

Environmental Rights: Human Rights and Pollution in Sarnia's Chemical Valley¹

A. Introduction

Environmental justice and environmental racism have been formally recognized as legal phenomena since the 1980s in the United States when several studies documented the disproportionate pollution burden that people in non-white and poor communities face.² The concentration of pollution in these communities results from the proximity of hazardous waste, petrochemical refining, and other industries, the siting for which is approved by state and federal agencies. This led the U.S. government to institute Environmental Justice Executive Order 12898 in 1994 and renew its commitment to Title VI of the *Civil Rights Act* prohibiting discrimination by government agencies that receive federal funds in an attempt to apply environmental justice and cumulative effects screens to the siting of toxic facilities.³

The enduring question in the environmental justice debate remains whether polluting uses become concentrated where land prices are lower or where opposition to those uses is less:

Related to the race or class debate, largely due to the role of the housing market as a systemic sorter of individuals and communities, is the “chicken or egg” polemic. On the one hand, hazards may concentrate disproportionately in existing communities of least resistance. On the other, hazards suppress land values making properties affordable to those of lower status.⁴

While Canada does not have the same history of concentration of industry, a recent study of air pollution in the Great Lakes Basin concluded that as the amount of toxic pollution released increases in a census subdivision, so does the incidence of poverty.⁵ Perhaps the most widespread and stark example of environmental inequality in Canada is that of water quality on Indian reserves. People living on reserves do not benefit from the same level of safety of drinking water as those

¹ Thanks to Ecojustice staff Justin Duncan, Kaitlyn Mitchell, and Margot Venton who provided court documents and other written material for use in preparing this Background. Of note is that this topic and the potential for other test cases were identified by staff of Ecojustice, the Environmental Law Centre and West Coast Environmental Law following the public interest environmental law conference in February.

² See, for example, Robert Bullard, Paul Mohai, Robin Saha and Beverly Wright, *Toxic Wastes and Race at Twenty, 1987-2007: Grassroots Struggles to Dismantle Environmental Racism* (Cleveland: United Church of Christ, 2007) <http://www.ejrc.cau.edu/TWARTFinal.htm>.

³ Civil Rights Act of 1964 ([Pub.L.](#) 88-352, 78 [Stat.](#) 241, enacted July 2, 1964).

⁴ Michael Buzzelli, *Environmental Justice in Canada – It Matters Where You Live* (Ottawa: Canadian Policy Research Networks, 2008) at 2.

⁵ PollutionWatch, *An Examination of Pollution and Poverty in the Great Lakes Basin* (Toronto: PollutionWatch, 2008) http://www.pollutionwatch.org/pub/PW_Pollution_Poverty_Report.pdf

living off reserve.⁶ Thirteen percent of reserve communities in Canada are subject to boil water or other water quality orders at any time.⁷

The place-based environmental inequalities on Indian reserves are underscored by socioeconomic and cultural or ethnic markers of First Nations' communities, the members of which cannot necessarily remove themselves from an undesirable land use. Indigenous people have a connection to their landscape that is inherently bound to their broader community and cultural practices. They have a cultural and financial attachment to a particular piece of land through the Indian reserve system.

One of the most recent examples highlighting these persistent environmental inequalities in Canada is the Sarnia Chemical Valley judicial review that staff with Ecojustice filed in October 2010. The applicants for judicial review are Ada Lockridge and Ronald Plain (the Applicants), members of the Aamjiwnaang First Nation, a community south of Sarnia that is surrounded by petrochemical facilities and refineries, as well as energy production and manufacturing enterprises. In addition to ongoing health problems, the community began to ask questions when the female to male birth ratio diverged significantly. A study published in 2005 in the journal *Environmental Health Perspectives* confirmed that only 33 percent of babies born in the community between 1999 and 2003 were male, with that number increasing to only 41 percent if averaged over ten years.⁸

The purpose of this backgrounder is to discuss this judicial review, based in part on *Charter* arguments, that is before the courts in Ontario. Section B sets out the facts of the case, focusing on the Applicants, the Aamjiwnaang First Nation, the air pollution within Chemical Valley, and the Ministry's air pollution control regime. Section C lays out the issues and arguments advanced by the lawyers at Ecojustice. Section D invites the reader to consider questions posed in anticipation of the ELC Associates teleconference on Monday, June 13, 2011.

