform, litigation and 'rights' as tactics to be employed strategically – but not without reservation. Legal scholars need to think critically about 'rights-talk' and confront the hard questions about its utility for advancing environmental justice. To do so, we must learn to listen to what people on the ground already know, and what they want to accomplish.

**What is "Environmental Justice"?**

"Environmental Justice", in the context of human rights and the environment, describes more than a fair outcome in environmental decision-making and the absence of discrimination in facility-siting. It describes a social movement, and a theoretical lens, that is focused critically on the social and political dynamics that produce unfairness in the distribution of environmental

benefits and burdens, and systematic biases in the processes for determining those distributions.[1] Applying the theoretical lens of environmental justice means understanding how disparities in wealth and power, inscribed and re-inscribed through social processes such as racialization and oppression, produce disparities in environmental burdens.[2] In the social movement, an attention to environmental justice means amplifying the voices—and increasing the power—of poor, racialized and Indigenous communities in environmental and resource decision-making venues across the global South, as well as in the so-called 'South of the North'.[3] These venues have typically applied legal norms and protocols that result in those communities, and the most disadvantaged individuals within them, bearing more than their "fair share" of environmental harms.[4]

For more than two decades, the environmental justice movement has drawn inspiration from the grassroots struggles of residents of so-called "sacrifice zones"—places marked by pollution, contamination and toxic waste, often located downwind and downstream of large

*Professor Scott wishes to acknowledge the generous guidance of Kaitlyn Mitchell at Ecojustice in her review of an early draft of this article, as well as the excellent contributions of JD/MES student Christie McLeod and JD student Graham Reeder.

[1] Dayna Nadine Scott, 'Environmental Justice' in Encyclopedia of Action Research (Sage 2013)
[2] See for example, Laura Pulido, 'A Critical Review of the Methodology of Environmental Racism Research' (1996) 28(2) Antipode 142; Dayna Nadine Scott and Adrian A Smith, 'Sacrifice Zones in the Green Energy Economy: Towards an Environmental Justice Framework' (2017) 62 McGill Law Journal 861 (Scott & Smith 2017)
[3]Shawkat Alam and others (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015); For work on the concept of the "South in the North", see the analysis of Daniel Bonilla Maldonado who states that the terms Global North and Global South "give social, political and economic unity to a very heterogeneous reality" (33). He argues that they nevertheless are useful because (among other reasons) they bring to mind a conceptual map that is both "territorialized and racialized" (32) and thus convey a meaning that we can inscribe *within* the categories as well ("The political economy of legal knowledge" in Colin Crawford and Daniel Bonilla Maldonado (eds), *Constitutionalism and the Americas* (Edgar Elgar 2018) 29; see also Amar Bhatia, 'The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World' (2012) 14 Oregon Review of International Law 131; Carmen Gonzalez and Sumudu Atapattu, 'International Environmental law, Environmental Justice, and the Global South' (2017) 26 Transnational Law & Contemporary Problems 229, 233 (in reference to the "South in the North")
[4] Dayna Nadine Scott, 'We Are the Monitors Now': Experiential Knowledge, Transcorporeality and Environmental Justice' (2016) 25 Social & Legal Studies 261

industrial complexes of extraction, refining and petrochemical production.[5] In classic conceptions, residents of sacrifice zones are members of low-income, racialized and Indigenous communities who work together from the grassroots to begin to piece together a complex puzzle of toxic pollution sources, routes of exposures, and associated health impacts by talking with their neighbours, comparing symptoms and compiling records.[6] As these exercises of popular epidemiology produce "evidence that is more informal, experiential, tacit, and explicitly value laden", it is often discounted or rejected by formal scientific and legal authorities.[7] In many cases, however, these popular accounts are subsequently validated.[8]

Over time, scholars working in this framework have expanded their conceptions of environmental justice. While initially focused exclusively on environmental "bads", scholars have broadened efforts to include attention to the distribution of environmental "goods", such as parks and bicycle paths, access to transit options, and farmers' markets.[9] The concept of "just

---

[5] Steve Lerner, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States* (MIT Press 2010). See also the seminal work by Robert Bullard. Robert Bullard, *Dumping in Dixie: Race, Class and Environmental Quality* (Westview Press 1990).

[6] See especially Phil Brown, 'Popular Epidemiology Revisited' (1997) 45 Current Sociology 137; Giovanna Di Chiro, 'Environmental justice from the grassroots' in Daniel Faber (ed), *The struggle for ecological democracy* (Guilford 2008); Luke Cole and Sheila Foster, 'History of the Environmental Justice Movement', in *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (NYU Press 2001); Dayna Nadine Scott, 'Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution' (2008) 46 Osgoode Hall Law Journal 293; Peggy Shepard and others, 'Advancing environmental justice through community- based research' (2002) 110 Environmental Health Perspectives 139

[7] Jason Corburn, *Street Science: Community Knowledge and Environmental Health Justice* (MIT Press 2005) 27

