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# Environmental Law for a Just Transition

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# Chapter 6: Environmental Law for a Just Transition

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## Highlights

- The environmental justice movement, which turns our attention to fairness in the distribution of environmental benefits and burdens and in the processes, biases and structures that determine those distributions, is challenging the foundations of environmental law.
- 'Extractivism' – a mode of accumulation that necessitates both a *high pace* and a *large scale* of taking of natural resources such as fossil fuels – is deeply embedded in environmental law, producing uneven costs/benefits and intense, concentrated impacts on people and ecosystems. Even as we move towards a greener economy, environmental laws and regulations governing such areas as facility siting, pollution permitting, and environmental/impact assessment continue to apply extractivist logics.
- As Indigenous peoples assert inherent jurisdiction over lands and waters, debates continue over the legal and practical standards of 'consent' required in relation to projects on or crossing Indigenous lands and waters. Moreover, regimes for achieving Indigenous 'prosperity' through natural resource development are moving from impact-benefit agreements, to equity stakes deals and joint ventures, and towards inherent jurisdiction.
- Environmental law for a just transition must prioritize equity and Indigenous jurisdiction, and work to re-make the underlying legal and structural relations of production and consumption by moving away from 'extractivism.'

## 6.1 Introduction

What kinds of laws do we need to make the transition to a low carbon, sustainable and resilient future? This chapter begins from the premise that environmental law for a 'just transition' requires moving past extractivism in all its forms, and paying careful attention to the fairness or justice dimensions of *how* we move towards a new set of relations. Struggles for environmental justice in the context of fossil extractivism are well-documented; this chapter examines whether and how these dynamics are shifting in the transition to a greener economy, and it offers strategies for re-structuring environmental law towards an energy transition that is just and equitable. The motivation here is to consider how, as Simon Dalby puts it, "those that manage to connect to this new political economy are distinguished from those dispossessed and displaced by its voracious appetite for resources and land".[1] It is very clear now that struggles over resources and land will continue in the green economy. Does the degree to which people can 'connect' in this new political economy vary according to the same familiar social gradients of the fossil era – with critical cleavages along lines of gender, race, Indigeneity and class, or are these shifting as well? What are the emerging contours of environmental justice in this period of transition? What kinds of laws do we need to ensure that the transition is just?

After a brief introduction to the relationship between environmental law and extractivism, this chapter examines the shifting dynamics in the transition from fossil extractivism to a green economy through the consideration of three major areas of environmental law and regulation: facility siting, pollution permitting, and environmental/impact assessment. In each case, the environmental justice dimensions under regimes of fossil extractivism and under the newly emerging regimes organized around net-zero commitments, such as renewable energy and critical minerals projects, are discussed. Also included in this is an examination of the effect of

escalating Indigenous assertions of inherent jurisdiction over lands and resources on the authorization of resource projects and infrastructure developments, in light of the drive to include Indigenous "prosperity" in some visions of what a just transition requires.

## 6.2 How Environmental Law Structures Extractivism

In order to understand how environmental law needs to change, we need to understand how environmental law structured (and continues to structure) fossil extractivism. Extractivism should be conceived not as an activity or a thing, but as a relation or a logic.[2] That is, we can think about *extraction* itself as the taking of minerals, oil and gas or other elements from the earth. But we must distinguish this from *extractivism* -- not the concrete activity of 'taking', but a way of relating. Extractivism is a mode of accumulation that necessitates both a *high pace* and a *large scale* of taking.[3] It contains an essential non-reciprocity: it generates benefits for distant capital at the expense of local peoples and ecologies. It has produced (and continues to produce) intense, concentrated impacts on people and ecosystems: "voracious water demands, suffocating air emissions, vast wastelands, and a trail of toxic tailings".[4] *Fossil* extractivism, then, may eventually come to an end with the green economy, but 'extractivism' could easily live on. In fact, it is clear that extractive logics are present in a variety of sites beyond those associated with fossil extraction, giving rise to pressing challenges in confronting the transition to a "post-extractive" future.

And yet, "deep decarbonisation" *is* crucial to the prospects that the international community will stay within the two degrees of warming that forms the outer limits set by the celebrated Paris Accord in late 2015. And so, while we know the transition will be long and arduous, we have already begun to look past the era of fossil extractivism. With the recognition

that we must move to a post-carbon future comes the imperative to craft a legal framework for overcoming extractivism and environmental injustice in the period of transition to a greener economy.

