2016 - ENVIRONMENTAL LAW (JEFFERIES)

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VOCABULARY

- Adaptive/reflexive regulation: ex. Permits issued with a monitoring requirement that requires them to report back to the agency to see if the development should continue in case circumstances change.
    - Regulation responsive to changing scientific information
- Command and control regulation: defn' in text. Ex. regulation tells us how many chemicals allowed
- Conservation Ecology: study of biodiversity (diversity of species in an area or diversity of genetic material in an area)
- Ecology: study of the relationship/interaction between organisms and their environment
- Ecosystems (inter-connected, dependent, complex, open/closed) – community of living organisms and their environment. Living and non-living as defined by a certain region.
- Environmentalism: perception that the unchecked modification or utilization of resources/ecosystems and the unbridled application of technology has adverse consequences
- Intergenerational equity: giving rights or value to future generations
- Intragenerational Equity – balance between developed and undeveloped world
- Pollution: the degradation of a system such that the natural balance is thrown out of whack, OR the introduction of a chemical or substance that has a harmful effect.
- Polluter pays principle: the entity responsible for pollution should also be the entity responsible for fixing it - Polluter pays for their impact
- Precautionary decision-making

    - Cautious risk assessment – in the face of uncertainty, precautionary principle would recommend regulation
- Preservation: maintain as is/was. Contrast with conservation.
    - Conservation: maintain/sustain something but do so such that we can continue to exploit.
- Regulatory science: working towards solving a specific problem for the regulator.
- Scientific Uncertainty & Risk
    - There is always scientific uncertainty and risk – becomes a judgment call about how much uncertainty and risk should be permitted, will allow activities with certain level of risk
- Sustainability: Social, economic and cultural values
- Sustainable development: development that meets the needs of the present without compromising the needs of future generations

THEMES

- Questions of complexity & necessity
- Jurisdiction to regulate / legislate & administrative review
    - E.g. greenhouse gases – could be federal or provincial governments
    - Federal government wants pan-Canadian approach and will be held liable for international treaties, but provincial governments already have systems in place
- Standard Setting
- Civil litigation, environmental rights & application of the common law
- Indigenous Rights
    - Duty to consult, treaty rights, Aboriginal title
- Public participation & transparency
- Enforcement & compliance
    - Level of prosecution
    - E.g. tailing ponds/duck case
- Remedies
    - Injunctions or fines
- Environmental Justice
    - Who bears the burden of environmental degradation – the poor, the minorities, First Nations
- Societal Structure (production, consumption, pollution & waste)

THEORETICAL & PHILOSOPHICAL JUSTIFICATIONS OF ENVIRONMENTAL REGULATION

Law's role in the environment:

- Means to reaching policy objectives
- Guide management of our resources to meet goals for sustaining multiples values
- Law's role for greenhouse gases: restructuring society, market based incentives, regulation

ENVIRONMENTAL LAW'S LEGITIMACY

SOURCES OF ENVIRONMENTAL LAW

- Ecology
- Science
- Human health
- Morality / public opinion

- Idea of Science vs Ethics/morality – religion, post-modern pluralism, or other?

COMPETING PARADIGMS – EQUILIBIRUM VS NON-EQUILIBRIUM

Equilibrium paradigm (Aldo Leopold's *Land Ethic*): "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."

- The balance of nature. Neutral universal organizing principle that could be applied to the use and management of all natural resources.
- Problem: natural systems are always changing
- Should not look to maintain a static system

Non-equilibrium paradigm (Daniel Botkin): even left alone nature is dynamic, complex, stochastic and pluralistic.

- The accelerating interaction between humans and the natural environment makes it impossible to return to an ideal state of nature.
- At best, ecosystems can be managed rather than restored or preserved, and management will consist of calculated experimentation.
  - management will consist of calculated experimentation
- Human action is one of the principle forces operating on ecosystems
- Focus on Science
  - Religion has not been and is unlikely to be a basis for a workable theory of environmentalism.
  - Despite efforts to create a revisionist green theology of stewardship, religion remains more of a cause rather than a solution to environmental problem – it is human focused

Pluralistic Compromise

- Science may justify regulation/management
- In the absence of science, ethics/morality may justify regulation
- Demands: a new branch of law that responds to external forces and challenges application of some of the basic tenets of our legal system

BACKDROP

Environmentalism

- perception that unchecked modification or utilization of resources/ecosystems and the unbridled application of technology has adverse consequences
  - Was a social movement, which led to a number of contributions to environmental laws in America
  - This is different from the environmental law though, as it is merely a social movement, the law itself is balanced and formed from several sources

Rule of Law

- Static paradigm rejected by modern ecologists, but the law lags
- Preservation vs management vs adaptive flexibility
  - Adaptive management is the goal but: Law is not very adaptive – it is defined by precedent, predictability, and solidarity
  - Very difficult to allow the law to be as adaptive as the environment and natural systems

Constitution – no environmental law but.. delineation of powers: resources, trade, POGG

Common Law – ie. Rylands v Fletcher, nuisance, trespass

Science – but difficult to apply, always changing

- Always in development – never reaches an absolute "truth"; difficult to reconcile with law

CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

Administrative Duties

Duties of the Government of Canada

2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),

> (a) exercise its powers in a manner that protects the environment and human health, applies the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation, and promotes and reinforces enforceable pollution prevention approaches;…..
>
> ….

ETHICAL/MORAL LEGITIMACY OF ENVIRONMENTAL LAW

1) Anthropocentric justifications:

- Welfare economic model/Utilitarianism
  - Cost-benefit analysis
  - *Tragedy of the Commons* (Hardin) – mutually agreed to regulation
    - cap & trade and carbon tax trying to regulate this in climate change context
  - Transaction costs, information costs, and free-riding
  - *Pareto optimality* as the goal (no one loses, some win) & Kaldor-Hicks (efficient redistribution)
  - Mark Sagoff – deliberative model that accounts for community values in its efficiency discussion (passive use)
    - Ecosystem-services dimension
    - Aesthetic/spiritual dimension

2) Non-anthropocentric justifications:

- *Biocentrism* – animal welfare (sentience) & intrinsic value (subject of a life). Logical extension of the post-Kantian rights discourse
- *Ecocentrism* – focus on ecosystems as the product of evolution. Regulate to maintain processes

HOW DOES THE LEGITIMACY AND MODE OF IMPLEMENTATION CHALLENGE LEGAL STRUCTURES?

- Uncertainty – legal causation (*Daubert* decision: scientific validity test, toxic torts, action in the face of uncertainty)
- Finality – adaptive/reflexive management
- Rule of law – "consistent applicant of fixed rules to yield a single, final result"
- Non-legal persons – intergenerational and non-human
- Remedial action

ENVIRONMENTAL LAW: ETHICS OR SCIENCE (DAN TARLOCK) – NON-EQUILIBRIUM PARADIGM

- The **non-equilibrium paradigm**, as it is being applied to biodiversity protection:
    - potentially dissolves the land boundaries that we have built up over centuries and extends the time scale of management decisions.
    - Public versus private land, national parks versus national forests have no meaning.
    - Under the non-equilibrium paradigm, all natural resources management is an on-going experiment instead of a series of discrete, final decisions.
- principal argument of this paper is that if environmental law is to succeed in this effort, there is no escape from the development of a science-based management
- This assertion rests on three propositions:
    - First, only science can establish the necessary conditions for legitimate environmentalism because it constrains political choice
    - Second, my argument resists the tendency to respond to the contingencies and uncertainties inherent in environmental science by reclassifying problems as ethical rather than scientific.
    - Third, my argument rejects the view that environmental law is (or should be) grounded in monistic, non-anthropocentric "rights of nature"

THE EVERGLADES AND PUTTING NATURE BACK TOGETHER

- influence of non-equilibrium ecology can be seen in various efforts underway either to restore ecosystems or to protect remnants of such systems that have been degraded
- important legal consequences of the non-equilibrium paradigm for modern environmental protection:

1. **Restoration is the Norm**
    - a major environmental management task will be the restoration of degraded ecosystems
2. **Adaptive Management: The End of Finality?**
    - feedback loops to reassess policy as new information accumulate
    - Adaptive management is premised on the assumption that management strategies should change in response to new scientific information: all resource management is an on-going experiment
3. **A New Regulatory Science: Conservation Biology**
    - Adherents to the non-equilibrium paradigm have pioneered a sophisticated new applied science, conservation biology, to protect ecosystems from human insults.
    - Only the minimum necessary habitats are preserved
        - Conservation biologists must be concerned with the relationship between habitat fragmentation and species extinction

UNCERTAINTY AND THE NON-EQUILIBRIUM PARADIGM: IS THERE A "JUNK ECOLOGY" PROBLEM?

- argument of scientists and engineers that risk assessments must err on the side of risk minimization by the incorporation of wide margins of safety has been widely endorsed by courts and has been carried over from toxic substances law to biodiversity protection
- Post-*Daubert* toxic tort cases illustrate the continued resistance of public law models for private adjudication.
    - Courts are now much less willing to substitute risk assessments for traditional scientific evidence
- use of science-based regulation requires more tolerance for uncertainty than does the civil and criminal law

TOWARD A NEW ENVIRONMENTAL ETHIC

- legitimacy of any theory that seeks to prescribe human behavior depends upon the following four conditions:
    - The theory must be grounded in comprehensible rationality. It must be able to explain why human behavior is limited, reoriented and sanctioned.
    - It must permit progressive discourse.
    - It must permit choice. Its principles should permit us to make choices among options.
    - It must be able to adapt to new knowledge.
- The efforts to include ecosystems within the moral community have largely failed because placing humans and living and non-living nature on an equal moral footing precludes rational choice

A NEW, SCIENCE-BASED ENVIRONMENTAL ETHIC

- Ethics can legitimately, however, bridge the gap between scientific uncertainty and the risks of inaction pending further research through the adoption of the cautionary principle
- Precautionary principle: the principle that the introduction of a new product or process whose ultimate effects are disputed or unknown should be resisted.
- The underlying philosophical principle of much environmental management is the duty of inter-generational equity

ENVIRONMENTAL LAW'S EVOLUTION IN CANADA

EVOLUTION OVER TIME OF ENVIRONMENTAL LAW:

- Local problems being addressed through the common law (property, tort, contracts)
    - Common law insufficient but still present as an option
- Transition from local problems to de-localized problems – needing statutory and regulatory intervention and cooperation
    - Thinking not only about private interests, but also public interest in a clean, healthy environment
    - Laws now targeting land, water, air, living organisms, our built organisms, and interactions amongst them

MODERN ENVIRONMENTAL LAW

- Environmental regulatory law: limits / standards / prohibitions
    - E.g. CEPA and EPEA
- Environmental assessment law: process & decision-making
    - Informs what a company must achieve as far as carrying out an assessment and addressing risks, then authorized board is faced with the decision to approve or deny, or approve with conditions
- Environmental rights law: information & participation
    - Focus in Canada since 2010
- International environmental law: transboundary & commons problems
    - A commons problem – being recognized as a global issue
    - Problem with who can be held liable, because so many different countries and companies could be cited as being part of the problem
    - Possibly sue your own government for failing to take meaningful action
        - Damages sought would be regulatory actions
- Structures: borrowed from other areas of law