[8] Scott and Smith (n 2), 877. Examples include Lois Gibbs and the other now-celebrated "housewives" that walked the streets to gather the data that eventually mapped the underground plumes of toxic contamination in Love Canal, New York in the early 1970s, and the families from the largely Black community of Warren County, North Carolina who rallied to demonstrate the link between their children's illnesses and the toxic waste dumped along their roadways in the early 1980s. For more information on Love Canal, see Amy M Hay, 'Recipe for Disaster: Motherhood and Citizenship at Love Canal' (2009) 21 Journal of Women's History 111; on Warren County, see Phil Brown and Edwin J Mikkelsen, *No Safe Place: Toxic Waste, Leukemia, and Community Action* (University of California Press 1990). "In Canada, we can document these tactics employed through the 1990s along Fredrick Street in the Sydney Tar Ponds on Cape Breton Island, Nova Scotia, on the Aamjiwnaang First Nation reserve adjacent to Canada's Chemical Valley, and on Township Road 842, downwind of the Peace River oil sands" (Scott n 4) 265–67. For Canada, see also Sarah Marie Wiebe, *Everyday Exposure: Indigenous Mobilization and Environmental Justice in Canada's Chemical Valley* (UBC Press 2016), 97

[9] Julian Agyeman, *Sustainable Communities and the Challenge of Environmental Justice* (New York University Press 2005); David Schlosberg, 'Theorising environmental justice: the expanding sphere of a discourse' (2013) 22 Environmental Politics 37

sustainabilities", popularized by Julian Agyeman and his colleagues, urged scholars to focus not only on the distribution of risks, but also the *prevention* of risks: instead of simply enacting the NIMBY (not-in-my-back-yard) syndrome, they made it clear that we should be looking for answers that reject toxics everywhere (NIABY, or not-in-anyone's- back-yard).[10]

Scholarship started to consider not only local manifestations of environmental injustice, but its global dimensions as well.[11] Carmen Gonzalez, Karin Mickelson and others have demonstrated vividly the inordinate contributions of the industrialized global North to the global environmental problems that disproportionately burden the nations and communities of the global South,[12] including work on the hazardous waste trade, food justice, drinking water, and vulnerability to disaster.[13] Recently, scholars have started branching out even further in the search for root causes: we now often witness scholars attributing environmental injustice to fossil fuel dependencies or 'fossil extractivism', and framing resistance as a fight for "climate justice".[14]

A current theme in environmental justice scholarship is towards more critical approaches that embrace 'intersectionality' by mapping the organization of power relations that underlie

---

[10] Julian Agyeman, Robert D Bullard and Bob Evans (eds), *Just Sustainabilities: Development in an Unequal World* (Earthscan 2003)

[11] See Carmen Gonzalez, 'Environmental Justice and International Environmental Law' in Shawkat Alam and others (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013)

[12] ibid. See also Karin Mickelson, 'The Stockholm Conference and the Creation of the Global North-South Divide: International Environmental Law and Policy' in Shakwat Alam and others (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015)

[13] See generally Shakwat Alam and others (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015)

[14] See e.g. Henry Shue, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014); Scholsberg and Collins, 'From environmental to climate justice: climate change and the discourse of environmental justice' (2014) 5 Wiley Interdisciplinary Reviews: Climate Change 359; Julian Agyeman, Robert Doyle Bullard, Bob Evans (eds), *Just Sustainabilities: Development in an Unequal World* (MIT Press 2003); Paul Mohai, David Pellow and J Timmons Roberts, "Environmental Justice" (2009) 34 Annual Review of Environment and Resources 405; Schlossberg, "Reconceiving Environmental Justice: Global Movements and Political Theories" (2004) 13 Environmental Politics 517

environmental disparities along a number of intersecting axes.[15] An example is the recent attention to questions at the intersection of gender, Indigenous rights and extractivism.[16] Through focusing squarely on social inequality, the framework strives to emphasize relationships across social divisions, rejecting binaries and embracing complexity.[17] Scholars also increasingly foreground the social processes of racialization that lie at the foundation of differential exposures and health disparities. As Laura Pulido argues forcefully in relation to the devastating water crisis that affected the mostly Black residents of Flint, Michigan in 2015, an intersectional conception of contemporary capitalism exposes its deeply racial character.[18] In fact, David Pellow and Robert Brulle have adopted the term "critical environmental justice studies" to refer to emerging attempts to incorporate multiple social categories of difference into analyses of environmental injustice.[19]

**Environmental Justice and the Right to a Healthy Environment**

Perhaps unsurprisingly in this context, environmental law scholarship increasingly employs human rights language.[20] Professor Rebecca Bratspies argues that "there is a growing

---

[15] Patricia Hill Collins and Sirma Bilge, *Intersectionality* (Polity 2016), 7

[16] Sara Seck, 'Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism and State Sovereignty' (2017) 26 Transnational Law & Contemporary problems 383; Penelope Simons, 'Unsustainable International law: Transnational Resource Extraction and Violence Against Women' (2016) 26 Transnational Law & Contemporary problems 415

[17] Ibid. This is not entirely new of course: Giovanna Di Chiro, as early as 2006, noted that environmental justice, as a scholarly lens, is intersectional because of its emphasis on the interdependence of human health, ecological integrity, and social justice. Giovanna Di Chiro, 'Teaching urban ecology: Environmental studies and the pedagogy of intersectionality' (2006) 16 Feminist Teacher 98. See also Elizabeth Hoover, *The River is in Us: Fighting Toxics in a Mohawk Community* (Minnesota 2017)

[18] Laura Pulido, 'Flint, Environmental Racism, and Racial Capitalism' (2016) 27(3) Capitalism Nature Socialism 1

[19] David Naguib Pellow and Robert J Brulle, 'Power, Justice, and the Environment: Toward Critical Environmental Justice Studies' in David Naguib Pellow and Robert J Brulle (eds), *Power, Justice, and the Environment: A Critical Appraisal of the Environmental Justice Movement* (MIT Press 2005); David N Pellow, 'Toward a Critical Environmental Justice Studies: Black Lives Matter as an Environmental Justice Challenge' (2016) 13 Du Bois Review: Social Science Research on Race 221; see also Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) Transnational Environmental Law 37 (arguing that human rights are an 'interpretive aid' to undefined statutory terms and obligations).