This period of immense change and uncertainty brings urgent questions of justice across spatial and temporal scales from molecular to global, immediate to infinite. The once relatively stable legal foundations upon which environmental law was based, such as private property rights, the assumption of assimilative capacity, notions of strict liability and but-for causation, are now obviously failing to protect ecological integrity and planetary boundaries, fuelling a building awareness of the profound intergenerational consequences of our contemporary choices.[5] Even the legal constructs invented in the optimistic decades of environmental law's heyday – sustainable development, the polluter pays principle, intergenerational equity, the precautionary principle – cannot contain the crisis.[6]

The environmental justice movement turns our attention to fairness in the distribution of environmental benefits and burdens, and in the processes, biases and structures that determine those distributions.[7] It is grounded in the grassroots struggles of marginalized communities shouldering more than their fair share of environmental harms related to pollution, contamination, toxic waste and heavy industry – those that 'environmental law' has left behind.[8] Early environmental justice research aimed primarily at documenting distributional inequities of pollution,[9] while research since the mid-1990s has expanded to include distributions of green space and housing, worker health and safety, and considerations of gender, sexuality, and other categories.[10] Scholars writing now, in the vein of 'critical environmental justice', further attend to "how multiple social categories of difference are entangled in the production of environmental injustice".[11] That entanglement results in vast disparities in wealth and power produced and

reproduced through processes of racialization and oppression, and in turn produce enduring disparities in environmental burdens. Ingrid R.G. Waldron shows how the environmental justice framework has grown out of movements against environmental racism.[12] She advocates for highlighting the "central role that racism plays through the enduring impacts of colonialism and capitalism on the cultures, lands, and bodies of Indigenous and Black communities".[13] As Waldron has argued, it is important for us to pay deliberate attention, as we move into the transition, "to educating environmentalists and others about the systemic ways in which racist ideologies get written into environmental decision-making and policy".[14] What we are pursuing, in other words, is not just a net-zero economy, but a "social system premised on equality and cooperation, rather than competition and hierarchical relationships based on race, colour, gender, and other social identities.[15]

The United Nations' influential Brundtland Report of 1987, following international lawyer Edith Brown Weiss's formulation, adopted a conception of sustainable development that called for 'development which meets the needs of current generations without compromising the ability of future generations to meet their own needs'.[16] In response, ecofeminist legal scholar Karen Morrow argued that sustainable development was "revolutionary in principle" as it called for a "wholesale change in the way humanity relates to its environment".[17] Anishinaabe conceptions of justice also include intergenerational aspects, with "the ancestors of current beings and those yet to come (at least as far ahead as seven generations from now)" also holding entitlements.[18] Mainstream conceptions of intergenerational justice, however, often flatten the social differences inhabiting any given generation.[19] Critics observe that this approach captures equity mainly in the inter-generational sense, with "only a faint suggestion in the definition of concern for distributive justice in the intra-generational sense".[20] Yet disparities amongst members of the current generation are profound and increasing: of resources, education, income,

nutrition, health care, air quality, toxic body burdens, access to clean drinking water, and more. No legislative pronouncement or environmental policy decision taken today can be said to affect those in 'the current generation' in a uniform way. Quite the opposite -- every one of those decisions in fact benefits some people and burdens some others.

These trade-offs are antithetical to mainstream constructions of the "win-win" green economy, which envision improved human well-being and social equity, and significantly reduced environmental risks and ecological scarcities.[21] The 'green economy' is said to be an economy that is low carbon, generates little pollution, is energy- and resource-efficient, protects ecosystems and biodiversity, and is socially inclusive. But in many instances, instead, 'green' seems to have come to mean simply 'low carbon' – policy-makers seem centrally (if not solely) focused on greenhouse-gas (GHG) emission reductions, leaving social equity, ecosystems, Indigenous sovereignty, and often even other forms of pollution, to the wayside.[22]

A considerable body of research now exists on environmental injustices brought on by the narrow-minded pursuit of climate change mitigation.[23] Efforts to reduce GHG emissions have been implicated in ecological and social devastation across the global South stretching back to at least the 1997 Kyoto Protocol, when the flexibility mechanisms made carbon into a commodity.[24] With this move, climate mitigation was elevated above other environmental protection goals, and local peoples' ways of living on the land often gave way to carbon credit-counting.[25] As Gonzalez and Atapattu say, it is increasingly obvious that "an ecologically sustainable planet is impossible in a world plagued with significant and growing inequalities".[26] Thus, environmental law for a just transition must prioritize equity, inherent Indigenous jurisdiction, and work to re-make the underlying legal and structural relations of production and consumption.[27]