ENVIRONMENTAL MANAGEMENT IS NOT A NEW PHENOMENON

- European deforestation (1400-present)
    - Why?: Fuel, clearing land for farms, building ships and homes

- Hans Carl von Carlowitz: *Silvacultura Oeconomica* (1713)
    - manual on how you have to plant new trees and a diversity of trees
- *Nachhaltigkeit* – sustainability in German

HIGHLY CONNECTED TO DEMOCRACY

- 1800s and 1900s: limit & control "waste" (planning)
- 1960s and 1970s: control & reduce the burst of pollution
    - Canada and the United Stated began issuing regulations and statutes
- Traditional: public well-being, participation, notification and transparency
- Supplemental: social media, direct lobbying, voluntary action
- Corporate: encourage leadership but also incent enhanced action
- Indigenous: connected to existing rights that have an environmental dimension
    - Example: failure to fulfill duty to consult has resulted in a pipeline approval being overthrown

4 PHASED EVOLUTION

PHASE 1: COMMON LAW RIGHTS & EARLY STATUTES

- Early statute: Fisheries Act – since the 1860s. Prohibition on the deposition of "deleterious substances" in "waters frequented by fish" + fish habitat protections
    - A lot of wiggle room, little protection
    - There is always a prohibition, with an allowance for approvals
        - Shows that it's not all out prohibition, rather a prohibition with exceptions to support economic values
- Public health, public nuisance, criminal negligence (*Criminal Code*)
- Torts:
    - **Negligence:** duty owed → standard of care breached → suffered damage → legal & factual causation
        - Elements
            1. Damage
            2. Breach of Standard of Care
            3. Cause in Fact - *difficult to prove in enviro cases
            4. Duty of care owed to Plaintiff
            5. Cause in Law (is it reasonably foreseeable this damage will be cause to this π?)
    - **Private Nuisance:** unreasonable and substantial interference with the plaintiff's use & enjoyment of their land (damage, seriousness, duration, no particular sensitivity).
        - Elements:
          1. π has interest in land
          2. substantial damage
          3. unreasonable (foreseeable) & substantial interference w/ the use or enjoyment of π's occupation caused by Δ
    - **Public Nuisance:** Crown as guardian of public waterways, highways, and amenities. Impacted public right or community at large is impacted.
        - Benefit held by the public has been harmed by the actions of another party, must show specific harm, and requires consent of the AG
        - Elements: [private action in public nuisance]
          1. a public nuisance (unreasonable (foreseeable) interference with public comfort/convenience/welfare [health, safety, morality, comfort or convenience])
          2. π suffers unique damage
    - **Strict Liability (Rule in *Rylands v Fletcher*):** strict liability

        - When you bring something liable for mischief onto your property, and it spreads or escapes to another person's property and causes damage.
        - No due diligence defence available, but damage must be reasonably foreseeable
        - For there to be liability, there must also be:
            - "non-natural/artificial use of the property"
            - Must be both dangerous and artificial
    - **Trespass to property:**
        - Elements:
            1. π has possessory right to land
            2. Δ physically contacts/interferes with land by direct action
    - **Battery:**
        - Elements: intentional & direct contact with π (except mere jostling) (don't have to prove injury)

CAMBRIDGE WATER V EASTERN COUNTIES LEATHER PLC, [ENG HL 1994] – NOT LIABLE – RYLANDS V FLETCHER

Ratio: restriction of Rylands v Fletcher – Knowledge or foreseeability of risk is required for strict liability in Britain (Britain has subsumed Rylands v Fletcher in nuisance)
Facts: The defendant (ECL) owned a leather tanning business. Spillages of small quantities of chemical solvents occurred over a long period of time which seeped through the floor of the building into the soil below.

- These solvents made their way (by percolation) to the borehole owned by the Claimant water company (Cambridge Water Company), 173 miles from the leather tanning facility. The borehole was used for supplying water to local residents. The water was contaminated at a level beyond that which was considered safe and Cambridge Water had to cease using the borehole. Cambridge Water brought actions based on negligence, nuisance and the tort in Rylands v Fletcher.
- At trial: negligence and nuisance were both denied as causes of action as the judge ruled that the harm caused was not reasonably foreseeable
    - The trial judge denied liability under the tort from Rylands v Fletcher because he held that the use of a solvent such as PCE in ECL's tanning business constituted, in the circumstances, a natural use of FCC's land
- At Court of Appeal: allowed CWC's appeal on the ground that FCC was strictly liable for the contamination of the water percolating under CWC's land (some 1,700,000 pounds awarded)
    - the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use

Decision: defendant not liable under Rylands v Fletcher, as the damage was not reasonably foreseeable
Reason:

- Foreseeability of Damage under the Rule in Rylands v Fletcher
    - Rylands v Fletcher
        - A defendant will be held strictly liable where s/he:
            - Brings onto his land something likely to do mischief if it escapes;
            - That thing escapes, causing injury; and
            - The defendant's use of the land is non-natural (non-natural and dangerous)
                - "Non-natural" means a use of the land that is both dangerous and unusual, and perhaps not for the "general benefit" of the community (Rickards v Lothian)
        - General tenor of Blackburn J. was that knowledge or at least reasonable foreseeability of the risk was necessary for there to be liability

    - Imposition of strict liability for pollution is the role of legislation, rather than stricter outcomes in the common law
- Application to the facts of the case:
    - It was not reasonably foreseeable that spills at the tanning facility would contaminate water at the bore hole
    - The contamination was seen as historical pollution that preceded the relevant legislation, so there could be no liability

On the issue of "non-natural" or ordinary use of the land: storage of large amounts of chemical on your land is not seen as an ordinary land use

ERNST V ENCANA, AER, ALBERTA ENVIRONMENT, SCC 2016

Facts:

- Plaintiff (Ernst) brought action against Encana and AER, her water was polluted by local development of methane in her area (requiring drilling of holes through coal, combined with fracking process)
- Encana using hydrolic fracturing to get gas out of low permeability shale. Substances used in the fracking (sand + dirty water) now contaminated her groundwater well.
- Action against Encana and the Alberta Environment for not investigating, and the ERCB (now AER) for s. 2b *Charter* violation as she alleges the complaint she filed with the board was not reviewed properly and the information was surpassed.
- Action in negligence, nuisance and *Rylands v Fletcher*.
- Portions of the statement of claim struck
    - Unsuccessful against Encana so far in negligence, unsuccessful so far for regulatory negligence against AER - ERCB statute gives statutory immunity from Charter challenges.
    - Why regulatory negligence struck?
        - Where law imposes duty of care, difficult to determine standard
        - AER owes duty to public at large, but not to individual – if individual duty was owed, it would infringe on AER's ability to meet its public duty
        - Fear of indeterminate liability
    - On-going before the SCC

PHASE 2: WASTE CONTROL & CLEAN-UP LAWS

- Broadening existing laws
    - Focus: General offence for waste discharges
    - Why? Need to manage nature's assimilative capacity
        - ability of ecosystem services to cleanse itself
- Establish a bureaucracy that is staffed by experts, requires permits/approvals, etc

Environmental Protection and Enhancement Act, RSA 2000 c. E-12

- controls release of substances.
    - Part 1: Administration
    - Part 2: Environmental Assessment Process, Approvals and Registrations
    - Part 3: Activities Requiring Notice
    - Part 4: Environmental Appeals Board
    - Part 5: Release of Substances
    - Part 6: Conservation and Reclamation
    - Part 7: Potable Water
    - Part 8: Hazardous Substances and Pesticides

- Part 9: Waste Minimization, Recycling and Waste Management
- Part 10: Enforcement

EPEA, ss. 108 & 109

- Prohibited release where approval or regulation
  - S. 108(1) No person shall knowingly release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval, a code of practice or the regulations.
  - (2) No person shall release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval or the regulations.
  - (3) For the purposes of this section, if there is a conflict between an approval or a code of practice and the regulations as to an amount, concentration, level or rate of release of a substance, the most stringent requirement prevails.
- Prohibited release where no approval or regulation
  - 109(1) No person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.
  - (2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.
  - (3) Subsections (1) and (2) apply only where the amount, concentration, level or rate of release of the substance is not authorized by an approval, a code of practice or the regulations.
  - (4) No person may be convicted of an offence under this section if that person establishes that the release was authorized by another enactment of Alberta or Canada.

PHASE 3: TOXIC CONTROL LAWS

- *Canadian Environmental Protection Act, 1999*
  - Process for assessing toxicity
  - Regulatory controls
  - Charge for violations (of reporting requirements [s. 95], interim orders [s. 94], or regulatory prohibitions/restrictions [s. 93(1)])
- Other regulatory statutes: *Pest Control Products Act; Transportation of Dangerous Goods Act; Hazardous Products Act; Canada Consumer Product Safety Act*

CEPA, 1999

Toxic substances

64 For the purposes of this Part and Part 6, except where the expression "inherently toxic" appears, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that

(a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;

(b) constitute or may constitute a danger to the environment on which life depends; or

(c) constitute or may constitute a danger in Canada to human life or health.

CEPA, 1999- exercise of federal criminal law power; assessment of new + existing pollutants

- Problem: some chemicals cannot be assimilated/diluted and instead accumulate
- *Significant risk:* inherently toxic & persistent; bio-accumulative; greatest potential for exposure

- *Lists:* Domestic Substances List (all substances); Priority Substances List (assessments); Toxic Substances List (determined to be toxic, then broad authority to regulate)

R V HYDRO QUEBEC, [1997] 3 SCR 213 – CEPA DECLARED WITHIN FEDERAL JURISDICTION – JURISDICTION OVER THE ENVIRONMENT

F: Hydro Quebec releasing PCBs, charged with 2 infringements under *CEPA*. Argued feds have no jurisdiction because they said enviro law shouldn't extend to criminal law.

- Hydro-Quebec charged with dumping polychlorinated biphenyl contrary to regulations under the Canadian Environmental Protection Act, 1999
- Hydro-Quebec challenged the government's authority to charge it with an offence under CEPA on the grounds that toxic substance provisions fell outside federal powers

Decision: provisions upheld as constitutional under the federal criminal law power, s 91(28)

- "The protection of the environment, through prohibition against toxic substances, constitutes a wholly legitimate public objective in the exercise of the criminal law power [s. 91(27)]."
- Environmental law involves both provinces and feds

PHASE 4: COMPREHENSIVE ENVIRONMENTAL ASSESSMENT + PLANNING AND MANAGEMENT SCHEMES

- Switch to anticipatory and preventative measures
- *Environmental Assessment*:
    - Process through which a proponent—for environmentally significant projects—must predict the consequences and respond (mitigate, etc)
        - *Canadian Environmental Assessment Act, 2012*
        - Part II of the *Environmental Protection and Enhancement Act*
- Management Schemes: fish; forests; mining etc.