[20] An early example is Neil Popovic, 'Pursuing Environmental Justice with International Human Rights and State Constitutions' (1996) 15 Stanford Environmental Law Journal 338; Lynda M Collins, 'The United Nations, Human

sense that the goal of realizing human rights necessarily entails protecting the environment".[21] In her view, the ongoing discourse regarding the right to a healthy environment is useful for the way it motivates lawmakers to bring the environment to the foreground as they "create, interpret, and enforce law".[22] In other words, her position is that recognizing a right to a healthy environment transforms environmental protection from one *aim* of government (among many competing aims), into an *obligation* on government to "respect, protect, and fulfill" this right.[23] This is similar to the approach taken by Peel and Osofsky describing the rise of rights talk in climate litigation globally: they argue that courts may be influenced by the idea of fundamental rights violations when they are interpreting open-ended concepts in legislation, such as a requirement to consider 'the public interest', such that environmental justice claims framed in human rights language are more likely to be successful even if not a win based strictly on an acknowledgement of the 'right' itself.[24] Further, proponents of this approach argue that constitutionalizing rights to a healthy environment may result in judicial application of the "standstill" principle, or the principle of non-regression in the environmental law context,[25] a principle based on the idea of "progressive realization."[26] In other words, existing environmental laws would be treated as a baseline or floor—they could be strengthened, but not weakened.

---

Rights and the Environment' in Louis Kotze & Anna Grear (eds), *Research Handbook on Human Rights and The Environment* (Edward Elgar 2015)

[21] Rebecca Bratspies, 'Do We Need a Human Right to a Healthy Environment?' (2015) 13 Santa Clara Journal of International Law 31, 35

[22] ibid 67

[23] ibid. See also John Merrills, 'Environmental Rights' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *Oxford Handbook on International Environmental Law* (Oxford University Press 2007)

[24] Peel and Osofsky (n19) at 59

[25] Lynda M Collins and David R Boyd, 'Non-Regression and the Charter Right to a Healthy Environment' (2017) 29 Journal of Environmental Law & Practice 285

[26] Sundhya Pahuja, Rights as Regulation: The Integration of Development and Human Rights (2007) 167, 168 <https://ssrn.com/abstract=1618646> accessed 6 March 2018

Some critics maintain, however, that environmental rights affect little practical change. As David Boyd, a prominent proponent, rightly acknowledges, it is hard to imagine how achieving a 'right to a healthy environment' on paper could promptly improve longstanding or persisting issues such as disparities in access to clean drinking water.[27] In fact, Bratspies allows that the embrace of human rights could lead to "unrealistic or overly lofty expectations of immediate transformation."[28] For example, the right to water enshrined in South Africa's post-apartheid constitution has yet to overcome the country's persisting race-based inequities in water distribution.[29] But as Emma Larking demonstrates, "the belief that there exists a global community already committed to rights realization [persists] even in the face of pervasive rights violations".[30] This, she says, is a function of the way that human rights 'rituals' use "symbolism to communicate at the level of affect", fuelling their "tremendous capacity to inspire and enrol people".[31] And the 'symbolic valence' of rights, as Sundhya Pahuja argues, is critical to their emancipatory, or political power.

But scholarship on environmental law, even in its recent turn towards rights, has not paid sufficient attention to the manner through which disadvantaged and historically oppressed peoples are disproportionately harmed, often along familiar social gradients. In fact, this

---

[27] As Boyd states, it is "not a magic wand that would instantly solve Canada's complex challenges". David R Boyd, "Enshrine our Right to Clean Air and Water in the Constitution" (2014) Policy Options, http://policyoptions.irpp.org/magazines/opening-eyes/boyd-macfarlane/. He has meticulously documented, however, the experience of other global North states following the constitutionalizing of environmental rights and has demonstrated convincingly that 'rights' are an important tool for beginning to make progress on longstanding and persistent issues.

[28] Bratspies (n 21), 31 citing David Kennedy, 'Boundaries in the Field of Human Rights: The International Human Rights Movement: Part of the Problem?' (2002) 15 Harvard Law School Human Rights Journal 99, 101

[29] See for example, P Bond and J Dugard, 'The Case of Johannesburg Water: What Really Happened at the Pre-paid 'Parish Pump' (2008) 12 Law, Democracy and Development 1; K Bakker, 'The "Commons" versus the "Commodity": Alter-Globalization, Anti-privatization and the Human Right to Water in the Global South' (2007) 39 Antipode 430.

[30] Emma Larking, 'Human Rights Rituals: Masking Neoliberalism and Inequality, and Marginalizing Alternative World Views' (2017) 32 Canadian Journal of Law and Society 1, 4

[31] Bond and Dugard (n 27); Sundhya Pahuja (n 25)

scholarship often seems woefully unaware as to the roots of the ambivalence that many environmental justice activists bring to the idea of rights.[32] Most crucially, critical legal scholars have long noted that 'rights-talk' can have a depoliticizing effect and work to obscure the material interests at stake.[33]

Rights-based framings of environmental justice tend to individualize problems and can lead to constructions of environmental harms as if they are a function of liberal choice and personal responsibility. Anti-toxics campaigns, as an example, instead of calling for across-the-board regulatory restrictions on toxic chemicals, often become calls for product labelling, couched as a "citizen's right-to-know". Foregoing a 'just sustainabilities' or not-in-anyone's-back-yard mindset, these campaigns may end up protecting privileged consumers with the education and resources to do smart, 'green' shopping, but leave the disadvantaged without remedy.[34] Considering the clear class and race gradients in exposures to everyday toxics,[35] these kinds of campaigns have the effect of exacerbating the social and political inequities that concentrate toxic exposures and confer risks upon the most disadvantaged and vulnerable.[36] Further, these approaches benefit the end-consumers, but ignore the workers producing the chemicals and the residents living in the communities downwind or downstream from the facilities producing the chemicals.