**Box 6.1**

**Green Opportunity: Indigenous-Owned Renewable Energy Projects**

The example of the *Chinodin Chigumi Nodin Kitagan,* (the Bow Lake Wind Farm) undertaken by the Batchewana First Nation in the Robinson Huron and Robinson Superior Treaty areas demonstrates that with recognition of the inherent jurisdiction of Indigenous peoples and genuine respect for the complex set of interconnections between people, lands and livelihoods, it may be possible to re-structure ownership and control of energy generation and distribution in more equitable ways.[28] The Indigenous-owned renewable power project, enabled by the now repealed Green Energy Act in Ontario, highlights opportunities to honor principles of environmental stewardship; to sustain less hierarchical governance structures; and, for Indigenous peoples, to maintain communal ownership of resources on their territories better aligned with their own social, political and legal orders. For everyone, it may point a path forward towards a more just set of energy relations.[29]

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Environmental justice and law intersect in many ways. Movements may pursue strategic litigation to force legislators to act; or they may lobby for law reform. Movements may also pursue direct action, by organizing marches, demonstrations, or occupations. Indigenous land defenders often employ blockades to physically prevent incursion onto and development of their lands, targeting infrastructural choke-points. These forms of direct action have increasingly resulted in the criminalization of activists and land defenders.[30] Actors on both sides of the conflicts pursue court orders, or injunctions, to gain leverage against their opponents. As

research is now uncovering, legal tests overwhelmingly favour state and industry interests when these issues are resolved through the settler courts.[31]

Finally, the energy transition is coming at the same time as the national political discourse is steeped in talk of 'reconciliation', and Indigenous peoples are experiencing a resurgence of their cultures and legal traditions, as well as increasingly asserting inherent jurisdiction over lands and waters.[32] Many communities are trying to carve out space for alternative visions in line with Indigenous legal traditions and stewardship obligations. Increasingly, especially in respect of resource development proposals, policy-makers are speaking about 'economic reconciliation' or Indigenous prosperity as being the key to gaining the elusive 'social license' for contested projects (fossil or not). Impact-benefit agreements, or mutual-benefit agreements, once thought to be the gold-standard of corporate good-behavior, are giving way to equity stakes deals and joint ventures. This deal-making between industry proponents and First Nations is now a central tactic in any attempt to gain authorization for incursions on contested lands. Debates over the legal and practical standards of 'consent' required in relation to projects on or crossing Indigenous lands and waters rage on.[33]

## 6.3 Foundations of Environmental Law from the Fossil Era to the Green Economy

The chapter now assesses the legal foundations for a transition from fossil extractivism to a green economy through the consideration of three major areas of environmental law and regulation: facility siting, pollution permitting, and environmental/impact assessment. These regimes are obviously interconnected and, in some ways, the fundamental failure of environmental law is our tendency to continue to work in these siloes rather than to adopt broad,

integrated regional planning mechanisms that integrate facility-siting and permitting into forward looking impact assessment regimes. The regimes in each area also vary across the country in their specific forms. Nonetheless, for the purposes of illustrating the enduring logics that characterized the fossil era and that threaten to carry into the transition, we break the analysis into the three conceptual categories, beginning with examples from facility-siting.

## *Facility Siting*

In the fossil era, facility-siting processes (or a lack of them) eventually produced the most pronounced examples of environmental injustice in Canada: the desecration of Africville in Nova Scotia and its intergenerational consequences; the concentration of petrochemical facilities in Sarnia's Chemical Valley that continues to poison Aamjiwnaang First Nation; and the notorious tar sands region of northern Alberta, also still spoiling lands and waters in a way that fundamentally violates Treaty rights, amongst many others. Included in this are state failures to adequately assess the probable impacts of individual facilities on already over-burdened or marginalized communities, as well as the failure to implement regional planning processes that can consider the cumulative impacts of multiple facilities on surrounding communities and the ecologies upon which they depend.

An example of the failure of fossil-era facility-siting procedures to prevent widespread ecological harm and the violation of Treaty promises recently came to prominence with the case of *Yahey v British Columbia*, 2021.[34] In that case, the Supreme Court of British Columbia held that the cumulative effect of regulatory regimes authorizing industrial development in British Columbia contributed to the meaningful diminishment of Blueberry River First Nation's Treaty

rights under Treaty 8, in the Peace region of north-eastern British Columbia. A combination of forestry, oil and gas, water withdrawals and hydroelectric approvals had effectively desecrated the territory; "whole areas had "gone dark"", according to testimony by Band members. Because of a failure to do anything other than mitigate the worst effects of each individual project as they are proposed, the Court found that the Crown did not have a land management system in place that could understand cumulative effects, much less monitor their impacts on treaty rights, such as a meaningful right to hunt.[35]

How might facility-siting regimes be changing in the transition? We might imagine that considerations of environmental justice will be central considerations in the green economy, but early indications give rise to worrying trends, amid a few possible openings.