CONTEXT AND CHALLENGES OF ENVIRONMENTAL LAW

Sustainable development – development that meets the needs of the present without compromising the ability of future generations to meet their own needs

- Sustainability has two central components:
    - Concern for well-being of future generations as well as those of the present
    - Comprehensive coverage of all core issues of decision making that affect lasting well-being

Positive feedback – a cyclical process in which a complex system responds to a perturbation in ways that expand, intensify or extend the initial effect ie. melting of sea ice in the Arctic

Adaptive capacity – the ability of a human and/or biophysical system to make adjustments in response to a potential or actual disturbance or its consequences without compromising the system's core characteristics

5 ASSOCIATED TRENDS IN THE EVOLUTION OF ENVIRONMENTAL LAW

1) Local → Regional → Continental → Global
2) Transparency & Participation
    - Courts have stated that citizens can bring challenges if they have a genuine interest in the matter and there is no other way to bring the issues before the court
3) International Influence and Precaution

- Precautionary principle in now widely accepted as customary law – although not yet seen in Canada
- E.g. for energy facilities: Public participation, time limits?, final project approval powers removed from tribunals

4) Effective & Efficient Application of the Law
    - Extent of implementation and enforcement
5) Sustainability Objectives
    - 3 major pillars: 1. economic, 2. social, 3. environmental.

IMPENDING PROVINCIAL-FEDERAL CONFLICT

- Federal promise of a Pan-Canadian framework (made in the Paris climate change meetings)
    - International commitment:
        - Canada as a participant in an international commitment to limit temperature change by 1.5ºC to 2ºC
        - Will be bound by the commitment once it passes legislature
    - Now looking for a federal approach
- Imposition of federally set "price on carbon"
    - Federal government would impose an indirect tax
    - Provincial governments may already have direct tax imposed
- Federal Environment Minister McKenna:
    - "It's mandatory that everyone will have to have a price on carbon. If provinces don't do that, the federal government will provide a backstop."
- Premier of Saskatchewan, Brad Wall:
    - "If it's some sort of universal price that will manifest itself as a tax and be disproportionately impacting the energy sector, which is already reeling, then we have a big problem in Saskatchewan"

COMPLEXITY

- Our legal system assumes that the world is understandable and strives for causal proof & final decision-making
- Traditional environmental law has employed silos: water/air/land
    - Laws related to each of the three silos separately – water use, water pollution, air pollution, land-use, land conservation, etc.
- There is elegance in this simplicity, but science has successfully challenged and undermined this assumption (inter-connected nature of major problems)

Dynamics, Interactions & Human Choices

- **Panarchy** – theoretical definition to understand complexity - evolution and hierarchy in a complex system
    - Process of organization and reorganization, constant succession and change e.g. forest ecosystem – mature growth, disturbance, establishment, regrowth
    - Combination of the complexity and constant change at fine granular scale all the way up to the broad, large scale
    - Further complexity between natural systems, economic systems, social systems, legal systems
- Integrated system dynamics
    - **9 Planetary Boundaries**
        - Novel entities, stratospheric ozone depletion, atmospheric aerosol loading, ocean acidification, biogeochemical flows, freshwater use, land-system change, biosphere integrity, climate change

- Linked connections, feedback mechanisms, and non-linear responses (i.e., climate change & cod moratorium)
    - Positive feedback loops – acceleration of impacts e.g. melting of permafrost, increase in decomposition e.g. melting of sea ice in the Arctic
    - Negative feedback loop – deceleration offsetting the impacts e.g. increasing cloud cover
- Natural systems have *adaptive capacity*
- Complexity as a managerial nightmare:
    - Linear decision-making
    - Linear institutions
    - Scaler problems & multiple uses
    - *Non-equilibrium systems*
    - *Adaptive management*
    - *Resilience*

IMPLICATIONS FOR ENVIRONMENTAL LAW

1) Precautionary decision-making
    - proposition that caution should be paramount when an activity raises threats of harm to health or the environment, and that the proponent of the activity should bear the burden of proving that it is safe; supports the notion that where threat of serious or irreversible damage exists, a lack of certainty should not be used as a reason for postponing measures to avoid environmental degradation
2) Foster Resilience (maintenance) & Transformation (thoughtful abandonment e.g. populations that we have already pushed past a brink)
    - Resilience – ability to resist and/or accommodate disturbance and change while retaining identifying characteristics
    - Transformation – a shift from one set of identifying system characteristics to another, including more or less significant changes in structure, function and/or processes
    - Backcasting – tool for future oriented planning that centres on identifying a desired future objective or set of desired characteristics and then seeking viable pathways from the present to the desired future
    - Forecasting – tool for future planning that centres on the projection of current trends into the future with adjustments for foreseeable influences
3) Utilize resiliency indictors (strengthen adaptive capacity, promote self-reliance, diversify resource use, equity, accountability, and trust. Ability to adjust)
4) Implement/operationalize sustainability
    - Integrated systems planning with multiple linked components managing demand and providing incremental supply for diverse benefits
    - Forest management – recognizing and accommodating multiple forest uses

LAW AS A TRANSFORMATIVE AGENT OF CHANGE

- 3 Part Process for Positive Change (Peter Montague):
    - 1- Local victories
    - 2- New approaches manifest in law & policy
    - 3- Cultural/societal transformation

COMPLEXITY IN ACTION: LAND-USE CHANGE

- Stockholm Resilience Centre says:
  - "Land use change is one driving force behind the serious reductions in biodiversity, and it has impacts on water flows and on biogeochemical cycling of carbon, nitrogen and phosphorous and other important elements."
- Local → Aggregated Global
  - Problems and solutions
- Edmonton Example:
  - Constant increase in population, density increase has been very slow – shows larger impact on the land from urban sprawl

THE URBAN SPRAWL DILEMMA

- Think: Edmonton/Calgary & the environmental problems this form of development brings
- World's "carrying capacity"
- Struggle with distributional discrepancies
- People have to drive everywhere. Converts undeveloped land to residences. Large homes with high heating costs and large water uses.

ONTARIO'S APPROACH

- Bifurcation protection approach (dual objective), want to protect agricultural land and protect environmentally sensitive areas from urbanization
- Greater Golden Horseshoe region
  - Low density, rapidly increasing population
  - Infrastructure issues, agricultural impacts (productive area), ecosystem loss
- Greenbelt facts
  - Aim was for smarter growth: Density vs Urban sprawl
  - Ontario laws passed in an attempt to force a transition in urban and suburban forms in one of NA's fastest growing areas – Toronto and surrounding area
  - Places to Grow Act, 2005 and the Greenbelt Act, 2005 trying to avoid the Red Queen effect – where it "takes all the running you can do, to keep in the same place"
- Municipal authority?
  - Municipal government has zoning authority – makes land-use bylaws (where commercial, industrial development can occur, water waste, etc.)
  - Province stepped in to make greenbelt plan designed to superseded the municipality's power, reason was that the impacts were being felt more broadly
  - Province can supersede municipal authority legitimately because municipalities are not constitutionally recognized, they have their existence by way of provincial legislation.

Greenbelt Act, 2005

- Area designation (s. 2)
- Plan establishment (s. 3) & Plan content (s. 6)
- Objectives (s. 5)
  - 5. The objectives of the Greenbelt Plan are,
    - (a) to establish a network of countryside and open space areas which supports the Oak Ridges Moraine and the Niagara Escarpment;
    - (b) to sustain the countryside, rural and small towns and contribute to the economic viability of farming communities;…
    - (i) to control urbanization of the lands to which the Greenbelt Plan applies;

…

- Legal superiority of plan (ss. 7 & 8)

- S 7 (3) Despite any other Act, no municipality or municipal planning authority shall, within the areas to which the Greenbelt Plan applies,
    - (a) undertake any public work, improvement of a structural nature or other undertaking that conflicts with the Greenbelt Plan; or
    - (b) pass a by-law for any purpose that conflicts with the Greenbelt Plan
- Review/public participation (s. 10)
- Limiting liability (s. 19)

ALBERTA'S APPROACH: *ALBERTA LAND STEWARDSHIP ACT*

- Local controversy (Parkland County example)
- *Alberta Land Stewardship Act*
    - Promotes integrative management
    - Incorporates the objective of sustainability
    - Utilizes cumulative effects management
    - Incorporates conservation mechanisms
    - Conservation easements/directives
    - Respects existing property rights
    - Maintains rights of appeal
- Two binding plans have been created thus far

Lower Athabasca Regional Plan

- Set up what standards and threshold trigger levels should be for known pollutants
- New triggers/threshold levels can be set and new pollutants can be added
- Establishes 6 new conservation areas
- Addresses infrastructure concerns
- Provides year-round tourism:
    - 9 new provincial recreation areas
- Committing to produce tailings management – no remedial plans in place
- Committing to working with Aboriginal communities – to support tourism, recreation and restoration
- Supporting diversification of the economy (but only mentions recreation and tourism)

OTHER INNOVATIVE ACTIONS

- Transportation: road tolls, carbon taxes (gasoline and diesel), HOV (carpool) lanes, bike lanes
- Development: tree preservation by-laws, anti-idling by-laws, infill designations, municipal greenbelts, Shark fin by-laws

CAUTION FOR MUNICIPAL ACTION - ***MUNICIPAL BYLAWS MUST IDENTIFY A MUNICIPAL PURPOSE***

Municipal Government Act, RSA 2000

s. 7 A council may pass bylaws for municipal purposes respecting the following matters:

(a) the safety, health and welfare of people and the protection of people and property;
(b) people, activities and things in, on or near a public place or place that is open to the public;
(c) nuisances, including unsightly property;
(d) transport and transportation systems;
(e) businesses, business activities and persons engaged in business;
(f) services provided by or on behalf of the municipality;
(g) public utilities;
(h) wild and domestic animals and activities in relation to them.