---

[32] See Cummings and Eagly, 475; Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance,and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 774 (1998). A notable exception is Tracy-Lynn Humby, 'Environmental Justice and Human Rights on the Mining Wastelands of the Witwatersrand Gold Fields' (2013) 43 Revue générale de droit 67

[33] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press 1997); Susan Marks, 'Human Rights and Root Causes' (2011) 74 The Modern Law Review 57; Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 Law and Contemporary Problems 147;

[34] Dayna Nadine Scott, Jennie Haw and Robyn Lee, 'Wannabe Toxic-Free? From Precautionary Consumption to Corporeal Citizenship' (2017) 26 Environmental Politics 322

[35] ibid

[36] Laura Senier and others, 'The socio-exposome: advancing exposure science and environmental justice in a postgenomic era' (2017) 3 Environmental Sociology 107

In other words, rights-based campaigns to tackle toxics often have the effect of exacerbating the very disparities that environmental justice campaigns are meant to address.[37] As Elizabeth Hoover argues, we need to "move away from a discourse on individual rights to a more expansive set of concerns for the *conditions under which rights can be exercised*."[38] This is because, as many critical legal scholars have argued, human rights norms do not fundamentally challenge material inequality; "they do not purport to provide an egalitarian agenda."[39] Of course, we need to distinguish here between the *kinds* of rights claimed – collective rights, land tenure rights and proprietary rights to lands and resources for Indigenous peoples certainly do have a more potent political power and most certainly could present fundamental challenges to existing social, political and economic orders. Further, resistance movements fully embracing the considerable symbolic power of rights to mobilize people around change are undeniably already confronting the existing inequities that underlie unequal pollution burdens.[40]

**Indigenous Peoples' Fight for "Environmental Rights" in Canada**

Notwithstanding these worries, the use of fundamental rights and freedoms, for many legal scholars, accords well with the aim of ensuring that vulnerable individuals and marginalized communities are not burdened with disproportionate environmental risks.[41] But for

---

[37] Perhaps it is unfair to even call 'right-to-know' campaigns rights-based strategies at all. In fact, these are often explicitly oriented around liberal notions of access to information and transparency and are quite easily distinguished from campaigns that attempt to redress the violation of fundamental human rights to clean air and water – or to highlight the unfair distribution of those.

[38] Hoover (n 17); See also 'Violence on the Land, Violence on our Bodies' (Native Youth Sexual Health Network and the Women's Earth Alliance, 2016) <landbodydefense.org/uploads/files/VLVBReportToolkit2016.pdf> accessed 5 March 2018 (emphasis added).

[39] Moyn (n 31), 161. Similarly, see Margot Young, 'the ideological framing lent by liberalism to rights law explains recurring resistance by courts to challenges that target serious economic and social injustices in Canadian society' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017)

[40] Luke Cole, 'Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law' (1992) 19 Ecology Law Quarterly 648-649

[41] Nathalie J Chalifour, 'Environmental Justice and the Charter: Do environmental injustices infringe sections 7 and 15 of the *Charter*?' (2015) 28 Journal of Environmental Law and Practice 89, 105. See also David Boyd and Lynda Collins (n 24).

others in the environmental justice movement, there is a real skepticism towards law and legal strategies for achieving change. This stems from the reality that, despite the theory of human rights, in practice they are neither self-executing nor easily enforceable.[42] The following example details how some environmental justice activists in Canada approached strategic litigation in an attempt to deploy environmental rights as a defence to the chronic pollution burdens facing Indigenous communities. The attempt ultimately disappoints, but further efforts are still underway, and we have much to learn from looking closely at this experience.[43]

The "Chemical Valley Charter challenge", a 2010 constitutional challenge to a local air pollution regime in a major pollution hotspot that disproportionately affects an Anishinaabe community in Canada, was withdrawn in 2016 to the great disappointment of many across the country.[44] This innovative judicial review application, which was explicitly oriented against the environmental racism that perpetuates the chronic releases of toxic air pollution in the region, had promised to provide Canada's courts with an opportunity to declare that all Canadians have a "right to a healthy environment", despite one not being provided for in the *Charter of Rights and Freedoms* ("the Charter") or elsewhere in the country's Constitution.

---

[42] James R May, 'Constituting Fundamental Environmental Rights Worldwide' (2006) 23 Pace Environmental Law Review 113, 119

[43] In September 2015, Grassy Narrows First Nation launched a constitutional claim against the government of Ontario alleging that the province's decision to allow logging of forests around the community will release mercury into the local waterways. "Grassy Narrows alleges that the logging plan will prolong and deepen the ongoing tragedy of mercury poisoning in their community and therefore violates their Charter rights to security and freedom from discrimination." See 'Grassy Narrows sues Ontario over mercury health threat from clearcut logging' (*Free Grassy*) <freegrassy.net/2015/09/14/grassy-narrows-sues-ontario-over-mercury-health-threat-from-clearcut-logging/> accessed 14 March 2018