B. Facts and Regulatory Approvals⁹

Ada Lockridge and Ronald Plain are challenging a decision by the Director of the Ontario Ministry of the Environment to allow Suncor Energy Products to increase its production by 25 percent at one facility and thus increase air pollutants. Ron and Ada's community, the Aamjiwnaang First Nation on Sarnia 45 Indian Reserve, is located on the St. Clair River and directly across the River from Port Huron, Michigan.¹⁰ Data from the Canadian National Pollutant Release Inventory shows

⁶ Commissioner of the Environment and Sustainable Development, Report of the Commissioner of the Environment and Sustainable Development to the House of Commons (Ottawa: Public Works and Government Services Canada, 2005) at para. 5.76.

⁷ Constance MacIntosh, "Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves" (2008) 39.1 *Ottawa Law Review* 63.

⁸ Constanze Mackenzie, Ada Lockridge and Margaret Keith, "Declining Sex Ratio in a First Nation Community" 2005, 113:10 *Environmental Health Perspectives* 1295-1298; CBC News, "Aamjiwnaang First Nations Concerned About Chemical Exposure" September 2 2005

http://www.cbc.ca/news/health/story/2005/09/02/no_boys20050902.html;

⁹ Information for this section is taken from *Lockridge and Plain v. Ministry of the Environment (Ontario)* (29 October 2010), Toronto 528/10 (Ont Sup Ct) (Notice of Application) (hereafter "Notice"); Elaine MacDonald and Sarah Rang, *Exposing Canada's Chemical Valley* (Toronto: Ecojustice, 2007).

¹⁰ Chemical Valley is defined as an area within 15 kilometres of Ms. Lockridge's home. Notice, *ibid* at 2j.

that the Reserve is in the midst of Ontario's heaviest air pollution load, with 46 facilities within 25 kilometres releasing 131,992 metric tonnes of air pollutants in 2005.¹¹

Ms. Lockridge resides on the reserve with her family and 700 other residents, however Mr. Plain left the reserve because of fears of adverse health effects from pollution. Ms. Lockridge's residence is 1.4 kilometres from the Suncor petroleum refinery. There are at least 11 facilities within a 15 kilometre radius of Ms. Lockridge's residence that emit hydrogen sulphide, sulphur dioxide, oxides of nitrogen, carbon monoxide, particulate matter and benzene. These pollutants all pose health risks to humans.

Ms. Lockridge and Mr. Plain assert that the existing air pollution in their community resulting from the concentration of industrial emissions pose serious risks to their health and wellbeing, and is causing illness and having a negative impact on their culture. In particular, they and the other community members experience demonstrated:

- Physical health impacts including cancers, asthma (22 percent of children and 17 percent of adults), birth defects, miscarriages, stillbirths, a skewed birth ratio female to male, skin rashes, chronic headaches, and high blood pressure;
- Mental health impacts including fear and anger from the proximity of industrial facilities and the related smells and sirens from pollution accidents and practice drills, as well as the stress from living in a constant state of emergency preparedness awaiting the next accident that releases pollutants at a dangerous level; and
- Mental health impacts related to the inability to undertake cultural activities because of the fear of pollution.

The regulatory scheme for air pollution in Ontario is established by the *Environmental Protection Act*¹² (EPA) and *Environmental Bill of Rights, 1993* (EBR).¹³ The EPA prohibits the discharge of contaminants that may cause adverse effects, which include effects to human health. The Air Pollution – Local Air Quality regulation (the Regulation) establishes the standards for air pollution, limiting the concentration of pollution measured at a specific location such as the property line of the facility.¹⁴ The Director and Minister of the Environment may approve exemptions to the prohibition on discharging contaminants if the discharge is not likely to cause an adverse effect.¹⁵ The Director issues certificates of approval¹⁶ or Director's orders¹⁷ to permit otherwise unlawful releases of air pollution.