ENG V CITY OF TORONTO – MUNICIPAL BYLAW AGAINST SHARK FINS STRUCK DOWN

- A number of municipalities banned the serving of shark fins
- Eng and numerous restaurant owners challenged Toronto's decision
- Was there a municipal purpose? – Toronto said that they valued a healthy environment and did not support the unsustainable act of sharkfinning
- This purpose was ruled to not be sufficient

SHELL PRODUCTS CANADA V VANCOUVER - REFUSING SHELL PRODUCTS B/C OF OPERATIONS IN SOUTH AFRICA

- City of Vancouver had an issue with South Africa because of apartheid
- Vancouver decided not to buy any Shell products because it was operating in South Africa
- Shell challenged the decision
- SCC said that for a municipality's action to be intra vires, there must be an identifiable municipal purpose

INTERNATIONAL ENVIRONMENTAL LAW

International Law is a governance system that lacks the indicia of traditional Western legal institutions:

- NO standing legislative body
- NO compulsory dispute resolution
- NO standing enforcement agency

International Law's Subject

- Common area outside the 200 nautical mile limit of any country
    - **Sovereign control over natural resources**
        - Up to 200 nautical miles from the shore
- Research – up to international law to determine who benefits
- Newly discovered species and potential for geoengineering/biotechnologies
- Atmosphere

Conventional law and international customary law

    - Treaties are the main source of international law
    - Commission tasked with resolving disputes that arise within the treaty
- International customary law only develops over time
- Issues with international law not present in domestic law:
    - Standing to sue in the courts of another country – wanting to sue for transboundary effects
    - No international legislatures
        - But have ability to form treaties
    - No law enforcement
        - Reliance on self-reporting
        - E.g. 1946 – international regulation on whaling
        - Negotiated a treaty that set quotas and limits on technologies that can be used
        - In the late 1980s, Russia was audited and found that they had harvested hundreds of thousands more whales than was permitted
    - No international courts with binding decisions
        - Makes dispute resolution difficult
        - We now have an International Court of Justice – statute in and of itself – created by the UN

        - Japan was sued by Australia over the whaling – both countries had signed on to agree to international liability
        - Decision: Japan violated the treaty
        - Moving forward: Japan changed program slightly, changed treaty provision so that they could not be sued internationally, and moved on…
- Canada's law has largely been driven by the international community
    - Example: Biodiversity Treaty in 1992
        - seed bank in Europe to provide seed source for the future

SOURCES OF INTERNATIONAL LAW

- **Article 38 of the Statute of the *International Court of Justice:***
    - judicial branch of the UN.
    - UN general assembly passes resolutions, but it is not a resolution body because they don't pass treaties. They can call meetings to help promote binding resolutions but they do not themselves create binding laws.
    - UN Security Council can pass binding resolutions when there are things like violent state action or potential war that destabilize global peace and order and countries are obliged to send help.
    - ICJ is part of the UN and is the closest we get to a world court, but there isn't a world court. ICJ not held by *stare decisis,* decision only affects the parties having the dispute.
    - No appeal mechanism.
- **Conventional/Treaty Law** – consent based
    - ex. Kyoto Protocol
    - Conventional international law – established when two or more countries conclude a treaty or convention
    - Protocol – used to describe an agreement of less formal nature than a treaty or convention; generally supplements, amends, or clarifies a multilateral treaty
    - Ratification – an agreement to the terms of a convention by the domestic legislatures of the countries signing the convention
- **Customary Law** – opt-out based + general accretion over time through State practice & opinio juris
    - *opinio juris*: principle that for conduct or a practice to become a rule of customary international law, it must be shown that countries believe that international law (rather than moral obligation) mandates the conduct or practice
    - set of rules that has evolved over time and has been accepted by states as effective law
    - Examples:
        - E.g. unilateral declarations made of sovereignty up to 200 miles from the edge of a nation's continental shelf
        - Push back if any nation tries to unilaterally declare sovereignty over greater area
- **General Principles of Law** – mostly procedural
    - generally procedural. Ex. Good Neighbour principle.
    - Also things that are held as laws in most countries, ie. some rules of evidence, will often be considered general principles of law.
- **Subsidiary Sources**
    - Treatises
    - ICJ is to apply judicial decisions and the teachings of highly qualified publicists of the various nations, as subsidiary (supplementary) means for the determination of rules of law.
- **"Soft Law" – i.e., Our Common Future**

- Not treaty or custom, but based on a common declaration or commission
- no sanctions for breaking soft law (may have social stigma type repercussions)
- examples:
    - **Brundtland Report/Our Common Future (1987)** –definition of sustainable development:
        - "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."
            - United Nations World Commission on Environment and Development

TREATY LAW

- By far the predominate form of IEL
    - >2500 environmentally oriented agreements concluded over some 40 years
- Bi-lateral → Multilateral
- Process: negotiation → signature → ratification → entry into force.
    - just because Canada signs treaty does not mean Canada is bound by it. Needs to be ratified.
    - Of force and effect if ratified by necessary number of nations and brought into effect
    - to ensure the treaty is followed it requires domestic implementation. Bring in the requirements under the treaty under domestic laws – ex. prevent import of a substance under *CEPA*.
    - if a country does not implement something they may violate their international obligations and the other states may then be able to put sanctions on you.
- IEL default: framework conventions
    - UN framework convention on climate change (UNFCCC) – set out broad objectives for society
    - Also recognized that subsequent legal action would be required
    - Conference of the parties every year where new laws are concluded
    - Each year produces new protocol/agreement
- **Canada's executive/dualist approach**
    - our treaty making process is an executive process. We put an international treaty before the House of Commons as a courtesy but they have no say.
- **Federalism concerns**
    - *Great Lakes Water Quality Agreement* –feds agree to new water quality thresholds after negotiating with ON. Federalism – prov control water and natural resources inside the prov but they can't sign international treaties.
        - Major province that needed to be on board was Ontario
        - Usually feds consult with provs before it negotiates so that it will be able to have effective implementations. Canada will be held responsible for violating an international treaty even though it is the provs that violate it.
    - *Espoo Convention*
        - Aimed at consistency in environmental assessments between countries
        - Convention on environmental assessments – was not ratified by Canada due to issues with federalism (provincial acceptance)

Treaty Examples

- Prominent examples: *UNFCCC (Paris Agreement), CBD, CITES, CMS (Convention on Migratory Species), UNCLOS (United Nations Convention on the Law of the Sea), Great Lakes Water Quality Agreement, Migratory Birds Convention (US, CAN, Mexico)*
- **Specific Examples and Canadian Implementation:**

- *Stockholm Convention on Persistent Organic Pollutants* → *CEPA, 1999, PCPA, FDA & Chemicals Management Plan*
    - Thrust was to phase out the dirty dozen most dangerous toxic substances in the world, including DDT (found to impact bird species, including the Peregrine Falcon, by thinning eggshells)
    - Canada was required to take a number of legislative and policy actions to meet the obligations under the Stockholm Convention
    - 2006 – action plan submitted to implement the convention and final version was released in April, 2013
- *United Nation Convention on the Law of the Sea (UNCLOS)* → *Oceans Act*
    - *Oceans Act* brought into Canada aspects of UNCLOS that were not already in effect
- *CBD (convention on biological diversity)* → *SARA* (2002)
    - Signed and ratified by Canada in 1992
    - In 2002, Canada's Species at Risk Act was enacted
    - Federal government did not intend to enter a controversial federal-provincial jurisdictional debate, so stayed within federal jurisdiction
- *United Nations Framework Convention on Climate Change (UNFCCC) + Kyoto Protocol* → *Kyoto Protocol Implementation Act* (repealed)
    - KPIA was repealed when we backed out of the Protocol in 2011
- *Paris Agreement* → *??*

CUSTOMARY LAW

- **Rules that have developed over the passage of time through State practice and *opinio juris***
- **I.e., Exclusive Economic Zone ("EEZ").. 200 nautical mile sovereignty**
    - 1949 Truman Declaration – USA claims we have 200 nautical miles from our coast. Time passes and states start recognizing 200 nautical miles as their exclusive economic zone.
    - 1972 Canadian declaration – Canada recognizes 200 nautical miles from coast as theirs – could do that because it was recognized as a customary principle of international law
- Consistent state practice and *opinio juris* required to be able to put in sanctions for not abiding by the practice.
- Only way you are not bound is if you are a persistent objector (opt-out)

CUSTOMARY PRINCIPLES OF LAW

- **The Good Neighbour Rule** (aka prohibition on transboundary harm)
    - *Trail Smelter Arbitration,* 1950 – Sates have no right to pollute and deteriorate a neighbouring state and if they do the state can seek legal action/sanction against the neighbouring state.
- **Duty to equitable utilization** – principle requires the fair sharing of resources outside national boundaries
    - *River Oder Case*
- **Duty to notify and consult** – principle requires a state that is undertaking an activity that could result in harm to neighboring nations to notify and consult with the governments of those nations
    - *Corfu Channel Case*
- **Procedural Requirement to Conduct an Environmental Impact Assessment**
    - *Pulp Mills on the River Uruguay,* 2010 – pulp mills case before the ICJ, court recognized that there is a customary requirement to use environmental assessments.
    - Customary obligation to complete EIA when there is potential for transboundary harm
- Sustainable Development??

TRAIL SMELTER ARBITRATION - GOOD NEIGHBORLINESS – PROHIBITION ON TRANSBOUNDARY HARM

- **Trail Smelter Arbitration**
  - alleged that sulfur dioxide fumes from a smelter located in Trail, British Columbia, were causing damage to farmland and crops in the neighboring State of Washington
  - after negotiations, government of Canada accepted liability and agreed to arbitrate the issue of damages
    - people in the states could not directly sue Canadians at fault (did not have standing in courts in the other country)
  - arbitration panel decided:
    - "Under the principles of international law, as well as U.S. law, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another [state] or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence"

RIVER ODER CASE: EQUITABLE UTILIZATION OF SHARED RESOURCES

- **River Oder Case**
  - Permanent Court of International Justice set the standard for the operation of the rule of equitable use of shared resources by stating:
    - "... this Community of interest [of riparian states] in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the use of the whole course of the river."
  - Helsinki Rules states: "Each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."

CORFU CHANNEL CASE: DUTY TO INFORM AND GIVE PRIOR NOTICE

- **Corfu Channel Case**
  - two British warships were traveling through the Corfu Channel, a part of the territorial waters of Albania.
  - the warships were damaged by mines that had been previously placed in the waters by the Germans during World War ll.
  - It was alleged that Albania had at least some knowledge of the existence of the mines
  - international Court of Justice ruled that Albania had a duty to compensate the British for damage to its property and for loss of life

PULP MILLS ON THE RIVER URUGUAY, 2010 – PROCEDURAL REQUIREMENT FOR ENV. IMPACT ASSESSMENT

- pulp mills case before the ICJ, court recognized that there is a customary requirement to use environmental assessments.
- Customary obligation to complete EIA when there is potential for transboundary harm

SOFT LAW

- **Something in between policy and law**
  - Developing but not fully formed
- ***Brundtland Report/Our Common Future* (1987)**
  - definition of sustainable development:
- **Stockholm Declaration** - Declaration of the United Nations Conference on the Human Enviro
- **World Charter for Nature (UNGA Res 37/7, 1982)**

- Not real law – just a global articulation of an objective
- – brings in environmental issues, contains general principles.
- High watermark for what states should do environmentally but it is not hard law.

- **1992 Rio Declaration on Environment and Development & Agenda 21**
    - The United Nations Conference on Environment and Development
    - Agenda 21 – went through sector by sector making recommendations on actions – not binding obligations though
    - progressive look at sustainable development.