We have witnessed many conflicts over the siting of renewable energy installations over the past decade,[36] and these conflicts demonstrate that the basic orientation to communities affected by contested developments has not fundamentally changed with the transition from fossil fuels to renewable energy. The Site C dam experience in British Columbia might be offered as an example in which a project is justified in the language of climate mitigation, but produces many of the same dynamics as fossil extractivism: people displaced or dispossessed from lives and livelihoods on the land.[37] The Keeyask Dam, a hydroelectric power project, and its effects on Cree peoples in the Nelson river system of northern Manitoba, would be another example. These conflicts expose enduring tensions over *who* makes decisions about *where* projects are located, and therefore who will reap the benefits and who will bear the costs.[38] Worse, the experience demonstrates that governments politically invested in the transition may be as willing as governments tied to fossil capital were to streamline processes for approval,

stymie public participation and even discredit residents' experiential knowledge related to possible health concerns using the language of NIMBYism.[39]

**Green Opportunity: New standards for consent in facility-siting?**

In terms of a potential opening in relation to facility-siting in the just transition, we might look to the example of the process for locating the Deep Geological Repository (DGR) for nuclear wastes. Ontario Power Generation Inc. (OPG) is searching for a site to construct a DGR capable of storing used nuclear fuel: essentially, a stable place to put some very dangerous wastes, that will last essentially forever. The wastes originate in Ontario's nuclear generating stations, which provide electricity to most Ontarians (and which also allow Ontario to claim that a vast majority of its electricity is produced from zero-carbon sources).

The regulators have developed a plan for siting the DGR that requires an "informed and willing host" community. In 2013, in response to major resistance by the Saugeen Ojibway Nation (SON), OPG promised that they would not move forward without the Nation's consent. Subsequently, early in 2020, members of the SON voted overwhelmingly 'NO' to a DGR site. Following that vote, the proposal was formally terminated from the federal environmental assessment process. What this experience exposes is that there are a variety of possible regulatory stances in facility-siting. It is worth noting that the state's position (in all jurisdictions except arguably British Columbia) is that providing a "veto" power to affected communities would be an untenable policy position. It may be that there are very good reasons to distinguish between nuclear wastes and other contested facilities, but it is also worth observing that expectations are shifting. Could meaningful consent mechanisms be a part of our regulatory vision for all facility-siting processes in a just transition?

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## *Pollution Permitting*

The regimes for distributing 'permits' to industry actors so that they may lawfully release pollution into the environment is a central pillar in the constellation of regimes we call environmental law. In the fossil era, pollution permitting (and its failings) have been a major contributor to environmental injustice.[40]

In one example, Aamjiwnaang First Nation's reserve is located downwind from Sarnia Ontario's Chemical Valley—a major hub of petrochemical refineries, chemical manufacturing, and other heavy industries in southwestern Ontario.[41] While easily classifying as a failure of facility-siting regimes, it is also a classic example of the failure of environmental law's central pollution permitting approach, which has eschewed binding ambient standards in favour of point source limits. Ontario's air pollution regime, like that of other provinces', does not include legislated limits on contaminant levels that account for the actual burden of emissions from all sources. It is a system for managing emissions to air that is essentially a pollution-permitting system in which the Director is unable to account for the reality of the region's already "oversaturated airshed" when deciding whether to allow industry to increase toxic emissions from any particular facility.[42] As a result of these cumulative effects, residents in Aamjiwnaang experience a major air pollution burden accompanied by elevated rates of cancer, miscarriage, respiratory illness, and developmental disorders.[43]

In 2010, two residents of Aamjiwnaang launched an application for judicial review of the Ministry of the Environment's approval of a permit to allow Suncor to increase production and thus increase emissions of critical air contaminants. The application was seeking a declaration

from the Superior Court of Justice in Ontario that the Province's permitting process violated Aamjiwnaang members' *Charter* rights to equality, as well as their life, liberty, and security of the person.[44] Advocates had hoped that this declaration would provide historic recognition of a *Charter* right to a healthy environment, which many environmental justice supporters believe is crucial to building an ecologically viable basis for our constitutional rights.

With the Chemical Valley example, it is easy to see how facilitating the flow of fossil fuels, from their extraction in the tar sands, by pipeline across the continent, and into Sarnia's petroleum refineries and petrochemical manufacturing plants, is also facilitating the flow of toxic air contaminants into the bodies of the residents of Aamjiwnaang. The legal regime is one that allows for routine exceedances (by orders of magnitude) of the so-called "health-based thresholds" for certain toxic air contaminants such as benzene, in ambient air.[45] That air pollution affects marginalized communities and vulnerable people in a way that provides obvious examples of environmental injustice that permitting regimes, as they currently operate, are not capable of addressing.