[44] Ecojustice, 'Defending the Rights of Chemical Valley Residents—Charter Challenge' (7 April 2016) <www.ecojustice.ca/case/defending-the-rights-of-chemical-valley-residents-charter-challenge> accessed 8 September 2017; and Ecojustice, 'Changing Course in Chemical Valley' (26 April 2016) <www.ecojustice.ca/changing-course-chemical-valley> accessed May 3, 2018

The claim, filed by two members of the Aamjiwnaang First Nation (Ada Lockridge and Ron Plain), questioned the constitutionality of permits granted to Suncor Inc., a major multinational oil company which operates a refinery in the massive petrochemical cluster near Sarnia, Ontario. Industrial emissions from Sarnia's Chemical Valley—consisting of several refineries and heavy industries accounting for approximately 40 percent of Canada's chemical production—flow downwind towards the Aamjiwnaang First Nation reserve.[45] The high air pollution burden in Aamjiwnaang and the devastating environmental health impacts, including higher than expected rates of cancer and miscarriage, respiratory illness and developmental disorders on the community, have been well documented.[46]

In this application, Lockridge and Plain contended that the decision by Ontario's Ministry of Environment ("MOE") to allow Suncor to increase its emissions to air, without proper consideration for the cumulative effects from all industrial emissions in the area, violated their rights enshrined in the Charter.[47] The applicants argued that the decisions and practices of the MOE contributed to exceedingly high levels of emissions that threaten their health and force them to confront risks and trade-offs that non-Indigenous Canadians do not face, engaging the *Charter*'s equality guarantee. This reasoning was also in line with persuasive accounts by leading Canadian environmental law scholars who argue that Canada's section 7—which guarantees the right to life, liberty, and security of the person—is "available to strike down laws

[45] ibid
[46] Elaine MacDonald and Sarah Rang, 'Exposing Canada's Chemical Valley: An Investigation of Cumulative Air Pollution Emissions in the Sarnia, Ontario Area' (Ecojustice, October 2007) <www.environmentalhealthnews.org/ehs/news/2012/2007-study.pdf> accessed 8 September 2017); Constanze A Mackenzie, Ada Lockridge and Margaret Keith, 'Declining Sex Ratio in a First Nation Community' (2005) 113 Environmental Health Perspectives 1295; Environmental Commissioner of Ontario, 'MOE Continues to Fail the Aamjiwnaang First Nation' in *Managing New Challenges: Annual Report 2013/2014* (October 2014).
[47] *Lockridge v Ontario (Director, Ministry of the Environment),* 2012 ONSC 2316 [1]

that allow pollution at levels that interfere with human health and well-being".[48] But despite the Supreme Court of Canada's emphasis on environmental protection as a central value in Canadian society and expansive jurisprudence interpreting section 7, this case was withdrawn and will not be heard, at least in part because the applicants lost some critical preliminary motions, including the motion for a protective costs order, and thus faced the prospects of paying Suncor's "considerable" legal bill at the end of a protracted litigation heavy on expert evidence.

The company's lawyers brought several preliminary challenges to the application: a collateral attack motion, which the applicants won, and a motion to strike much of the affidavit evidence filed by the applicants. The company argued that the residents' knowledge about the "health effects allegedly flowing from [the] emissions…is irrelevant", and that their affidavits contained "improper opinion evidence, inadmissible hearsay, argument or speculation".[49] These motions consumed the majority of 4 days of oral argument. The Court agreed that some portions of the evidence should be struck, but left most of the evidence in. Even though they were not successful in all of the preliminary motions, the company lawyers certainly succeeded in delaying the ultimate hearing of the application and ratcheting up the time and financial resources necessary to proceed with the suit. To use that strategy to maximum effect, the company's lawyers also successfully opposed the applicants motion for a 'protective costs order', which would have insulated the residents, absent improper conduct, from adverse costs if the application was ultimately successful. Worse, in the course of deciding the matter of the protective costs order, the company managed to convince the Court that the scope of the judicial

---

[48] Chalifour (n 38) citing Lynda Collins, 'An Ecologically Literate Reading of the Charter' (2008) 26 Windsor Review of Legal and Social Issues 7; David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions Human Rights, and the Environment* (UBC Press 2011); David Wu, 'Embedding Environmental Rights in Section 7 of the Canadian Charter: Resolving the Tension between the Need for Precaution and the need for Harm' (2015) 33 National Journal of Constitutional Law 191

[49] *Lockridge* (n 44) [4]

review application was very narrow. The Court stated that all that was at stake was the quashing of one specific regulatory approval; the decision "would not affect general emissions from the refinery, and could not generally impose a cumulative effects assessment into the regulatory process".[50] All of the meaning that the local activists and their *pro bono* lawyers tried to pour into the case—the environmental racism, the disproportionate burdens, the right to breathe clean air—all of this drained out as the shape of the air-tight legal compartments solidified through the preliminary motions.

This case illustrates the potential utility of fundamental rights and freedoms recognized by scholars in the environmental justice movement – many young activists were inspired, politicized and became engaged in the fight for environmental justice through this community's ongoing struggle[51] – but it also exemplifies why many in the movement feel a real skepticism towards legal strategies and litigation for achieving change. Many deserving claims are blocked from even being heard by procedural and logistical barriers, such as standing or costs rules, are denied the opportunity to be examined on their merits, and thus sap energy and resources from the communities mobilizing against environmental injustice. Here, as in many other cases, affected marginalized people are silenced, despite the best efforts of their lawyers to engage and involve them; to give them voice through the process.[52] This is because the very structure of the

---

[50] ibid [162]

[51] Of course, winning in court is not always the driving purpose of bringing forward strategic litigation. As Peel and Osofsky (n19) argue, "[e]ven 'losing' cases can have important flow-on effects through the ways in which they shape public dialogue, business attitudes and government action" (at 67) In the final analysis, as the authors point out in relation to climate change litigation more specifically, "the strongest benefit from a turn towards rights arguments" lies in these more informal effects (ibid.)