Under the EBR, when making decisions the Minister of the Environment is required to consider the Ministry of the Environment's statement of environmental values, which include taking an ecosystem approach and assessing cumulative impacts.¹⁸

¹¹ Elaine MacDonald and Sarah Rang, *Exposing Canada's Chemical Valley* (Toronto: Ecojustice, 2007) at 11; Mary Ann Colihan, "Chemical Valley: Aamjiwnaang First Nation in Sarnia Sounds Alarm Over Toxins" CBC News April 1 2008 <http://www.cbc.ca/news/background/aboriginals/health.html>

¹² R.S.O. 1990, c. E.19.

¹³ S.O. 1993, c. 28.

¹⁴ O Reg 419/05.

¹⁵ *Supra* note 12 at s.14.

¹⁶ *Supra* note 12 at s.9.

¹⁷ *Supra* note 12 at ss. 18, 157, 157.1, 157.2 and 196. Through a Control Order the Director may permit companies to discharge contaminants in excess of the standards set in the Regulation.

¹⁸ *Supra* note 13 at s.11.

There are two primary problems with this regulatory regime when looked at from a public health perspective. First, several of the standards under the Regulation are outdated, and the Regulation does not contain any standards for some hazardous substances such as benzene. Second, when approving these releases under the EPA, the Director, in fact, does not take into account cumulative impacts from existing air pollution, the emission from other facilities in the area, and the concentration of a particular contaminant in an area beyond a specific facility.

The 2010 decision by the Ministry of the Environment that permitted Suncor to increase its production by 25 percent is only the most recent in a history of approvals to emit contaminants at that facility. Of note is that the Ministry capped Suncor's emission of sulphur in 2008 to 145 tonnes per day for the facility following an investigation into Suncor's flaring of acid gas, a by-product of the sulphur removal process from crude oil. The purpose was to bring Suncor's emissions into compliance with the Regulation. Suncor reduced its production for a time, but in 2010 the Director authorized an increase in production at the same facility that allowed releases of up to 180 tonnes of sulphur per day. The Director's decision permits Suncor to exceed the standards set by the Regulation. At no point did the Ministry undertake a cumulative effects assessment.

C. Issues and Arguments¹⁹

The Applicants challenge the way in which decisions are made to issue certificates of approval or Director's orders under the EPA, and seek remedies under section 52 of the *Constitution Act, 1982* declaring these provisions inoperative insofar as they allow for the violation of the Applicants' rights under sections 7 and 15(1) of the *Charter*. In particular, the Applicants assert that the Director's decision to allow more pollution in their community infringes their rights to life, liberty and security of the person under section 7 of the *Charter*, and their equality rights under section 15(1) of the *Charter*.

The Applicants also claim a remedy under subsection 24(1) of the *Charter* in relation to the Minister's failure to take cumulative effects into account. They challenge the Minister's application of the EBR as infringing their sections 7 and 15(1) *Charter* rights.

1. Charter Section 7

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.

The Applicants are seeking a declaration under section 24(1) of the *Charter* that the decision of the Director infringes section 7 of the *Charter* by depriving the Applicants of their right to life, liberty and security of the person. Although to date the case law that considers section 7 has not found a positive obligation on governments to ensure that the three rights of life, liberty and security of the

¹⁹ Information for this section is taken from Notice, *supra* note 9 and *Lockridge and Plain v. Ministry of the Environment (Ontario)* (29 October 2010), Toronto 528/10 (Ont Sup Ct) (Notice of Constitutional Question).

person are protected, governments cannot interfere with these rights of an individual. In particular, section 7 is triggered when government action causes serious risks to physical or mental health.²⁰