INSTITUTIONS OF INTERNATIONAL LAW

- United Nations (GA & Sec. Council)
    - United Nations clearly stands as the preeminent international forum
- International Court of Justice (UN Organ)
- United Nations Environment Program
        - coordinating United Nations environmental activities, assisting developing countries in implementing environmentally sound policies, and encouraging sustainable development through the adoption and implementation of sound environmental practice
            - Environment Fund generally relies on voluntary contributions from member states in order to create a funding mechanism for financing various United Nations initiatives and for sponsoring its many programs
- United Nations Food and Agriculture Organization
- World Bank
    - Changes in 1987 when the World Bank was reorganized and a dedicated environmental department was established
    - For each loan application, a project will receive an "environmental rating:"
        - Category A—involves the greatest potential to incur environmental impact. As a result, a fill environmental audit (EA) will be required of the potential borrower;
        - Category B—requiring a limited assessment ofspecific impacts;
        - Category C—not requiring any assessment because the project request is unlikely to have an environmental impact;
        - Category Fl—not requiring an assessment because the environment is the focus of the project itself.
    - World Bank Group has set a goal of increasing the investment in renewable energy (RE) and energy efficiency (EE) by twenty percent annually from 2005 to 2010
- Global Environment Facility
    - funds specific projects that focus on environmental protection.
    - The GEF was established in 1991 and was later modified in 1994 to finance actions in four areas:
            - biodiversity loss;
            - climate change;
            - degradation of international waters; and
            - ozone depletion.
- Regime specific management authorities (i.e., COPs/IWC)
    - a treaty will often create a commission that will establish a body that is responsible for bringing something forward.
- International Union for the Conservation of Nature
    - Provides info on species, range, and status
- World Trade Organization

IMPLICATIONS FOR DOMESTIC ENVIRONMENTAL LAW

1. A driver for domestic law/policy *(SARA, CEPA, 1999*)
    - Major conventions drove Canadian domestic law
2. A normative objective or standard (climate change goals to limit increase in temperature)
3. An interpretive tool for the courts
    - ex. *Spraytech v Hudson, 2001 SCC 40* – SCC upheld municipal bylaw limit of pesticide use b/c it recognized that precautionary principle is a customary international law, which help inform the contextual approach to statutory interpretation and judicial review.

EXAMPLE: PROCESS OF CREATING AND IMPLEMENTING ENVIRONMENTAL LAW IN CANADA

- 1) New Climate Change Treaty signed – this is an intention to be bound
- 2) Ratification – complete ratification and deposit it with international body (role of the executive branch of the federal government)
    - Parliament's consent is not required, nor is the agreement of provinces
        - If it is not followed, sanctions are imposed
        - E.g. Canada withdrew ratification from Kyoto Protocol in 2011
    - Part of the implementation is the role of the provinces e.g. division of powers and the provinces control natural resources
    - Canada can reserve from certain provisions, to delay until agreement is made with provinces to carry out the proposed treaty provisions
        - E.g. environmental assessment process – due to federalist-provincial division of powers
        - In the United States – becomes a two-step process: Congress signs on and the Senate refuses to agree
    - Canada is a dualist – international law does not automatically become domestic law
- 3) Implementation

SPRAYTECH V HUDSON: CANADA LTEE (SPRAYTECH, SOCIETE D'ARROSAGE) V. HUDSON (2001 SCC) – PRECAUTIONARY PRINCIPLE – MUNICIPAL JURISDICTION

- **Facts:**
    - 1991 the respondent Town, located west of Montreal, adopted By-law 270, which restricted the use of pesticides within its perimeter to specified locations and for enumerated activities - cosmetic application in Hudson
    - appellants are landscaping and lawn care companies operating mostly in the greater Montreal area, with both commercial and residential clients. They make regular use of pesticides approved by the federal Pest Control Products Act in the course of their business activities and hold the requisite licences under Quebec's Pesticides Act
- **Use of international law**
    - Court says: municipalities can regulate pesticide and herbicide use (as can the federal government)
    - Municipality had said that the purpose was to protect people from harm
    - Court notes that to allow the municipality to regulate pesticides is consistent with international environmental law – reference is made to sustainability and sustainable development
        - "Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment"

- **Sustainable development/sustainability in action**
    - Court says that precautionary principle may be customary law
    - In para 32: looking at sustainability as arising from soft law but potentially having become customary law – reliance is on soft law as the source because there is not treaty specifically on "sustainable development"
    - Upon finding that law is customary international law, Courts can recognize it in Canada without requiring Canadian statute to implement
- **Emergence of the principle of subsidiarity**

LEGAL PRINCIPLE OF SUSTAINABILITY

R V ELDIN (2016) - "DRYCLEANER FINED $20,000 FOR ENVIRONMENTAL INFRACTIONS" – USING PERC AS CLEANING AGENT, CONTRARY TO TETRACHLOROETHYLENE REGULATIONS

Background:

- "Tetrachloroethylene (PERC) is a commonly used dry-cleaning solvent, and is listed as a toxic substance under CEPA, 1999." [It is carcinogenic!]
    - Listing enables regulation…
- "The aim of the *Tetrachloroethylene (Use in Dry Cleaning and Reporting Requirements) Regulations* is to reduce PERC releases into the environment, where it has the potential to contaminate ground and surface water."
- "CEPA, 1999, is an important part of Canada's body of federal environmental legislation. It is an Act respecting pollution prevention and the protection of the environment and human health in order to contribute to sustainable development."

***Tetrachloroethylene (Use in Dry Cleaning and Reporting Requirements) Regulations*, SOR/2003-79:**

- **Prohibitions**
    - **3** No person shall use a spotting agent that contains tetrachloroethylene for commercial or institutional dry-cleaning purposes.
    - **4** No person shall use tetrachloroethylene for dry cleaning unless the tetrachloroethylene, waste water and residue are stored in closed containers at all times, except when access is required for operation or maintenance.
    - **5** No person shall sell tetrachloroethylene to the owner or operator of a dry-cleaning machine or use tetrachloroethylene for dry cleaning unless the dry-cleaning machine
        - **(a)** uses the same drum for the washing, extraction, drying and aeration cycles;
        - **(b)** has an integral refrigerated condenser that recovers tetrachloroethylene vapour in the recirculated air from the drum of the machine;
        - **(c)** prevents tetrachloroethylene vapour in the drum from being vented into the atmosphere during the washing, extraction, drying and aeration cycles;
        - **(d)** has an integral tetrachloroethylene-water separator that recovers tetrachloroethylene from waste water;
    - **Also: wastewater and residue management, prohibited to produce, managed importing/use/sale reporting**

R v Eldin (2016) Alberta Provincial Court (unreported)

- J. Dixon: "You say you care about your employees and the environment, but actions speak louder than words. PERC is bad stuff. You need to go to jail for this."
- 4 month commuted jail sentence
    - First time in Canada that sentence was imposed – basically a house arrest

- 1 page national advertisement
- Community service

SUSTAINABILITY: THE BASIC DEFINITION

- **1983 Brundtland Commission report, *Our Common Future***
- **Sustainable Development:** "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"
    - Falls into a 3rd category of international law, soft law (not customary international law or conventional law)
    - Not enforceable
    - Task of environmental laws is to give sustainable development a legal meaning
    - Means: working with current legal system to give weight to the meta-objective of sustainability
    - Sustainable development is a meta-principle, or an umbrella statement
    - The law and policy must be something through which sustainability can be achieved
        - E.g. making the polluter pay
        - Ecosystem-based management
- Depictions: balance of social, environmental and economic values
    - The three pillar approach isn't so good though… environmental values are often the ones that are pushed aside e.g. oilsands development
    - Five pillars: culture, economic, environment, social concerns, governance structures
- Depictions of Sustainability: panarchy
    - Dynamic, evolving
    - Adaptive management, succession

BASIC REQUIREMENTS FOR SUSTAINABILITY

1) Socio-ecological system integrity – restore and strengthen the resilience of desirable systems
2) Livelihood sufficiency and opportunity – ensure sustainable livelihoods for everyone
3) Intragenerational equity – close gaps in sufficiency and opportunity between rich and poor
4) Intergenerational equity – preserve or enhance the opportunities and capabilities of future generations to live sustainably
5) Resource maintenance and efficiency – reduce extractive damage, avoid waste, and cut overall material and energy use
6) Socio-ecological civility and democratic governance – commitment to respectful socio-ecological relations
7) Precaution and adaptation – respect uncertainty, avoid risk of damages to the foundations for sustainability
8) Immediate and long-term integration – address all sustainability requirements at once
9) Justice (environmental, socio-economic, etc)

Sustainability in Society

1) Personal objective
2) Community objective
3) Cultural objective
4) A policy objective
5) Societal objective
6) A species imperative

SUSTAINABILITY: A LEGAL PRINCIPLE

- Every statute starts off with…. In the goal of pursuing sustainability

- Operationalizing sustainability to prioritize ecological resilience:
    - Habitat centric ecosystem-based management
    - Precautionary science-based decision-making
    - Transparency and robust public participation
    - Polluter pays principle & prevention
    - Environmental assessment
    - Adaptive management
    - Intergenerational equity
- Appears throughout major environmental statutes
    - Subject of focused attention in the *Federal Sustainable Development Act*
    - Elucidated in the *Federal Sustainable Development Strategy*
    - *Alberta Land Stewardship Act*
    - *Environmental Protection and Enhancement Act*
    - *Alberta Utilities Commission Act*
        - Not really operationalized though….
-

CONTEXT OF CANADA'S ROLE

- Federal Environmental Retreat: 2008-2015
    - Science
    - Climate change mitigation
    - Habitat protection
    - Environmental assessment
    - Public participation & transparency
    - Rhetoric of sustainability
- Academic assessment of consequences & renewed focus on a rights-based approach
- Gap: future of rationally constructed command and control regulation

FISHERIES ACT CASE STUDY

- S. 91(12) – "Sea Coast and Inland Fisheries"
    - First passed in 1870
- Jurisdictional aspects
- 1977 amendment: added habitat protection & a prohibition on depositing harmful substances into fish bearing waters…
- **Deposit of deleterious substance prohibited**
    - **36(3)** Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.
- **Deposits authorized by regulation**
    - **(4)** No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of
    - **(a)** waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act;
    - **(b)** a deleterious substance of a class and under conditions — which may include conditions with respect to quantity or concentration — authorized under regulations made under subsection (5) applicable to that water or place or to any work or undertaking or class of works or undertakings; or

- **(c)** a deleterious substance the deposit of which is authorized by regulations made under subsection (5.2) and that is deposited in accordance with those regulations.