[52] A particularly devastating aspect of this case involved the cancer diagnosis of one of the main applicants, Ron Plain, the specific symptoms of which prevented him from being available for cross-examination. In a recent interview, Ron attributes his cancer to the pollution from Chemical Valley. Sean Craig, Carolyn Jarvis, Emma

enterprise, in this case a judicial review raising Charter issues, requires the 'repackaging of client grievances in a form the court [can] understand'.[53]

**Effective Advocacy in an Environmental Justice Mode**

In part, the environmental justice movement emerged out of a rejection of the way that the conventional environmental movement–seen as conservative, professionalized and invested in a 'preservationist mindset' – was letting communities of colour down.[54] This has given rise to a need for lawyers and legal scholars to re-think how they want to work with communities towards long-term, fundamental social change. The thrust of much environmental justice scholarship reaching back to the ground-breaking "empowerment lawyering" model described by Luke Cole in 2000, has embraced the notion that "affected residents must "speak for themselves", their expertise must be valued, and they must be believed".[55] Collaborative efforts such as Cole's have proven to be very fruitful in many cases, but should not be understood as easy or straightforward to implement.[56]

One point of tension involves the use of experts. Communities use experts when they need to make credible scientific claims about levels of environmental exposures in their communities, and their associated health impacts, sometimes strategically deploying these experts to preserve the voice of the grassroots and counter the power of lawyer and

---

McIntosh, Sawyer Bogdan, Morgan Bocknek and Robert Mackenzie, "Toxic Secret: We Expected Cancer", Global News, October 14th, 2017, https://globalnews.ca/news/3796720/sarnia-oil-industry-spills-human-impact-investigation/

[53] Lucie E White, 'Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak' (1987-1988) 16 NYU Review of Law and Social Change 535, 543-44

[54] Cole and Foster (n 6); Richard Toshiyuki Druri and Flora Chu, 'From White Knight Lawyers to Community Organizing: Citizens for a Better Environment – California' (1994) 5 Race, Poverty and the Environment 52

[55] Cole and Foster (n 6), 106

[56] Luke Cole (n 37), 619

professionalized policy discourses.[57] The differences between residents' and experts' orientations to knowledge have been shown to lead to concrete differences in the kinds of questions asked, the methodologies employed and even the overall goals of the intervention strategy crafted.[58] Often, these differences center on approaches to the usefulness of "more data". Here, political activism leading to the introduction of community-right-to-know laws has been instrumental in helping residents begin to understand what their exposures are, so they can press for more rigorous regulations to protect their health. In other situations, where communities feel they already know enough, their members are sick and they want stringent regulatory controls to reduce exposures, offers from state agencies to fund health studies or install environmental monitoring equipment are often seen as mere attempts to obscure the problem, appease industry and delay action.[59]

New models for working with communities seek to combine and enhance the expertise, capacities and perspectives of experts and residents to meet the needs and priorities identified by affected residents. These models draw on a broad base of scholarship setting out participatory action methods, sometimes under the banner of community-based participatory research (CBPR). CBPR is "motivated by a belief that researchers have a moral and ethical obligation to engage laypeople in formulating research questions, in collecting and interpreting data, in sharing research results with the community being studied, and in disseminating research findings and discussing how they may be used to inform policy".[60] Legal scholars have, by-and-large, not embraced these methods. But there is much to be gained: by collaborating closely with

[57] Scott, 'We are the Monitors' (n 4). The relative ability of the parties to absorb the high cost of retaining experts is another crucial factor to consider in thinking through systemic biases in our modes of litigation.
[58] Senier and others (n 34)
[59] In the Aamjiwnaang case described earlier, renewed media attention to the long-standing chronic pollution problem that emerged after the constitutional challenge was withdrawn brought promises from politicians to fund a health study. This was met with a mixed reaction, but most community activists recognized it as a delay tactic.
[60] Senier and others (n 34), 113

communities, legal researchers can support the strategic use of a *variety* of tools – 'rights-talk', litigation, research, law reform campaigns or direct action – as the situation demands and depending on the priorities of those on the ground.[61] Where these decisions are taken by community members themselves, lawyers and legal scholars become better allies in the environmental justice movement, and campaigns for environmental rights can draw more effectively on the symbolic, political power of rights.

**Conclusion**

The use of human rights in environmental justice movements, while demonstrating potential utility, is hampered by severe limitations. For instance, to say that everyone has a right to a healthy environment is to confront, almost everywhere we look, the glaring reality of a universal entitlement that is demonstrably unmet. Litigation, as a means of addressing this tension, comes up short: it benefits repeat-players and deep pockets, it puts up procedural barriers to public interest applicants in the form of standing rules and costs rules, and it denigrates the expertise of residents and activists on the ground. Legal scholars need to understand and account for this history and to honestly confront these significant drawbacks when working for environmental justice – when we do so, we learn to listen to what communities want before we default to 'rights' and other legal tools often ill-fitted to the task.