A B.C. example of the use of section 7 to protect human health is the 2009 decision of the B.C. Court of Appeal in *Victoria (City) v. Adams*.²¹ The applicants challenged two sections of the City of Victoria's *Parks Regulation Bylaw* that prohibited temporary overnight abodes and generally erecting shelter in parks. The Court of Appeal accepted expert evidence that erecting shelter, in particular for people without housing, is an important part of protecting themselves from the elements and thus their health. The Court of Appeal also found that at certain times of year there are not enough shelter beds available in Victoria to meet the needs of people without housing. The Court of Appeal concluded that the City's bylaw violated section 7 of the *Charter* because it deprived homeless people of life, liberty and security of the person not in accordance with the principles of fundamental justice and were not saved by section 1 of the *Charter*. The ensuing remedy was narrowly crafted: the impugned sections of the bylaw were inoperative insofar as they "...prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds in the City of Victoria."²²

Principles of fundamental justice to date include protection from arbitrariness, vagueness, and overbreadth, as well as decisions that shock the conscience or violate other Charter provisions.²³

The Applicants argue that the decisions of the Director and failure of the Minister to take a cumulative effect approach violate their rights to life, liberty and security of the person because they have contributed to and compounded their:

- Fear of the ongoing release of pollutants;
- Fear of the outdoors due to the contamination;
- Fear of warning sirens and industrial accidents;
- Fear of the increase in industrial pollution sources near their community;
- Loss of personal autonomy;
- Loss of health and well-being;
- Loss of community connection due to lower life expectancy on reserve and the number of community members living away from the reserve due to the pollution;
- Deprivation of personal choices that are available to most Canadians, such as living without fear for their health and safety, working and engaging in recreation outdoors, and not having to choose between community cohesion and personal health.

2. *Charter* Section 15(1)

²⁰ See, for example, *R. v. Morgentaler* [1988] 1 S.C.R. 30 (access to the health services of abortion), *Chaoulli v. Quebec (Procurer General)* 2005 SCC 35 (access to health services delayed due to waitlists), and *Victoria (City) v. Adams* 2009 BCCA 563 (no access to shelter beds and ability to shelter from the elements in municipal parks prohibited).

²¹ *Ibid.*

²² *Supra* note 20 at para. 166.

²³ Justin Duncan, powerpoint presentation to the conference *Renewing Environmental Law: A Conference for Public Interest Environmental Law Practitioners*, Vancouver B.C. February 3-4 2011.

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Applicants are seeking a declaration under section 24(1) of the *Charter* that the Director's decision deprives them of their right to equality and thus infringes their section 15(1) *Charter* rights.

The test to establish violation of a section 15 right is found in *R. v. Kapp* and requires that the law creates a distinction, directly or by application, based on enumerated or analogous grounds, and that the distinction creates a disadvantage by perpetuating disadvantage, prejudice or stereotype.²⁴

Enumerated and analogous grounds in this case are indigenaity and the residency, both cultural and by necessity, of the Applicants. By virtue of being a member of the Applicant's place- and culturally based community the Applicant's are disadvantaged by the heightened exposure to pollution. These impacts are exacerbated by:

- The cultural and economic barriers that make moving away from the reserve difficult for the Applicants;
- The impact of the pollution on their ability to practice their cultural activities; and
- The fact that adverse health effects are passed on from one generation to the next.

Finally, the Applicants have a cultural connection to the Aamjiwnaang community and intend to live there for generations in the future. They rely on the Minister and Director to make decisions that take into account cumulative effects such that they do not face unequal treatment of the law.

3. Ontario Environmental Bill of Rights

The Applicants also seek an order setting aside or quashing the decision of the Director on the basis that it is in violation of the rules of procedural fairness or that he lacked the jurisdiction to make the decision under the EPA. Finally, in the alternative the Applicants seek an order declaring that the Minister's decision was unreasonable when he failed to require an assessment of cumulative adverse health effects of pollution.²⁵ In particular, the Minister's duties under the EBR must be interpreted consistently with the *Charter*.

D. Discussion

This paper is a modest attempt to explain the reasoning behind the application for judicial review in *Lockridge and Plain v. Ministry of the Environment*. This area of law and its interaction with Aboriginal law raises interesting questions that are making the application of the *Charter* to broader considerations of environmental rights more tangible. We invite Associates to consider the following list of questions at our next teleconference on Monday, June 13, 2011 from 4pm to 6pm:

²⁴ 2008 SCC 41.

