



## ENVIRONMENT IN THE COURTROOM

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# The Intersection of Human Rights Law and Environmental Law

NICKIE NIKOLAOU

Clean water and clean air are believed to be ours by birth; we somehow assume that such important and fundamental rights are protected by law.

—ELIZABETH SWANSON & ELAINE HUGHES<sup>1</sup>

## 1. Introduction

Decision makers, scholars, and litigants are increasingly viewing environmental impacts—for example, air and water pollution—as human rights issues. In Canada, a lawsuit that started in 2010 alleged violations of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) in the context of exposure to toxins in Sarnia’s Chemical Valley.<sup>2</sup> Landowners in Alberta have alleged violations of section 7 *Charter* rights in the context of environmental impacts from oil and gas facilities.<sup>3</sup> The European Court of Human Rights has repeatedly recognized that human rights may be infringed by environmental harm caused by industrial activities.<sup>4</sup> Courts in Nigeria have struck down regulations authorizing gas flaring on human rights grounds.<sup>5</sup>

This chapter explores the intersection between human rights law and environmental law by examining why and how human rights are relevant in the context of environmental harm. Part 2 considers how human rights law differs from traditional environmental law and why it is increasingly being referred to by people affected by environmental degradation. Part 3 outlines the different approaches currently in use internationally for using human rights in the environmental context. Part 4 reviews the current state of the law in Canada, and Part 5 concludes by noting the key challenge with applying human rights law in this context.

## 2. Why Human Rights?

The idea of addressing questions of environmental pollution through the lens of human rights is a marked departure from traditional approaches to environmental protection. Sax exposed the differences between the traditional regulatory model of environmental protection and what a rights-based regime would look like.<sup>6</sup> The traditional regulatory model is characterized by broad governmental powers, sweeping administrative discretion, and various procedural rights such as the right to be consulted or to be heard in a decision-making forum. By contrast, as Sax argued, a truly rights-based regime would be one which granted its citizens clear substantive environmental rights that would have to be balanced against other legally recognized interests (property rights, for example). In his view:

The citizen who comes to an administrative agency comes essentially as a supplicant, requesting that somehow the public interest be interpreted to protect the environmental values from which he[/she] benefits. The citizen who comes to court has quite a different status—he[/she] stands as a claimant of rights to which he/she is entitled.<sup>7</sup>

Thus, one reason to pursue human rights claims in the context of actual or potential environmental harm is their legal force in the decision-making process. Human rights are not on par with other “interests” to be taken into account in public interest calculations (typical of traditional environmental law decision-making approaches). Rather, they may trump in a balancing of interests where the decision would amount to an unjustifiable human rights violation. As noted by Swaigen and Woods:

Sometimes a right may preclude any balancing of interests; for example, when a fundamental constitutional right prevents the majority from overriding the interest of an individual or minority group, even to serve a public interest or provide some benefit to the community.<sup>8</sup>

Another reason for using human rights law in this context is because of its post-decision application. Where a decision maker has not struck the right balance and has exercised its discretion in a manner that violates fundamental human rights, the decision is reviewable even by a stakeholder that was not involved in the decision-making process at first instance.<sup>9</sup> Further, human rights not only provide a vehicle to influence or challenge a decision but also allow

for challenges to environmental laws, regulations, and standards that have the effect of infringing on fundamental human rights.<sup>10</sup>

### **3. Which Human Rights?**

The literature reveals three possible approaches to human rights in the environmental context: (i) the creation of procedural environmental rights; (ii) the recognition of a substantive right to environmental quality (e.g. a right to a healthy environment); and (iii) the recognition of infringements on existing human rights through adverse environmental conditions.<sup>11</sup>

#### **PROCEDURAL ENVIRONMENTAL RIGHTS**

Procedural environmental rights include access to environmental information, participation in environmental decision making, and access to justice in environmental matters.<sup>12</sup> Such rights are recognized at the international level and domestically throughout the world.<sup>13</sup> In Canada, federal and provincial law implements procedural environmental rights in various ways, “including environmental assessment statutes, environmental bills of rights, and administrative regulatory schemes that provide members of the public with a right to challenge environmental decisions made by government.”<sup>14</sup>

While procedural rights are important, scholars agree that they cannot, in themselves, provide a remedy for impacts from state-sponsored environmental harm. “Substantive” concerns matters of substance (i.e. what the right consists of), and “procedural” refers to the process through which the right can be enforced.<sup>15</sup> Without substantive rights of some kind, procedural rights allow for a balancing of interests (as opposed to rights) only. They may get parties to the table, but they do not place outer limits on which decisions are acceptable. They also do not direct the course of decision making in an obvious way.