[61] Robert Lovelace, 'Notes from Prison' in Julian Agyeman and other (eds), *Speaking for Ourselves: Environmental Justice in Canada* (UBC Press 2010)

**Bibliography**


——‘Grassy Narrows sues Ontario over mercury health threat from clearcut logging’ (*Free Grassy*) <freegrassy.net/2015/09/14/grassy-narrows-sues-ontario-over-mercury-health-threat-from-clearcut-logging/> accessed 14 March 2018.

Agyeman J, Bullard RD and Evans B (eds), *Just Sustainabilities: Development in an Unequal World* (MIT Press 2003).

Agyeman J, *Sustainable Communities and the Challenge of Environmental Justice* (New York University Press 2005).

Alam S and others (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015).

Bakan J, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press 1997).

Bakker K, ‘The “Commons” versus the “Commodity”: Alter-Globalization, Anti-privatization and the Human Right to Water in the Global South’ (2007) 39 Antipode 430.

Bhatia A, ‘The South of the North: Building on Critical Approaches to International Law with Lessons from the Fourth World’ (2012) 14 Oregon Review of International Law 131.

Bond P and Dugard J, ‘The Case of Johannesburg Water: What Really Happened at the Pre-paid ‘Parish Pump’ (2008) 12 Law, Democracy and Development 1.

Boyd DR, ‘Enshrine our Right to Clean Air and Water in the Constitution’ (2014) Policy Options, http://policyoptions.irpp.org/magazines/opening-eyes/boyd-macfarlane/.

Boyd DR, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2011).

Bratspies R, ‘Do We Need a Human Right to a Healthy Environment?’ (2015) 13 Santa Clara Journal of International Law 31.

Brown P and Mikkelsen EJ, *No Safe Place: Toxic Waste, Leukemia, and Community Action* (University of California Press 1990).

——, ‘Popular Epidemiology Revisited’ (1997) 45 Current Sociology 137.

Bullard R, *Dumping in Dixie: Race, Class and Environmental Quality* (Westview Press 1990).

Chalifour NJ, ‘Environmental Justice and the Charter: Do environmental injustices infringe sections 7 and 15 of the *Charter*?’ (2015) 28 Journal of Environmental Law and Practice 89.

Cole L and Foster S, ‘History of the Environmental Justice Movement’, in *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (NYU Press 2001).

Cole L, ‘Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law’ (1992) 19 Ecology Law Quarterly 648.

Collins LM and Boyd DR, ‘Non-Regression and the Charter Right to a Healthy Environment’ (2017) 29 Journal of Environmental Law & Practice 285.

Collins LM, 'An Ecologically Literate Reading of the Charter' (2008) 26 Windsor Review of Legal and Social Issues 7.

——, 'The United Nations, Human Rights and the Environment' in Kotze L and Grear A (eds), *Research Handbook on Human Rights and The Environment* (Edward Elgar 2015).

Collins PH and Bilge S, *Intersectionality* (Polity 2016).

Corburn J, *Street Science: Community Knowledge and Environmental Health Justice* (MIT Press 2005).

Craig S, Jarvis C, McIntosh E, Bogdan S, Bocknek M and Mackenzie R, 'Toxic Secret: We Expected Cancer', Global News, October 14th, 2017, https://globalnews.ca/news/3796720/sarnia-oil-industry-spills-human-impact-investigation/

Cummings SL and Eagly IV, 'A Critical Reflection on Law and Organizing' (2001) 48 UCLA Law Review 443.

Di Chiro G, 'Teaching urban ecology: Environmental studies and the pedagogy of intersectionality' (2006) 16 Feminist Teacher 98.

——, 'Environmental justice from the grassroots' in Faber D (ed), *The struggle for ecological democracy* (Guilford 2008).

Druri RT and Chu F, 'From White Knight Lawyers to Community Organizing: Citizens for a Better Environment – California' (1994) 5 Race, Poverty and the Environment 52.

Ecojustice, 'Defending the Rights of Chemical Valley Residents—Charter Challenge' (Ecojustice, 2016) <www.ecojustice.ca/case/defending-the-rights-of-chemical-valley-residents-charter-challenge> accessed 8 September 2017.

Ecojustice, 'Changing Course in Chemical Valley' (Ecojustice, 2016) <www.ecojustice.ca/changing-course-chemical-valley> accessed May 3, 2018

Environmental Commissioner of Ontario, 'MOE Continues to Fail the Aamjiwnaang First Nation' in *Managing New Challenges: Annual Report 2013/2014* (2014).

Foster S, 'Justice from the Ground Up: Distributive Inequities, Grassroots Resistance,and the Transformative Politics of the Environmental Justice Movement' (1998) 86 Cal L Rev 774.

Gonzalez C and Atapattu S, 'International Environmental law, Environmental Justice, and the Global South' (2017) 26 Transnational Law & Contemporary Problems 229.

Gonzalez C, 'Environmental Justice and International Environmental Law' in Alam S and others (eds), *Routledge Handbook of International Environmental Law* (Routledge 2013).

Hay AM, 'Recipe for Disaster: Motherhood and Citizenship at Love Canal' (2009) 21 Journal of Women's History 111.

Hoover E, *The River is in Us: Fighting Toxics in a Mohawk Community* (Minnesota 2017).

Humby TL, 'Environmental Justice and Human Rights on the Mining Wastelands of the Witwatersrand Gold Fields' (2013) 43 Revue générale de droit 67.

Kennedy D, 'Boundaries in the Field of Human Rights: The International Human Rights Movement: Part of the Problem?' (2002) 15 Harvard Law School Human Rights Journal 99.

Larking L, 'Human Rights Rituals: Masking Neoliberalism and Inequality, and Marginalizing Alternative World Views' (2017) 32 Canadian Journal of Law and Society 1.