- **Prior to 2012 Amendments:**
  - 35(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat (HADD provision)
- **Post-2012:**
  - **35(1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery**
  - **Serious harm: "death of fish or any permanent alteration to, or destruction of, fish habitat"**
  - Amendments passed in an omnibus bill – many issues dealt with in one bill, not allowing the debate and voting
- **Empirical assessment (Olszynski, 2015)**
  - **Concerns:** economic nexus; EA nexus severed; species coverage; permanence threshold
  - **Other problems:**
    - Proponent's perspective
      - The new provision is ambiguous, so people will be less likely to go through environmental assessments
    - EA nexus severed
    - Diminished adherence to certain aspects of sustainability
- **Transformative moment?**
  - PM Trudeau's instruction to Minister Tootoo (Nov. 13, 2015):
  - "…review the previous government's changes to the *Fisheries Act* …, restore lost protections, and incorporate modern safeguards."
  - "Use scientific evidence and the precautionary principle, and take into account climate change, when making decisions affecting fish stocks and ecosystem management."

OPERATIONALIZING SUSTAINABILITY – IMPROVING THE FISHERIES ACT

- **1) Statutory revision**
  - Re-emphasize habitat protection
  - Enhance integration with other instruments
    - Align with other legislations, like the SARA
  - Articulate and enshrine a *de minimus* standard
    - Make a clear standard for when environmental assessments are required – list activities that won't disrupt fish habitat
  - Measured environmental assessment exclusion
  - Articulate factors to consider re: authorization
  - Establish a public s. 35 authorization registry
  - Fine allocation – mandatory fines
- **2) Regulatory Functionality**
  - inject authorization flexibility (monitor & report) so there is adaptive management [this achieves regulatory functionality]

INHERENT SUSTAINABILITY CONDITIONS:

1. Healthy environment – substantive and procedural.
   - positive, state has an obligation to provide us a healthy environment, or negative, state has obligation to make sure our healthy environment isn't taken away, right. Probably predominately positive.
   - could argue s. 7 but would probably need dire situations.

- *Ontario v Canadian Pacific (Justice Gonthier)*: "environmental protection has become … a fundamental value in the life of Canadian society" and "we are individually and collectively responsible" for protecting it.

2. Equity – intra and inter-generational
    - *Spraytech,* 2001 SCC: "Today we are more conscious of what type of environment we wish to live in, and what quality of life we wish to expose our children to" which "perhaps indicates the birth of a feeling of solidarity between generations and an environmental debt towards humanity and the world of tomorrow." – great words, but probably still rhetoric
3. Integration
    - *Labrador Inuit Association,* 1997 NLCA: "enviro assessment" is an integral part of economic development"
    - *Rio Declaration,* Principles 12-14: "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

OPERATIONAL SUSTAINABILITY CONDITIONS

1. Habitat centric ecosystem based management
2. Precautionary science-based decision-making (best available technology should be the standard and put into our laws)
3. Transparency & public participation
4. Polluter pays & preventative action
5. Environmental assessment
6. Adaptive management – consider cumulative facts
7. Intergenerational equity – consider the consequences and use it as an aspect of statutory interpretation

CANADA'S CRUMBING SUSTAINABILITY FAÇADE: OR, WHETHER CITIZEN SUSTAINABILITY INTERVENTIONS CAN HELP FIX ITS FOUNDATION? – CAM JEFFERIES

PART I: DISCOURSE ANALYSIS & SUSTAINABLE DEVELOPMENT

DISCOURSE ANALYSIS?

- Discourse analysis is connected to panarchy in that it also emphasizes that "[e]nvironmental problems tend to be interconnected and multidimensional
- **key environmental discourses, organized thematically, are:**
    - 1. Global Limits & Survivalism
        - Limits and Survival. This discourse is premised on Malthusian theory, ecological carrying capacity, and the notion of fixed biological limits that, when overshot, result in collapse
    - 2. Environmental Problem Solving
        - Administrative Rationalism. experts are aggregated within bureaucratic structures and are tasked with applying their scientific and technical expertise E.g. Environment Canada
        - Democratic Pragmatism. It is not surprising that democratic pragmatism rests upon the actions of citizens within liberal capitalist structures
        - Economic Rationalism. This discourse relies on privatization and market-based approaches
    - 3. Towards Sustainability
        - a. Sustainable Development. Varied agents are united in their motivation to promote the public good within an evolving organic society

        - b. Ecological Modernization. This discourse expands sustainable development's green vision by seeking to modify—but not replace—elements of modern capitalist society e.g. Germany transferring from nuclear and fossil fuel dependence to renewables
    - 4. Green Radicalism
        - a. Green Consciousness. This discourse targets the way that people think and act. It houses a variety of philosophies, from deep ecology to ecofeminism, and is interested in re-asserting nature's agency and our relationship with it.
        - b. Green Politics. This discourse targets change within society's institutional structures and demands equality between people and recognition of the complex connections between humans and nature.

CLIMATE CHANGE ACTION

- GHGs were listed as toxic substances to Schedule 1 of CEPA, 1999 in 2005 – allows federal government to regulate them under the federal criminal law power
- The federal government exercised its authority under CEPA, 1999 to regulate interprovincial and international trade to establish vehicle emission standards for passenger automobiles and light trucks and heavy-duty vehicles
- Conservatives obtained a majority government in 2011, Canada formally withdrew from the Kyoto Protocol and repealed the KPIA
    - Kyoto Protocol Implementation Act – private member bill so it could not allocate public expenditures

HABITAT AND ECOSYSTEM PROTECTION: EXECUTIVE INACTION AND MOVEMENT AWAY FROM ECOSYSTEM-BASED MANAGEMENT

- ecosystem-based management ("EBM") means that the ecosystem itself rather than any one species or resource is the management target
    - sustainable future is one that maintains ecosystems for the services they offer and the resources they contain
- SARA
    - Operates "to prevent wildlife species from becoming extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened"
    - SARA creates the independent and science-based body—Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") and tasks it with classifying species considered to be at risk.
    - The competent Minister is charged with acting upon the resulting risk assessment by recommending to the Governor in Council that the species be included on Schedule 1 of SARA, not listed, or returned to COSEWIC for re-assessment
- Environmental Impact Assessment ("EIA") process
    - radical transformation of the federal ETA process with the creation of the CEAA, 2012, which is meant to streamline the assessment process, narrows the type of project that is subject to a federal EIA and is "not designed to ensure comprehensive considerations broadly or narrowly defined," limits the requirement that alternatives be considered," and tends to devolve assessment authority to the provinces

PART III: FIXING THE FOUNDATION - LITIGATION

FRIENDS OF THE EARTH V THE MINISTER OF THE ENVIRONMENT ("FRIENDS OF THE EARTH") – JUDICIAL REVIEW OF EXECUTIVE ACTION ON KPIA - DISMISSED

- "a Canadian not-for profit organization with a mission to protect the national and global environment," sought judicial review of executive action pursuant to the Kyoto Protocol Implementation Act in the Federal Court and declaratory and mandatory relief to force Canadian compliance with the Kyoto Protocol.'
- Friends of the Earth turned on statutory interpretation of the KPIA.
- The Court conducted a justiciability analysis, concluding it "has no role to play in reviewing the reasonableness of the government's response to Canada's Kyoto commitments"

TURP V MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA ("TURP") – JUDICIAL REVIEW OF WITHDRAWAL FROM KYOTO PROTOCOL - DISMISSED

- the applicant applied for judicial review of the executive decision to withdraw from the Kyoto Protocol, asserting that the said action was "illegal, null, and void as it is in violation of the KPIA, the principle of the rule of law, the principle of the separation of powers, and the democratic principle."
- The Court was less concerned with justiciability and instead focused instead on the federal executive's authority to conduct foreign affairs and international relations stemming from its Royal prerogative power.

WESTERN CANADA WILDERNESS COMMITTEE ET AL V MINISTER OF FISHERIES AND MINISTER OF THE ENVIRONMENT – JUDICIAL REVIEW OF MINISTERIAL DELAY ON SARA – APPLICATION GRANTED

- public interest litigants before the Federal Court applied for judicial review of Ministerial delay in producing recovery strategies under SARA.
- They sought declaratory relief and mandamus compelling recovery strategy production for the: Nechako White Sturgeon; Pacific Humpback Whale; Marbled Murrelet; and Southern Mountain Caribou.
- The Court observed that the very act of initiating litigation prompted work on creating the delayed recovery strategies but still proceeded to grant the application for judicial review, characterizing the extent of Ministerial inaction as "egregious",' and declaring the failure to comply with the statutory timelines unlawful

CANADIAN ENVIRONMENTAL FEDERALISM

WHO IS RESPONSIBLE FOR ENVIRONMENTAL REGULATION AND STEWARDSHIP?

- "Everyone is aware that individually and collectively, we are responsible for preserving the natural environment …. Environmental protection [has] emerged as a fundamental value in Canadian society."
  - *Ontario v. Canadian Pacific Ltd.*, [1995] 2 SCR 1031 at para. 55.
- But environmental responsibility is not expressly enumerated in the Constitution
  - Issues: large land mass, issues and sensitivities vary between regions, provinces and municipalities
- Want successful laboratories of experimentation and not lowest common denominator of political compromise.
- **Principle of Subsidiarity**: governing should happen at the lowest, local level possible so law makers and regulators are closest to the problem.

FEDERALISM

- Federalism potential advantage – ability to take into account the different interests and preferences across the federation, innovative abilities of the provinces
    - Federal government can use its criminal law power to make regulations and laws on toxic pollutants e.g. the Canadian Environmental Protection Act (held valid in R v Hydro-Quebec)
- Fragmentation is a feature *v.* nature as a unitary whole & the environment as a common good
- Constitutional division of authority is a relic *v.* the need for modern and holistic regulatory approaches
    - Trying to fit new, modern problems into old system e.g. criminal law power for the federal government to create blanket provisions … but provinces have power to make offences that are anchored in provincial powers
- Lowest common denominator political compromises *v.* successful laboratories of experimentation
    - Failure of provinces to regulate responsibly or maybe they can find the approaches that will fit the province and region best
- Henry Brun et al: "partial amalgamation to accomplish certain common tasks without sacrificing the autonomy of the components in other matters"

ALTERNATIVE APPROACHES

- It is common post-1972 to see the government tasked with a *constitutional duty to steward the environment* in different jurisdictions
- Sometimes grounded in the *public trust doctrine* which creates a fiduciary relationship, the content of which is to manage public resources and the environment for the *public good*

LABORATORIES OF DEMOCRACY – PROVINCES AND MUNICIPALITIES

- "[The] state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"
    - - Justice Brandeis in *New State Ice Co. v Liebmann* [1932]
    - If all responsibility is on the provinces though, the system can fail: you may see a race to the bottom rather than a race to the top – companies will go to the provinces with the least stringent regulations and allow for environmental degradation to encourage land development and investment
- "It is critical that, in this context and with our federal framework, the central government not consider the provinces as simple agents for implementing national policies but rather as veritable *laboratories for the development of solutions adapted to local realities*."
    - Belanger

CONFIRMATION OF DIVISION OF POWERS

Constitution Act, 1867

Federal Government:

- s. 91 – National concern/dimension & POGG
    - if something hasn't specifically been given to the provinces than the residual is given to the feds.
    - ex. nuclear power regulation, climate change, ect.
- s. 91(2) – Trade and commerce
    - interprovincial hook: ex. pipelines, NEB, movement of goods and services.
- s. 91(3) – Raising monies
- s. 91(10) – Navigation and shipping
- s. 91(12) – Sea coast and inland fisheries
- s. 91(24) – Indians, and lands reserved for the Indians

- s. 91(27) – Criminal law
- s. 132 – Treaty obligations
    - could in limited circumstances be used to uphold treaties
- Federal Paramountcy
    - where prov and fed laws conflict, the fed law trumps – although doctrine is now rarely applied

Provinces:

- s. 92(2) – Direct taxation
- s. 92(5) – Public lands disposition
- s. 92(8) – Municipalities
- s. 92(9) – Licenses
    - can raise revenue for local purposes – might be able to slip enviro processes into here.
- s. 92(10) – Local works and undertakings
- s. 92(13) – Property and civil rights
    - important one for enviro regulation,
    - ex. businesses, industry, industrial activity, emissions, including air emissions, water discharges, ect.
    - licensing schemes for industrial activity fall here
- s. 92(16) – Matters of a merely local or private nature
- s. 92A – Non-renewable natural resources, forestry resources and electrical energy
    - closest thing we have to an "environmental regulation provision in the constitution
    - allows provinces to create the Alberta Utilities Commission, Alberta Energy Regulator
    - allows province to regulate oil, gas and bitumen extraction in the province
- s. 109 – Property in lands, mines, etc.
    - Crown ownership rests with the province. Implications for *SARA.*

FRIENDS OF THE OLDMAN RIVER SOCIETY V CANADA (MINISTER OF TRANSPORT) (SCC 1992) – GUIDELINE ORDER FOR ENV ASSESSMENT LAW – FEDS/PROVINCES CAN REGULATE ENVIRONMENT

Ratio: both provincial and federal governments can regulate the environment if they can anchor the legislation in one of their own powers; can both make laws regarding the environment under the incidental affects doctrine

Background:

- Provincial government sought approval for a dam on the Oldman River under the Navigable Waters Protection Act
- Federal government had a guideline order, but no law for an environmental impact assessment
- The Society claimed that environmental assessment was necessary

Facts: The respondent Society, an Alberta environmental group, brought applications for certiorari (review of the lower court's decision) and mandamus (a judicial writ issued as a command to an inferior court or ordering a person to perform a public or statutory duty) in the Federal Court seeking to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal Environmental Assessment and Review Process Guidelines Order, in respect of a dam constructed on the Oldman River by the province of Alberta

- In assessing the application, the Minister considered the project's effect on marine navigation and approved the application on September 18, 1987 subject to certain conditions relating to marine navigation.
    - he did not subject the application to an assessment under the Guidelines Order.
- At trial: found that Minister of Transport was not required to follow the Guidelines Order

- On appeal: appeal allowed and dam approval quashed; finding that the dam project fell within the ambit of the Guidelines Order and that the Department of Transport was an "initiating department" for the purposes of the Guidelines Order thereby engaging the application of the Guidelines Order and that the Order was binding

Issue: What is the constitutional and statutory validity of the Guidelines Order and was the Minister of Transport required to follow the Order?

Decision: Appeal dismissed; the Guidelines Order is constitutionally valid, intra vires the federal government; no order was made in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order.

- Confirmed that each level of government can legislate on environmental matters when acting pursuant to a constitutional head of power
    - SCC also said that guideline order was more than just a guideline
        - Hastened an environmental impact assessment law
    - However, litigation had the effect of stalling, but not stopping the dam

Reason:

- The "environment" is not an independent matter of legislation under the Constitution Act, 1867.
    - Understood in its generic sense, it encompasses the physical, economic and social environment and touches upon several of the heads of power assigned to the respective levels of government.
    - while both levels may act in relation to the environment, the exercise of legislative power affecting environmental concerns must be linked to an appropriate head of power.
    - Local projects will generally fall within provincial responsibility, but federal participation will be required if, as in this case, the project impinges on an area of federal jurisdiction
- LA FOREST J.: The protection of the environment has become one of the major challenges of our time.
    - Intrusion of the legislation into the provincial power was merely incidental

R V. CROWN ZELLERBACH CANADA LTD, [1988] 1 S.C.R. 401 – POGG NATIONAL CONCERN DOCTRINE FOR FEDERAL POWER OVER DUMPING IN OCEAN

- Corporation was dumping logging debris into the ocean, but it was in an area of provincial ocean jurisdiction
    - Federal government still pursued prosecution
    - Claimed that it fell under federal powers
- Validity of a federal prohibition on ocean dumping (except with a permit) called into question
- Trial & Appeal – prohibition *ultra vires* parliament
- SCC – overturns the courts below and finds a valid exercise of federal jurisdiction
    - Based on the National Concern doctrine (POGG)
        - Test for national doctrine: what would be the effect of each province regulating this aspect of an interprovincial matter?
        - Because there is expected to be more than a merely interprovincial aspect in dumping in the ocean, it falls within a national concern, even though management of the coastal waters would otherwise be provincial jurisdiction

R V. HYDRO-QUEBEC, [1997] 3 S.C.R. 213 – CEPA INTRA VIRES IN REGULATING CHEMICAL RELEASE INTO ENV. – CRIMINAL LAW POWER S. 91(27)

- How broad is the federal constitutional power to establish a broad and general regulatory scheme to control the emission of substances that are harmful to the environment or human health?
- Facts:

        - Hydro-Quebec charged with releasing PCBs into the environment (these chemicals accumulate and do not breakdown for long periods of time) – charged with dumping PCBs, in contravention of CEPA
        - Hydro-Quebec claimed that it was a local matter, and that the federal government had no jurisdiction
    - **Outcome:** SCC held the federal law as intra vires
        - Broad scheme supported by criminal law power
        - Strong dissent: not criminal law
    - Significance
        - Very significant, justified continued existence of federal prohibitions and CEPA

IN PRACTICE – SPLIT BETWEEN PROVS/FEDS

1) Provincial ownership of natural resources
2) Provincial jurisdiction over Crown land, property & civil rights, municipal jurisdictions, and matters of a local or private nature
3) Federal hooks: fisheries, navigation, criminal law, "national dimension/concern" doctrine (AKA POGG)
4) Informal or formalized provincial-federal action

FEDERAL-PROVINCIAL AGREEMENTS

- Trend towards this cooperative approach
- 4 federal-provincial harmonization accords (ie. Canada-Wide Accord on Environmental Harmonization)
    - Aimed to bring federal and provincial law into unity
- source of authority: s. 7 of the *Department of the Environment Act; CEPA; CEAA*
- Impacts:
    - agree for provincial regulations to displace federal regulations
    - re-organization of authorities and responsibilities
    - uniform process for EAs, pollution standards, inspection processes

CANADIAN ENVIRONMENTAL LAW ASSOC. V CANADA (MINISTER OF THE ENVIRONMENT) (1999), 30 CELR (NS) (FCTD), AFF'D FCA (2001) – APPROVED HARMONIZATION AGREEMENTS – PRO-COOPERATION

F: Federal Minister of the Enviro created harmonization agreements. Argued didn't have jurisdiction to.

- Court said harmonization agreements valid, unique, but valid. We don't have a clear jurisdictional division on environmental issues so we should have cooperation.

FEDERALISM AND CLIMATE CHANGE

- Provinces will prefer their own routes
- Federal government has signed onto international targets and want a pan-Canadian approach
    - May create a national budget on carbon, allocated between provinces

FEDS VS PROVINCES EXAMPLE: SPECIES AT RISK ACT

- Canadian method of carrying out Convention on Biological Diversity
    - Most significant step for protecting species and their habitats
    - Protecting species such as the sea otter (classified as extirpated)
- Justification for existence
    - Creates COSEWIC

        - Purpose is to assess the conservation status of different species, makes a scientific recommendation to Minister for a species to be listed under certain status
    - Act describes prohibitions that exist for each species, based on the list that it falls under, relating to habitat and taking individuals of the species
    - Once listed, there must be designation of critical habitat for that species
- Scope of coverage (*NRT*)
    - Majority of public land held by provinces – transfer of resources to province (AB) from Canada in 1930s
    - So federal government does not own the land but declares that habitat must be set aside – <u>not effective</u>, no federal jurisdiction over provincial land
    - Good for protecting migrating birds and species on oceans, or species on federal lands
- Impact (LGX Oil + Gas)
    - E.g. southern AB – federal legislation made to list a species such as the sage grouse, and highlight habitat that cannot be disturbed - but limited power to protect…
    - **S 80 of SARA** – can make emergency order for protection of species and its habitat – only if there is imminent danger
    - Emergency order was made by the federal government to protect habitat of the sage grouse
    - LGX Oil is now suing the federal government for the losses it incurred by being unable to operate on those lands – Constitutional challenge possible on jurisdiction of powers

THE CANADIAN LEGAL FRAMEWORK – TEXT COVERAGE

Primary Law-making Bodies:

- Parliament and legislatures make laws in two ways:
    - Statutes – codified laws passed by legislatures
    - Regulations – legally enforceable rules created by the governor in council or lieutenant governor in council providing practical details of how a statute is to be implemented
        - Regulations and rules make environmental regulatory systems work – set out operational details, including particular limits and obligations
- Courts:
    - Interpreting statutes
    - Decisions that establish or adjust the principles of common law
- Administrative tribunals, boards and officials

Role of the Constitution

- Most constitutions established since the United Nations Conference on the Human Environment held in 1972 in Stockholm contain some environmental protection principles
- Division of powers:
    - Some issues under the federal law power: pollution deleterious to fish, marine pollution, regulation of highly toxic substances such as PCBs, assessment of actions
    - Provincial law power examples: water pollution that results from logging operations, environmental regulation of railroads within the provinces
- Environmental regulation is usually a shared constitutional subject
    - Canada-Wide Accord on Environmental Harmonization
    - Criticism from the public – fearing that standards and other environmental measures would lead to the lowest common denominator among the provinces and the federal government
- Municipal jurisdiction

- Municipalities can deal effectively with emergent environmental problems, have a recognized power here to regulate pesticide use in the community

The making of statutes

- Creation usually begins with a government developing policy
- Then a proposal is developed by the Department of Environment or something equivalent
- Env. Minister then sends proposal, with necessary supporting information, to Cabinet
- After review, proposal is sent to legislative drafters for preparation of a bill
- Reading Process:
  - First reading in the House of Commons
    - No debate takes place
  - Second reading
    - Bill is debated, approved in principle
  - Committee stage
    - If referred to committee, committee drafts proposed amendments
  - Report sage
    - Report made of recommended amendments and findings of the committee
  - Third reading
  - Senate
    - For federal bills
  - Royal Assent
    - Usually just a formality
  - Coming into force
- Not unusual for parliamentary or legislative sessions to end before a bill makes it to third reading
  - The bill then dies