#### **SUBSTANTIVE ENVIRONMENTAL RIGHTS**

Two possibilities exist for recognizing substantive human rights in the environmental context: (i) the recognition of a free-standing right to environmental quality; and (ii) the recognition that environmental rights are implicit within already-established human rights.

##### **A Free-Standing Environmental Right**

A free-standing environmental right has been variously described as a right to a healthy, safe, clean, and/or ecologically-balanced environment.<sup>16</sup> Although there is some overlap, a free-standing environmental right is one that extends

beyond other existing rights.<sup>17</sup> The idea is that, by virtue of being human, each person has a right to a basic level of environmental quality.

Scholars note that, internationally, such a right has been recognized expressly or implicitly in a substantial body of global human rights treaties (e.g. the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of the Child*), declarations (e.g. the *Stockholm* and *Rio Declarations*), and regional human rights treaties (e.g. the *African (Banjul) Charter on Human and Peoples' Rights*, the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, and the *Aarhus Convention*).<sup>18</sup> Human rights tribunals enforcing international and regional human rights treaties have built a “substantial body of decisions enforcing the right to a healthy environment.”<sup>19</sup> Ninety national constitutions recognize that their citizens have a substantive right to live in a healthy environment.<sup>20</sup>

Nonetheless, there is debate as to whether a free-standing environmental right has emerged as a principle of customary international law, binding on all nations even without their consent. Some conclude that it has.<sup>21</sup> Others are more cautious and say that, although not there yet, it may be *emerging* as customary international law.<sup>22</sup>

In Canada, there is no explicit recognition of a free-standing environmental right in the Constitution. Even environmental bills of rights statutes do not set up enforceable substantive rights to a healthy or clean environment.<sup>23</sup> Quebec is the only province that recognizes a right to a healthy environment in its human rights legislation.<sup>24</sup>

Is it possible that a free-standing environmental right exists implicitly within Canada's Constitution or within Canadian common law? The Supreme Court of Canada has acknowledged that “a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the *right to a safe environment*.”<sup>25</sup>

It is unclear what the legal status of such a right is in Canadian law. To the extent that it is a rule of customary international law, it is “arguably part of Canadian common law.”<sup>26</sup> At a minimum, though, scholars note that developments internationally could (and according to some, should) be used as interpretive aids in construing existing provisions in Canadian constitutional and statutory law. The Supreme Court of Canada has indeed used international hard and soft (i.e. binding and non-binding) law repeatedly to determine Canadian law, especially in cases involving the *Charter* and environmental protection.<sup>27</sup> The contextual approach to statutory interpretation requires legislation

to be read in a broader legal context that includes any relevant values and principles expressed by the international community (binding and non-binding) and reflected in Canadian law or policy.<sup>28</sup>

### **Environmental Protections within Existing Human Rights**

The third and “most established”<sup>29</sup> approach to environmental human rights involves the recognition that existing human rights may be violated by adverse environmental conditions. The idea is that “damage to the environment can impair and undermine all the human rights spoken of in the *Universal Declaration* and other human rights instruments.”<sup>30</sup> Scholars note that environmental degradation can result in violations of various human rights recognized around the world, including the right to life, to health, privacy and family life, adequate standard of living, religion, and culture. Tribunals at the international, regional, and domestic levels have “taken an ecologically literate approach to their respective human rights instruments, in order to protect basic human rights from state-sponsored environmental harm.”<sup>31</sup>

The most widely recognized human right of relevance is the right to life, which is variously stated in international conventions, declarations, regional treaties, and national constitutions. As Neil Popovic says:

The right to life represents the most basic human rights doctrine, the essential and non-derogable prerequisite to the enjoyment of all other rights. Environmental problems that endanger life—directly or indirectly—implicate this core right.<sup>32</sup>

Although there has yet to be a definitive statement by an international legal body in an actual case, tribunals and scholars have fleshed out the environmental dimensions of this right. The United Nations Human Rights Committee, for example, has stated that the right to life, liberty, and security in international law has been interpreted too narrowly and that it does include state obligations to protect people from threats (including environmental ones) to survival or quality of life.<sup>33</sup> Earlier, in *EHP v. Canada*,<sup>34</sup> the committee stated that the storage of radioactive waste near homes raised “serious issues” with respect to state obligations to protect human life. It directed the Canadian applicants to seek a remedy under section 7 of the *Charter*.<sup>35</sup>