Lerner S, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States* (MIT Press 2010).

Lovelace R, 'Notes from Prison' in Agyeman J and other (eds), *Speaking for Ourselves: Environmental Justice in Canada* (UBC Press 2010).

MacDonald E and Rang S, 'Exposing Canada's Chemical Valley: An Investigation of Cumulative Air Pollution Emissions in the Sarnia, Ontario Area' (Ecojustice, October 2007) <www.environmentalhealthnews.org/ehs/news/2012/2007-study.pdf> accessed 8 September 2017).

Mackenzie CA, Lockridge A and Keith M, 'Declining Sex Ratio in a First Nation Community' (2005) 113 Environmental Health Perspectives 1295.

Maldonado DB, 'The political economy of legal knowledge' in Crawford C and Maldonado DB (eds), *Constitutionalism and the Americas* (Edgar Elgar 2018).

May JR, 'Constituting Fundamental Environmental Rights Worldwide' (2006) 23 Pace Environmental Law Review 113.

Merrills J, 'Environmental Rights' in Bodansky D, Brunnée J and Hey E (eds), *Oxford Handbook on International Environmental Law* (Oxford University Press 2007).

Mickelson K, 'The Stockholm Conference and the Creation of the Global North-South Divide: International Environmental Law and Policy' in Shakwat Alam and others (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015).

Mohai P, Pellow D and Roberts JT, "Environmental Justice" (2009) 34 Annual Review of Environment and Resources 405.

Moyn S, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 Law and Contemporary Problems 147.

Native Youth Sexual Health Network and the Women's Earth Alliance, 'Violence on the Land, Violence on our Bodies' (Native Youth Sexual Health Network and the Women's Earth Alliance, 2016) <landbodydefense.org/uploads/files/VLVBReportToolkit2016.pdf> accessed 5 March 2018.

Pahuja S, 'Rights as Regulation: The Integration of Development and Human Rights' (2007) 167 <https://ssrn.com/abstract=1618646> accessed 6 March 2018.

Peel J and Osofsky HM, 'A Rights Turn in Climate Change Litigation?" (2018) 7(1) Transnational Environmental Law 37

Pellow DN and Brulle RJ, 'Power, Justice, and the Environment: Toward Critical Environmental Justice Studies' in Pellow DN and Brulle RJ(eds), *Power, Justice, and the Environment: A Critical Appraisal of the Environmental Justice Movement* (MIT Press 2005).

Pellow DN, 'Toward a Critical Environmental Justice Studies: Black Lives Matter as an Environmental Justice Challenge' (2016) 13 Du Bois Review: Social Science Research on Race 221.

Popovic N, ‘Pursuing Environmental Justice with International Human Rights and State Constitutions’ (1996) 15 Stanford Environmental Law Journal 338.

Pulido L, ‘A Critical Review of the Methodology of Environmental Racism Research’ (1996) 28(2) Antipode 142

——, ‘Flint, Environmental Racism, and Racial Capitalism’ (2016) 27(3) Capitalism Nature Socialism 1.

Schlosberg D and Collins LB, ‘From environmental to climate justice: climate change and the discourse of environmental justice’ (2014) 5 Wiley Interdisciplinary Reviews: Climate Change 359.

Schlosberg D, “Reconceiving Environmental Justice: Global Movements and Political Theories” (2004) 13 Environmental Politics 517.

——, ‘Theorising environmental justice: the expanding sphere of a discourse’ (2013) 22 Environmental Politics 37.

Scott DN and Smith AA, ‘Sacrifice Zones in the Green Energy Economy: Towards an Environmental Justice Framework’ (2017) 62 McGill Law Journal 861.

Scott DN, ‘Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution’ (2008) 46 Osgoode Hall Law Journal 293.

——, ‘Environmental Justice’, *Encyclopedia of Action Research* (Sage 2013).

——, ‘“We Are the Monitors Now”: Experiential Knowledge, Transcorporeality and Environmental Justice’ (2016) 25 Social & Legal Studies 261.

Scott DN, Haw J and Lee R, ‘Wannabe Toxic-Free? From Precautionary Consumption to Corporeal Citizenship’ (2017) 26 Environmental Politics 322.

Seck S, ‘Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism and State Sovereignty’ (2017) 26 Transnational Law & Contemporary problems 383.

Senier L and others, ‘The socio-exposome: advancing exposure science and environmental justice in a postgenomic era’ (2017) 3 Environmental Sociology 107.

Shepard P and others, ‘Advancing environmental justice through community- based research’ (2002) 110 Environmental Health Perspectives 139.

Shue H, *Climate Justice: Vulnerability and Protection* (Oxford University Press 2014).

Simons P, ‘Unsustainable International law: Transnational Resource Extraction and Violence Against Women’ (2016) 26 Transnational Law & Contemporary problems 415.

Susan Marks, ‘Human Rights and Root Causes’ (2011) 74 The Modern Law Review 57.

White LE, ‘Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak’ (1987-1988) 16 NYU Review of Law and Social Change 535.

Wiebe SM, *Everyday Exposure: Indigenous Mobilization and Environmental Justice in Canada’s Chemical Valley* (UBC Press 2016).

Wu D, ‘Embedding Environmental Rights in Section 7 of the Canadian Charter: Resolving the Tension between the Need for Precaution and the need for Harm’ (2015) 33 National Journal of Constitutional Law 191.

Young M, ‘The Right to Life, Liberty and Security of the Person’ in Oliver P, Macklem P and Des Rosiers N (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017).