We see no evidence of instability in this approach to permitting, as we strive to move towards a just transition. As Lynda Collins has argued in her recent book, *The Ecological Constitution*, "ecological pollution regulation" would require a systematic replacement of point source pollution limits with binding ambient standards for both air and water. We would need policies to take account of cumulative effects, rather than one-off approvals. We would need to build the health-based thresholds into our approach to ambient standards, rather than just lean on them for risk assessments performed in a permissive regulatory environment.

What will pollution-permitting look like in a post-extractive future? Interestingly, there are two federal bills currently before Parliament that have garnered some attention for their

ability to address environmental racism and institutionalize environmental rights, yet neither of these regimes signals any in-road on this fundamental pollution-permitting problem.

First, consider Bill S-5, "Strengthening Environmental Protection for a Healthy Canada Act," which has completed third reading in both the Senate and the House of Commons at the time of writing this chapter.[46] . This Bill provides amendments to the *Canadian Environmental Protection Act* (CEPA). CEPA regulates toxic substances, greenhouse gases and other pollution to protect environmental and human health; it is said to be our "cornerstone environmental law". The proposed amendments, if passed, will introduce a "right to a healthy environment" into Canadian statute law for the first time. The language appears in the preamble, but is also supported by the requirement that, within two years, the Ministers of Environment and Health jointly develop an "implementation framework" for the right.[47] In doing so, the Minister is expected to "elaborate on …the principles to be considered in the administration of [the] Act, such as principles of environmental justice — including the avoidance of adverse effects that disproportionately affect vulnerable populations — the principle of non-regression and the principle of intergenerational equity". The Act will not yet facilitate the making of geographically targeted regulations that could, as advocates had hoped, be used to help address pollution "hot spots". Environmental organizations had urged the Standing Committee on Environment and Development to strengthen this aspect of the Bill – so that Ministers would be required to take specific actions when ambient environmental quality standards are routinely breached in specific geographic areas.

Second, consider Bill C-226, the National Strategy Respecting Environmental Racism and Environmental Justice Act.[48] The Bill originated in the backbenches of the Nova Scotia legislature in 2014. More recently, it was picked up by the Federal Green Party and introduced

to Parliament by the party leader Elizabeth May in 2022. The Bill requires the Minister of Environment to develop and table a National Strategy on Environmental Racism and Environmental Justice, to include measures that could be taken to address environmental racism, and to make periodic reports to Parliament on any actions taken. The Bill contains no provisions which would bind the Ministry to conduct or complete any of those identified measures. It is a very short bill, with one operative provision, which in s.(3)(a) requires that the strategy must include: 1) a study on the link between race, socio-economic status and environmental risk, as well as any data on that relationship, and 2) "measures that can be taken to advance environmental justice and assess, prevent and address environmental racism". Interestingly, those measures can include 'compensation for individuals or communities', and can include 'amendments to federal laws, policies and programs'. The limitation of the amendments that may be required to 'federal' ones is not surprising, of course, for an Act of Parliament, but it surely points to a major limitation of this legislative attempt at addressing environmental racism and justice, given what we have just reviewed about the foundational role of facility-siting and pollution permitting regimes – both considered to fall within the legislative powers of the provinces.

The problem is deeply entrenched in the very architecture of our Constitution. It is not going to disappear with the introduction of a simple 5-section statute (as elegant as it is), and neither is it going to disappear due to the 69-section Act to amend the very long and complex CEPA (even if it provides for a 'right to a healthy environment'). This is because there are extractive logics built into environmental law: they reside in the risk-based models for toxic substance regulation in the CEPA; the assumption of assimilative capacity that informs the thresholds built into air and water pollution permitting regimes; and the permissive, rather than

precautionary, stance of our facility-siting regimes. These recent legislative efforts are necessary but nowhere near sufficient to meet the problem.

## *Environmental / Impact Assessment*

Environmental or impact assessment is the third central regime of environmental law examined here. We have already arguably moved past 'fossil era' environmental assessment at the federal level with the 2019 *Impact Assessment Act*, said to adopt "next-generation" environmental assessment principles. For the purposes of illustrating the enduring logics that characterized the fossil era and that threaten to carry into the transition, the two central aspects of environmental assessment examined here are in relation to regional assessments and Indigenous jurisdiction.