²⁵ Notice, *supra* note 9 at 4-5.

Questions arising from environmental rights litigation:

1. What other fact scenarios and government decisions lend themselves to challenge through an environmental rights framework, with a particular focus on the negative right not to have one's life, liberty or security of the person infringed by government decisions to allow pollution or other environmental conditions?
2. Given courts' tendency to narrow rights over time, and the inability to protect non-humans through challenges based on rights in Canada, is *Charter* litigation a viable long-term strategy?
3. The public trust doctrine, well-used in some U.S. states, is discussed in Canada as a potential avenue for pursuing environmental rights:

At its core the Public Trust Doctrine [PTD] is a "background principle" of property law that serves to strike an appropriate accommodation between the public interest and private development rights through requiring "continuous state supervision of trust resources (i.e. resources to which the public has rights of use or access that by their nature are of collective interest, such as water). The earliest uses of the doctrine protected fundamental access rights such as navigation, fishing and foreshore access...

It is more helpful to think of the PTD as [*sic*] fiduciary duty, which means that government officials entrusted with managing the underlying resource (e.g., water) owe a duty to preserve the resource and act in good faith in management decisions.²⁶

How could the use of the public trust in Canada complement *Charter* litigation for environmental health?

²⁶ Oliver Brandes and Randy Christensen, *The Public Trust and a Modern BC Water Act* (Victoria: Polis Project on Ecological Governance, 2010) Legal Issues Brief 2010-1 at 2-3. See also Andrew Gage, "Public Environmental Rights: A New Paradigm for Environmental Law?" (Vancouver: Continuing Legal Education Association, 2007) at 10.

For More Information:

Legislation

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

<http://www.canlii.org/en/ca/const/const1982.html#I>

Environmental Bill of Rights, 1993, S.O. 1993, c. 28

http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_93e28_e.htm

Environmental Protection Act, R.S.O. 1990, c. E.19

http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e19_e.htm

Books, Articles and Reports

Oliver Brandes and Randy Christensen, *The Public Trust and a Modern BC Water Act* (Victoria: Polis Project on Ecological Governance, 2010) Legal Issues Brief 2010-1

http://poliswaterproject.org/sites/default/files/public_trust_brief_2010-1.pdf

Robert Bullard & Glenn Johnson, *Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making*. *Journal of Social Issues* 56:3, 2000 pp.555-578

<http://www.unc.edu/courses/2005spring/epid/278/001/Bullard2000JocIssues.pdf>

Michael Buzzelli, *Environmental Justice in Canada – It Matters Where You Live* (Ottawa: Canadian Policy Research Networks, 2008) http://www.cprn.org/documents/50875_EN.pdf

Elaine MacDonald and Sarah Rang, *Exposing Canada's Chemical Valley* (Toronto: Ecojustice, 2007)

<http://www.ecojustice.ca/publications/reports/report-exposing-canadas-chemical-valley/attachment>

Kaitlyn Mitchell, "Human Rights and Pollution in Sarnia's Chemical Valley" Ontario Bar Association Environews December 6 2010

http://www.oba.org/En/Environmental/newsletter_en/v20n2.aspx#Article_7

PollutionWatch, *An Examination of Pollution and Poverty in the Great Lakes Basin* (Toronto:

PollutionWatch, 2008) http://www.pollutionwatch.org/pub/PW_Pollution_Poverty_Report.pdf

Other Resources

Aamjiwnaang First Nation Health and Environment Committee

<http://www.aamjiwnaangenvironment.ca/index.html>

Environmental Justice Resource Centre Clark Atlanta University

<http://www.ejrc.cau.edu/Welcome.html>

Lockridge and Plain v. Ministry of the Environment (Ontario) (29 October 2010), Toronto 528/10 (Ont Sup Ct)

(Notice of Application) http://www.ecojustice.ca/media-centre/media-release-files/notice-of-application-sarnia/at_download/file

Lockridge and Plain v. Ministry of the Environment (Ontario) (29 October 2010), Toronto 528/10 (Ont Sup Ct)

(Notice of Constitutional Question)