Regional human rights tribunals have also held the right to life may be violated in the context of environmental risks or harm. For example, in *Yanomami Indians v. Brazil*,<sup>36</sup> the Inter-American Commission on Human Rights held

that Brazil had violated the Yanomami peoples' rights to life, liberty, and personal security when it failed to prevent serious environmental damage caused by natural resources development. Elsewhere, the European Court of Human Rights has exposed the links between the right to life and environmental pollution in several decisions. In one case, a complaint was brought about a chemical factory close to the complainants' homes that released large amounts of toxic substances. In finding that the government had failed to adequately protect the complainants in the circumstances, the court held that a violation of the right to "private and family life" and the "right to life" had occurred.<sup>37</sup>

Similarly, domestic courts have exposed the environmental dimensions of the right to life. Courts in India, Pakistan, Bangladesh, and Nigeria, for example, have repeatedly said the right to life in their constitutions includes the right to live in a safe and pollution-free environment. They have required governments to clean up unsafe pollution causing serious health risks or effects.<sup>38</sup>

#### **4. Current State of the Law in Canada**

The most fertile ground for human rights claims in the context of environmental harm in Canada is section 7 of the *Charter*,<sup>39</sup> which states:

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.

Scholars considering whether, based on current case law, section 7 has environmental dimensions have concluded that it undoubtedly does.<sup>40</sup> Although there has yet to be a definitive ruling on the matter, cases that have come before the courts have hinted that a remedy may be available on the right facts. Such facts would have to evidence significant physical or psychological health risks or impacts.<sup>41</sup>

To date, section 7 has been argued in the environmental context in several cases that, by and large, have been dismissed on other grounds. These include: *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*<sup>42</sup> (alleged violation of section 7 based on the threat to human health posed by the operation of a waste incinerator); *Manicom v. Oxford*<sup>43</sup> (alleged violation of section 7 by a government decision to locate a landfill near the plaintiffs' homes); *Energy Probe v. Canada (Attorney General)*<sup>44</sup> (alleged violation of section 7 in the context of a liability limitation for nuclear power generation); two cases alleging breaches in the context of environmental impacts from oil and

gas operations;<sup>45</sup> two cases involving health risks and impacts from fluoridated drinking water;<sup>46</sup> and a lawsuit alleging section 7 infringements in the context of emissions from refinery and chemical facilities.<sup>47</sup>

Case law developed under section 7 strongly suggests that it protects against unreasonable risks or impacts to human health.<sup>48</sup> According to Collins, “state action that results in a clear increase in the risk of death may result in a deprivation of this right.”<sup>49</sup> As for “security of the person,” courts have said it encompasses a right to bodily integrity and a right to be free from harm and from threats to that integrity, including risks to health.<sup>50</sup> Section 7 also protects against serious interference with the psychological integrity of a person.<sup>51</sup> As Gage notes, “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.”<sup>52</sup>

Even if life, liberty, or the security of the person is impacted, section 7 is not violated unless the infringement is not in accordance with the “principles of fundamental justice.” While these principles include the usual procedural guarantees (e.g. right to a fair hearing), the cases reveal substantive elements as well. These include “the sanctity of human life,” which, according to Collins, means that government conduct which results in actual or potential loss to human life would be unsustainable no matter what decision-making process was followed. There is also a prohibition against deprivations of life, liberty, or security of the person that would “shock the conscience” of Canadians. Collins suggests some state-sponsored environmental harm may result in health effects so “serious and wide-ranging” as to “shock the conscience.”<sup>53</sup>

As Canadian courts interpret section 7 in the environmental context, they will likely be guided by international developments. As noted, both international and regional human rights tribunals as well as numerous domestic courts (including from common law jurisdictions) have held that, in certain circumstances, state-sponsored environmental harm can amount to a violation of the right to life. These developments should be highly persuasive to Canadian courts and tribunals.<sup>54</sup>

## 5. Conclusion

Human rights law and environmental law intersect when human rights are impacted by environmental degradation. Internationally, there has been significant movement towards applying human rights law in the context of state-sponsored environmental harm. In Canada, while the application of human rights law in this context is in its infancy, there are no doctrinal reasons why the *Charter* may not provide a remedy in some circumstances. Still, scholars



note that proving causation will be a significant challenge. It will have to be proven that state action caused actual or threatened harm sufficient to make out a deprivation of life, liberty, or security of the person.<sup>55</sup> Given the difficulties in establishing causation generally in the environmental context, this will likely prove to be the greatest hurdle for any human rights claim in this context. It remains to be seen whether the evidence in the ongoing litigation relating to Sarnia's Chemical Valley will be able to overcome this hurdle.