In the fossil era, environmental assessments were project-specific, proponent-driven, and operated on a "consult-and-accommodate" model in relation to affected Indigenous peoples.[49] Take the example of the environmental assessment for the contested Transmountain Pipeline Expansion project (TMX). In 2016, Canada approved Kinder Morgan's application to roughly triple the capacity of its oil pipeline, which cuts through Alberta to the British Columbia coast, crossing Treaty 6, Treaty 8, and Métis lands. The expansion was fiercely opposed by Indigenous communities and other movements aligned with environmental justice. In 2018 the approval was overturned by the Federal Court of Appeal, because the National Energy Board's environmental assessment prior to approving the project had failed to consider the likely negative impacts of increased cargo ship traffic on endangered orcas, and had not included the adequate consultation and accommodation of Indigenous peoples. The environmental assessment was repeated according to the court's conditions. Later, the federal government purchased the pipeline and in 2019, the federal Cabinet approved the expansion application despite the environmental impacts

of the pipeline and the urgent need to drastically reduce, not expand, greenhouse gas emissions. As of April 2022, the expansion project was halfway complete[50] and the total cost had ballooned from $12.6 to $21.4 billion.[51]

The political calculus of the Trudeau government relied heavily on the ability to say that the project was supported by Indigenous communities along the pipeline's route, and this justification hinges on the signing of Impact-Benefit Agreements (IBAs) or sometimes 'Mutual Benefit Agreements'. These are private contracts between a resource company and an affected First Nation's Band Council. The bargain struck in the agreement typically is that the Band Council offers its support for or 'consent' to the project in exchange for certain monetary payments, increased environmental monitoring or control, and employment, contracting, or training opportunities for its members. These kinds of agreements were central to the negotiations between the pipeline proponents and 69 of the Indigenous nations whose territories the TMX crosses. According to TransMountain, the company changed its plans for construction routes and methods in negotiation with these communities. Furthermore, the company says it concluded thousands of contracts with Indigenous businesses and created "partnerships" valued over $2.7 billion, and that approximately 11 per cent of the expansion's workforce is Indigenous.[52]

While the positive impacts of IBAs should not be discounted, it is worth interrogating the implications of turning to private contract to govern extraction. This is even more pressing when IBAs are cited as evidence of consent, even though there are serious reasons to doubt whether that can be the case. First, Indigenous communities, at law, are denied the power to say "no" to extractive projects on their lands.[53] The resulting power imbalance means that companies may agree or decline to negotiate with certain communities based on the company's interests.

Critically, despite the formally private nature of these agreements, "the state is actively engaged in shaping the contractual outcomes."[54] After a regulatory approval is granted, it is difficult—though not impossible—to reverse it even if a community withdraws their support. However, companies can cease making payments to an unaccommodating community with relative ease.[55] More fundamentally, many Indigenous communities contest the idea that Band Councils, as colonial creations of the *Indian Act,* can take authoritative decisions in respect of lands outside of the reserve.

Environmental or impact assessment is meant to be a central regulatory tool for anticipating and planning for the effects of industrial development. However, it is widely recognized that project-level, proponent-driven assessment methods are inadequate to the task of considering potential cumulative impacts of developments on ecosystems and communities. These assessments simply cannot provide an adequate base for determining whether proposed developments are likely to contribute to lasting well-being and sustainability for the people of the region. What would impact assessment in a just transition include?

Many hoped the IAA would overcome these limitations; it is fair to say all of those aspirations were not achieved. The IAA began as the highly contested Bill C-69 (the so-called "No Pipelines Bill") and the extent to which the final text was able to fully incorporate a "next generation" approach was arguably compromised through the long and arduous committee process. In the end, the Act did introduce some novel elements: a "climate test", sustainability assessment, regional and strategic assessments, and provisions to allow for assessments to be conducted in partnership with "Indigenous Governing Bodies".

The Government of Canada acknowledged the growing distrust among the public, NGOs, Indigenous communities and others in the environmental assessment process when they

established an Expert Panel in late 2016 to initiate an assessment law reform process mandated to rebuild that trust.[56] The panel recommended that :"Should Indigenous Groups without modern treaties wish to undertake their own IA processes, they should be able to do so, and co-operation arrangements with these Groups should be negotiated. Federal IA governance structures and processes should support Indigenous jurisdiction".[57]

It has only become more obvious in the intervening years, as escalating resource conflicts across the country have shown, from the TMX to the Coastal Gas Link pipeline examples, that when Indigenous peoples do not control the development of their territories (and work out their differences themselves), conflict and disruption will follow. Further, there is support for this model in the federal government's Expert Panel for the Review of Environmental Assessment Processes Final Report (2017). The Expert Panel stated: "free, prior and informed consent (FPIC) is not necessarily a veto but a process of mutual respect, trust and collaborative decision-making grounded in the recognition of Indigenous Peoples as equal partners".[58] Similarly, the submission of the Manitoba Metis Foundation to the Expert Panel describes the notion of "collaborative consent" that is increasingly employed across the country as Indigenous-led IA processes proliferate: it is an "integral concept for ...environmental assessment...in the context of nation-to-nation agreements set out by mutually agreed-upon frameworks". In the Ring of Fire in the boreal north of Ontario, a model is being debated which could potentially point the way for impact assessment in the just transition.

Mineral deposits beneath the peatlands of the James Bay lowlands, known as the "Ring of Fire," have become the subject of much recent interest. Government and industry enthusiasm for accessing the region is fuelled by an intensifying global rush to secure 'resilient' supply chains for the "critical minerals" needed for the energy transition. In the Ring of Fire, deposits of nickel in particular are sought after for electric vehicle (EV) batteries. Ontario has put forward a vision of a fully made-in Ontario EV, including sourcing the minerals for the batteries and thus also taking advantage of incentives recently introduced into United States law for "re-shoring" supplies of critical minerals.

Accessing the Ring of Fire, however, requires building roads through hundreds of kilometres of Indigenous homelands that also constitute a globally significant wetland and a critical carbon sink. Disturbance of the peatlands would release stably-stored greenhouse gases into the environment, and reduce the planet's ability to reabsorb them in the future. It is estimated that the James Bay Lowlands store 35 billion tonnes of carbon.[59] To complicate matters further, two First Nations in the remote region have agreed to act as proponents for the road, which has been split into three separate projects each requiring both a provincial EA and a federal IA. The assessments are proceeding on the proponents' and the state's timelines and protocols, and according to Ontario and federal law, without meaningful application of the Anishinaabe laws and protocols of the territory. Relations with neighboring First Nations who are concerned about and will be impacted by the road access are proceeding according to the prevailing "consult-and-accommodate" model, refusing all calls for respect of each First Nation's rights to free, prior and informed consent (FPIC) according to the UNDRIP.[60] By splitting the projects, the scope of the each assessment is narrowed to exclude meaningful consideration of the probably irreversible and considerable cumulative effects of opening up the

remote region to development, which include significant risks to Indigenous women and girls. Dissenting First Nations in the region, including Neskantaga, Attawapiskat and Fort Albany, where long-term boil water advisories, housing shortages and other crises overlap, repeatedly object and assert their right to withhold consent to developments which affect their homelands. And Canada and Ontario continue, over more than a decade, to ignore the infrastructural deficits that would help improve living conditions for remote First Nations.

It was in this context that many hoped the new IAA would open space for a ground-breaking Regional Assessment in the Ring of Fire. Early in 2020, Canada agreed to initiate a Regional Assessment in the Ring of Fire Area. Then Minister of Environment and Climate Change Jonathan Wilkinson stated that the purpose of conducting a regional assessment would be to "assess the effects of existing or future physical activities carried out in a region." The most optimistic of us imagined that the assessment would not only provide baseline data to inform cumulative effects analysis for future impact assessments, as is envisioned by the IAA, but would be genuinely oriented towards finding pathways to durable, positive contributions to sustainability for the region and viable, prosperous futures for its inhabitants in line with their own visions and priorities.

At the end of 2021, only few months into the new "activist" Minister Steven Guilbeault's term, a "Draft Agreement to Conduct the Regional Assessment in the Ring of Fire Area" was released for public comment. The Draft Agreement outlined the "the goal, objectives and planned outcomes of the regional assessment, as well as key aspects of its governance and administration" and included the proposed "Terms of Reference" for the Regional Assessment. This initial TOR and Draft Agreement was roundly criticized and rejected, primarily because it failed to recognize any form of Indigenous jurisdiction and governing authority in the proposed

Regional Assessment process, but also because it proposed a very narrow geographic scope for the assessment, essentially excluding consideration of the road infrastructure necessary to build any of the mines.

In the face of widespread opposition by First Nations in the region as well as a host of environmental and conservation groups (including a cheeky social media campaign called "A Treaty People's Briefing by the Mining Injustice Solidarity Network), the Minister released a statement in April 2022 that he would be "carefully considering" comments received on the Draft Agreement. Over the next several months, many Indigenous communities put forward models for working with Canada on a Regional Assessment that would meaningfully incorporate their jurisdiction. . In early 2023, As of the time of writing, it seems that Minister Guilbeault announced that Canada will work with First Nations in the region to co-develop a TOR for the Regional Assessment. He stated, "Its clear to me that there is no access to critical minerals in Canada without Indigenous Peoples being at the table in a decision-making position." In another high-profile example of how struggles by Indigenous peoples to exercise their inherent jurisdiction on the land are changing the contours of environmental law, consider the conflict over Coastal Gaslink in British Columbia. In 2018, Coastal Gaslink Pipeline Ltd applied for an interlocutory injunction ordering members of the Wet'suwet'en Nation to stand down from their blockade which was preventing construction of a natural gas pipeline on Wet'suwet'en territory. Wet'suwet'en members' position was that pipeline construction should not proceed without consent until their longstanding claims for Aboriginal title had been resolved.[61] Coastal Gaslink's application was successful, and in a well-publicized series of events,[62] land defenders who defied the injunction by remaining at a blockade were arrested and forcibly removed from