## NOTES

- 1 Elizabeth Swanson & Elaine Hughes, *The Price of Pollution* (Edmonton: Environmental Law Centre, 1990) at 205.
- 2 *Ada Lockridge and Ronald Plain v Director (Ministry of the Environment) et al*, Notice of Application to Divisional Court for Judicial Review, 29 October 2010 (Ontario).
- 3 *Domke v Alberta (Energy Resources Conservation Board)*, 2008 ABCA 232; and *Kelly v Alberta (Energy and Utilities Board)*, 2008 ABCA 52.
- 4 For example, *Lopez Ostra v Spain*, 20 Eur HR Rep 277 (1994); and *Guerra & Others v Italy*, 26 Eur HR Rep 357 (1998).
- 5 *Gbemre v Shell Petroleum Development Co Nigeria Ltd et al*, Order of the Federal High Court of Nigeria in the Benin Judicial Division Holden at Court Benin City, 14 November 2005.
- 6 Joseph P Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Knopf, 1970).
- 7 *Ibid* at 58.
- 8 John Swaigen & Richard E Woods, "A Substantive Right to Environmental Quality" in John Swaigen, ed, *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at 197.
- 9 In Canada, statutory decision makers must comply with the *Charter* in exercising their discretion: see Nickie Vlavianos, "Alberta's Energy and Utilities Board and the Constitution of Canada" (2005) 43 Alta L Rev 369; Lynda M Collins, "An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*" (2009) 26 Windsor Rev Legal & Soc 7 [Collins]; Andrew Gage, "Public Health Hazards and Section 7 of the *Charter*" (2003) 13 J Env L & Prac 1; and Nickie Vlavianos, "Public Participation and the Disposition of Oil and Gas Rights in Alberta" (2007) 17 J Env L & Prac 205.
- 10 Although human rights law typically protects against state rather than private action, state action is engaged in the environmental harm context in three ways: (i) where government runs industrial operations that may discharge harmful contaminants; (ii) where government permits or authorizes private conduct that causes environmental harm; and (iii) where government sets statutory or regulatory standards that allow for emissions of harmful levels of environmental pollution: see Collins, Gage and Vlavianos articles, *ibid*. The term "state-sponsored environmental harm" has been used to refer broadly to harm falling within any of these categories: see Collins and Gage articles, *ibid*.
- 11 Collins, *supra* note 9 at 10.
- 12 *Ibid*.
- 13 The most significant statement at the international level is the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the *Aarhus Convention*), 25 June 1998.
- 14 Collins, *supra* note 9 at 10. According to Boyd, Canadian legislation fails to meet the standards set by the *Aarhus Convention* (to which Canada is not a

- party): David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (Vancouver: UBC Press, 2011) [Boyd].
- 15 Swanson & Hughes, *supra* note 1 at 206.
  - 16 See Boyd, *supra* note 14; James T McClymonds, “The Human Right to a Healthy Environment: An International Legal Perspective” (1993) 37 *NYL Sch L Rev* 583; and Diana Shelton, “Human Rights, Environmental Rights, and the Right to Environment” (1991) 28 *Stanford J of Int’l L* 103.
  - 17 Collins, *supra* note 9 at 10.
  - 18 See: Lynda M Collins, “Are We There Yet? The Right to Environment in International and European Law” (2007) *McGill JSDLP* 119; and John Lee, “The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law” (2000) 25 *Colum J Evt’l L* 238.
  - 19 Boyd, *supra* note 14 at 165.
  - 20 *Ibid* at 91.
  - 21 See Collins, *supra* note 9; Boyd, *supra* note 14; and L Rodriguez-Rivera, “Is the Human Right to Environment Recognized under International Law? It Depends on its Source” (2001) 12 *Col J Int’l Evt’l L* 1.
  - 22 See McClymonds and Shelton, both *supra* note 16.
  - 23 Five provinces/territories in Canada have enacted environmental bills of rights: Quebec, Ontario, the Yukon, the Northwest Territories, and Nunavut. Despite some mention of a right to a healthy environment in the purposes/preamble sections, they focus on procedural environmental rights: Boyd, *supra* note 14.
  - 24 *Charter of Human Rights and Freedoms*, RSQ c C-12. But the provision’s restrictive language (guaranteeing the right “to the extent and according to the standards provided by law”) means it is likely of limited effect: Boyd, *supra* note 14.
  - 25 See *Ontario v Canadian Pacific*, [1995] 2 SCR 1031 at para 55 (emphasis in original) and *R v Hydro-Québec*, [1997] 3 SCR 213.
  - 26 Collins, *supra* note 9 at 20.
  - 27 See Boyd, *supra* note 14; and Elizabeth Brandon, “Does International Law Mean Anything in Canadian Courts?” (2001) 11 *J Evt’l L & Prac* 399.
  - 28 *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817.
  - 29 Collins, *supra* note 9 at 11.
  - 30 *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep 92, separate but concurring opinion of Judge Weeramantry.
  - 31 Collins, *supra* note 9 at 17. For summaries of the relevant decisions, see: Collins and Gage, both *supra* note 9; Boyd, *supra* note 14; and Nickie Vlavianos, *Health, Human Rights and Resource Development in Alberta: Current and Emerging Law*, Human Rights Paper #1 (Calgary: Canadian Institute of Resources Law, 2003).
  - 32 Neil Popovic, “In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment” (1996) 27 *Colum Human Rts L Rev* 487 at 512.
  - 33 General Comment on art 6 of the *International Covenant on Civil and Political Rights* issued by the United Nations Human Rights Committee in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev 3 (1997).
  - 34 *Communication No 67/1980, EHP v Canada*, 2 Selected Decisions of the Human Rights Committee (1990), 20 (UNDOC CCPR/C/OP/2).
  - 35 *Ibid*. Although a *prima facie* claim was made out, the case was dismissed for failure to exhaust domestic remedies.
  - 36 (1985), Inter-Am Comm HR 7615, *Annual Report of the International American Commission on Human Rights: 1984085*, OEA/Ser L/V/II.62, Doc 10.

- 37 As protected by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222.
- 38 See: Collins, *supra* note 9; and Boyd, *supra* note 14.
- 39 Other provisions may have limited application. For example, s 15 may apply “[i]n the environmental arena, [...] when a particular marginalized group in society receives less environmental protection than comparator groups.”: Collins, *supra* note 9 at 43.
- 40 See: Boyd, *supra* note 14; Collins and Gage, both *supra* note 9; and Vlavianos, *supra* note 31.
- 41 One case may suggest no role for s 7 in the environmental context: *Kuczerpa v Canada* (1993), 152 NR 207 (Fed CA). But scholars have emphasized the case’s peculiar circumstances (a self-represented litigant, the improper pleading of the *Charter* claim, and the tort cause of action in negligence): Gage and Collins, both *supra* note 9.
- 42 (1993), 108 DLR (4th) 145 (NSCA), leave to appeal to SCC denied [1999] 1 SCR vii.
- 43 (1985), 52 OR (2d) 137 (Div Ct).
- 44 (1989), 58 DLR (4th) 513 (Ont CA).
- 45 *Domke and Kelly*, both *supra* note 3.
- 46 *Locke v Calgary* (1993), 15 Alta LR 70 (Alta QB); and *Millership v British Columbia*, 2003 BCSC 82.
- 47 *Lockridge*, *supra* note 2. See also Ecojustice, “Chemical Valley Challenge” (accessed 31 January 2012), online: <<http://www.ecojustice.ca/cases/chemical-valley-charter-case>>.
- 48 As for risks, there is no doubt that the *Charter* provides *prospective* protection: see *Operation Dismantle v The Queen*, [1985] 1 SCR 441.
- 49 Collins, *supra* note 9 at 22, citing *Chaoulli v Quebec*, [1995] 1 SCR 791.
- 50 *R v Morgentaler (No 2)*, [1988] 1 SCR 30.
- 51 *New Brunswick v G(I)*, [1999] 3 SCR 46.
- 52 Gage, *supra* note 9. Collins notes that it is “well established that persons exposed to known environmental risks frequently experience substantial psychological effects, including anxiety sometimes rising to the level of a phobia.”: *supra* note 9 at 25.
- 53 Collins, *supra* note 9 at 27–28. See also Gage, *supra* note 9.
- 54 *Charter* issues in the environmental context may arise not only before the courts but also before administrative tribunals. Barring legislation to the contrary, tribunals empowered to determine questions of law must determine questions of constitutional law: *Nova Scotia (Workers’ Compensation Board) v Martin*, [2003] 1 SCR 504.
- 55 Collins, *supra* note 9.