their lands. The charges against the land defenders were later dropped, and pipeline construction was allowed to proceed despite the fact the title claim had still not been heard.

This example raises another aspect of the dynamics we must strive to overcome but which seem likely to continue into the energy transition. The use of injunction applications can allow proponents to access public funding to employ Royal Canadian Mounted Police (RCMP) and its Community-Industry Response Group (C-IRG) as industry security forces. In the C-IRG's first five years of operation, it spent nearly $50 million dollars enforcing injunctions on behalf of extractive industries.[63] Reporting from Wet'suwet'en's resistance to the Coastal GasLink project revealed that TC Energy, the company carrying out the pipeline's construction, gave direct instructions to the RCMP on enforcing the injunction against Wet'suwet'en land defenders.[64] One land defender described the relationship between proponents and police as "so close and intertwined that it's hard to distinguish roles."[65] It is important to note that while injunctions may contain enforcement provisions, police retain broad discretion into how and when that enforcement is carried out.[66] In 2021, a B.C. Supreme Court ruled that the C-IRG's enforcement methods, including the use of exclusion zones and road blocks, were unlawful.[67]

The Wet'suwet'en land defenders relied upon Indigenous law and inherent, hereditary systems of Wet'suwet'en governance authority.[68] They argued that the company was in their traditional territory "in violation of Wet'suwet'en law and authority and their efforts in erecting the Bridge Blockade were to prevent violations of Wet'suwet'en law".[69] As Kent McNeil has argued, this should have brought the relevance of Wet'suwet'en law directly before the court. However, the judge in the case refused to acknowledge that Indigenous law is part of Canadian law, unless explicitly incorporated.[70] The Canadian legal system's refusal to recognize Indigenous law as *law* despite Canada's multi-juridical history[71] serves to entrench extractivism

into our legal regimes, including through environmental and impact assessment, even in a "next-generation" mode.

## 6.4 Conclusion

Even as we recognize the global assemblages that support it, we must recognize that the 'taking' necessary to extractivism happens in specific places where those resources are found. These places are what Macarena Gómez-Barris calls the "extractive zone"; those resource-rich regions of high biodiversity, where complex social ecologies and lifeways are dismantled to achieve conversion of environmental elements into 'resources' for capital.[72] Gómez-Barris explains how dispossession from the means of social reproduction – the land base – is necessary for the 'wealth' to be extracted. But she also reveals the way in which *people* in the communities also come to be evaluated through an extractive logic – they are reduced to their capacity to provide wage labor for a resource economy.

It is not inevitable that the sacrifice zones and the environmental injustice of fossil extractivism be replicated in the green economy. This chapter examined how environmental law is changing in the transition to a greener economy. Struggles over land and resources will continue in the green economy, and conflicts may perhaps intensify. We see plenty of indications that many of the familiar social gradients of the fossil era – certainly along lines of Indigeneity and class – will continue to be salient markers of environmental burdens in the green economy, at least in the short-term. We have offered directions for the kinds of laws we need to continue fighting for to ensure that the transition is just.

**Questions for Discussion:**

1. In what ways is "extractivism" embedded in our environmental laws and processes? How are extractivist logics continuing to influence the Green Transition?

2. What are the costs and benefits of Impact-Benefit Agreements for Indigenous communities and authorities? Are there better ways to fully recognize and act on Indigenous jurisdiction and stewardship approaches to natural resource management?

3. While proposed amendments to the *Canadian Environmental Protection Act* (CEPA) introduce a "right to a healthy environment" into Canadian statute law for the first time, they are unlikely to require strong action on the part of Ministers. Why?

4. What is environmental racism? Is there any evidence that recent changes to the Canadian environmental laws and regulations will try to combat environmental racism?

**Additional Resources**

Ecojustice, Environmental racism: What is it, what are the impacts, and what can we do about it? https://ecojustice.ca/news/environmental-racism-in-canada/

Government of Canada, UPDATE – Strengthening the Canadian Environmental Protection Act, 1999 and recognizing a right to a healthy environment

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