Regulations

- Policy is initially developed by government departments or agencies
- Legal drafting specialists draft the regulations
  - This is a less open process
- Requirements for Federal and Provincial Regulations:
  - Legal examination
  - Order-in-council approval
    - Order-in-council issued by lieutenant governor (province) or governor in council (federal)
  - Publication
    - In gazettes
    - Citizens are legally bound once regulations are publishes
  - Registration
    - Registered to ensure access to the public

IDLE NO MORE! THE INTERSECTION OF ABORIGINAL & ENVIRONMENTAL LAW

SUSTAINABILITY INTERVENTION

- An intervention that, properly construed, is at least *partially* motivated by the desire to move society towards a more ecologically sustainable state
  - Ripe for consideration - Aboriginal rights pose a strong mechanism for leveraging change in the environmental law and sustainability

OCTOBER 10, 2016: INDIGENOUS DAY OF ACTION IN CONTEXT (P. 2):

1) Residential schools programme
    - State purpose of this program in the 1800s: to "kill the Indian in the child"
2) Missing/murdered Aboriginal women
    - Disproportionate number compared to non-Aboriginals
3) Suicide crisis
4) Third-world living conditions

ENVIRONMENTAL AND CLIMATE JUSTICE

- "Canada faces a continuing crisis when it comes to the situation of indigenous peoples of the country"
    - James Anaya
- Environmental Justice defined (p. 5)
    - "the fair and consistent distribution of environmental benefits and burden, without discrimination on the basis of socio-economic status, race, ethnic origin, or residence on an Aboriginal reserve"
- Climate Justice defined (p. 5)
    - Climate justice exists at the nexus of climate science, human rights, sustainability and the right to develop, and intergenerational equity. Substantively, it acknowledges, describes, and responds to concerns that marginalized or disadvantaged peoples are disproportionately impacted by the consequences of a changing climate to which they have minimally or negligibly contributed
        - Poorer nations and poorer people are forced to face the greater burden of climate change
- First Nations experience (pp. 5-6)
    - First Nations often bear a disproportionate share of environmental burdens.
    - Aboriginal peoples in Canada suffer from the environmental contamination, decreased availability, and lower safety of traditional food due to the impact of climate change on ecosystems.
    - Communities in the Arctic have already begun to experience the health implications of climate change effects, such as the increased probability and severity of extreme weather events, and sea-level rise and associated coastal erosion.
        - The adverse environmental impacts of industrial activity on Aboriginal communities has also been observed

IDLE NO MORE MOVEMENT

- "INM calls on all people to join in a peaceful revolution to honour indigenous sovereignty, and to protect land and water" (2012)
    - national **Idle No More movement** is "one of the largest Indigenous mass movements in Canadian history" and began in late 2012 in **protest to federal environmental law reforms that threatened "Indigenous sovereignty and environmental protections** . . . . [and] the social and political landscape of Canada."
- Voicing concerns to be taken to the federal government
- First Nations also showed their willingness to litigate

FIRST NATION RIGHTS - SOURCES

- Common law
- *Royal Proclamation, 1763*
    - recognized several Nations or Tribes of Indians and stipulated that Indian lands could be surrendered to the Crown in order to avoid frauds and abuses by settlers

    - protectionist in nature, could not buy land from Aboriginals without it being dealt with via the Crown first.
- *Indian Act*
    - Sets the base for residential schools and disenfranchisement (loss of Indian status)
- *Constitution Act, 1867* s. 91(24) provides that Indians and land reserved for Indians falls under federal jurisdiction
- *Constitution Act, 1982* s. 35(1)– existing aboriginal and treaty rights are hereby recognized and affirmed
- Treaties – contain rights, obligations gov't had to provide. Extinguished title and many uses of land.
    - both fed and prov gov't responsible for fulfilling treaty obligations (Grassy Narrows)

COMMON LAW → CONSTITUTIONAL RIGHTS

- *Recognition of existing aboriginal and treaty rights*
    - **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
        - Does not bring back rights that were extinguished prior to 1982 – must have been existing in 1982
- Definition of "aboriginal peoples of Canada"
    - (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Aboriginal Rights

- Substantive nature:
    - Treaty
        - Exchanging title and ceding land or rights for specific treaty rights and reserve land
    - Title
        - A collective right to a tract of land – exclusive use and occupation
        - Right to choose what the land is to be used for – inherently limited however – can't be used in a way that would severe the original connection the First Nation holds with the land
    - Rights to fish, hunt, trap, and gather
        - Collectively held right but individually exercised
- Procedural nature:
    - Duty to consult

COMMON LAW PROGRESSION

CALDER V BC (1973) – TITLE EXISTS, PREDATES PROCLAMATION, SPLIT ON WHETHER EXTINGUISHED

Ratio: aboriginal title exists as a legal right derived from historic occupation and possession of tribal lands and predates the royal proclamation

- Confirmation that the *Royal Proclamation* applies west of the Rocky Mountains
- Propagated future title claims and drove land claim agreements

Facts: appellants, suing on their own behalf and on behalf of all other members of the Nishga Tribal Council and four Indian bands, brought an action against the Attorney-General of British Columbia for a declaration "that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory… has never been lawfully extinguished".

- Nisga'a title claim to 2,600 square kilometers in northwestern British Columbia.
- The action was dismissed at trial and the Court of Appeal rejected the appeal.

Decision: Appeal dismissed; aboriginal title exists, but it was extinguished in this case

R V SPARROW (1990) – JUSTIFIED INFRINGEMENTS

Ratio: test for interference with an existing aboriginal right and for the justification of interference

- Recognition that existing rights that receive constitutional protection are those that were not extinguished prior to 1982
    - Test of extinguishment of right under s 35(1): Sovereign's intention must be clear and plain.

Facts: Musquaem food fishing licence dictated by Fisheries Act. Band member charged with offence of fishing with net longer than permitted by food fishing licence.

- Defence: exercising existing aboriginal right to fish and net length restriction is inconsistent with s 35 of Constitution Act and is therefore invalid
- Case where there is a contest between environmental law and regulation and on the other hand, an Aboriginal right to carry out an activity

Issue: Whether parliament's power to regulate fishing is now limited by s 35(1) of the Constitution and whether the net length restriction in the licence is inconsistent with that provision?

Decision: New trial, Band needs to show that shorter fishing nets infringe collective aboriginal right to fish for food, and if that is found, then crown must demonstrate that regulation is justifiable.

- **"Sparrow Test" for rights infringement:**
    - 1. Existing Aboriginal Right?
        - Specific nature of the right defined
        - Right is integral to the distinctive culture prior to contact
        - Was the right extinguished? – with clear and plain intent
    - 2. Proposed regulatory action an interference with the right because it is: Unreasonable? Imposes undue hardship? Denies the right holder the preferred means of exercising the right?
    - 3. If the right exists and is infringed, can the infringement be justified because of: a valid legislative objective; and with the honour of the Crown being upheld (consistent with fiduciary relationship)?

DELGAMUUKW V BC (1997) – ABORIGINAL TITLE

Ratio: test for Aboriginal title based on occupation prior to British sovereignty, continuity of occupation, and exclusive occupation; priority allocation may not apply when there are exclusive commercial rights to a resource being recognized; justifications for limitations are broad

Facts: Gitksan or Wet'suwet'en chiefs claimed 58,000 km of BC under aboriginal title. BC counterclaimed that the appellants had no right or interest in the territory, or that the cause of action ought to be for compensation from Government of Canada.

Issue: Nature and scope of constitutional protection afforded by s 35(1) to common law aboriginal title

Decision: Appeal allowed in part; new trial ordered, but suggests negotiation as better method of resolution

- **What is the Content of Aboriginal title?:**
    - Aboriginal title encompasses right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of Aboriginal Practices integral to distinctive Aboriginal Cultures
    - Right to choose the uses of the land, within the inherent limit
- **General Features of Aboriginal Title:**
        - **Sui generis**: must be understood through common law and aboriginal perspectives, no freedom of transfer, derived from pre-contact occupancy
        - **Inalienability**: Cannot be transferred, sold or surrendered to anyone but crown
        - **Source**: Aboriginal title was recognized by the Royal proclamation of 1763, but arises from prior occupation of Canada by Aboriginal peoples.

        - Relevant by physical fact of occupation
        - Arises from possession before assertion of British sovereignty vs. normal estates like fee simple, which arise afterward
    - **<u>Communally held</u>** = collective right to land held by all members of ab. Nation. Decisions made communally
    - **Inherent Limitation:** Range of uses is subject to limitation that they must not be irreconcilable with nature of the aboriginal attachment to the land

- Compensation payable if Title is infringed; which it can be, based on the Sparrow Test
- Where it exists (or may exist), duty of consultation is engaged prior to action/decisions taking place

Test for Title:

- 1) Occupied prior to the assertion of Crown sovereignty
- 2) Exclusive occupation
- 3) Continuous occupation (oral history with equal evidentiary value)

- Difficult test to meet
    - Can title claims be made in Alberta? – possibly, but only by Frist Nations that did not sign treaties

HAIDA NATION V BC (2004) – DUTY TO CONSULT

Ratio: there is a Constitutional duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title claim and contemplates conduct that might adversely affect it; that duty extends to rights and titles that have been asserted but not fully litigated

- Process of consultation may lead to the duty to accommodate by adapting decisions/policies
- agreement not necessary but commitment to a meaningful process undertaken in good faith is required

Facts: Province unilaterally decided to change and redistribute tree farming licences (TFL) over land where the Haida Nation claims title.

Decision: Government had duty to consult with and accommodate Haida with respect to harvesting red cedar timber on lands where Haida had claimed aboriginal title.

Reasoning:

- **Duty to Consult**
    - The duty to consult is grounded in the principle of "Honour of the Crown" (fiduciary relationship)
    - honour of the Crown requires that s 35 rights be determined, recognized and respected.
- **<u>Scope and nature of duty:</u>**
    - is proportionate to the preliminary assessment of the *strength* of case supporting existence of right/title and to the seriousness of the *potentially adverse effect* upon the right or title claimed
    - The obligation is scaled, dependent upon the strength of the Aboriginal right and the degree of impact of the proposed decision

TAKU RIVER TLINGIT FIRST NATION V BC (SCC 2004) - DUTY TO CONSULT BUT NO DUTY TO REACH AGREEMENT

- Proposed action (160 km road) ran though group's traditional territory and could negatively affect aboriginals. Court held that the provincial government had consulted and fulfilled its duty to accommodate before approving reopening of mine
    - Accomplished through environmental assessment process under the **Environmental Assessment Act**, which included consultation with aboriginals
        - Required consultation and accommodation, not necessarily agreement

- Province not under duty to reach agreement with aboriginals, and failure to do so did not breach obligation of good faith it owed

TSILHQUOT'IN NATION V BC (2014) – ABORIGINAL TITLE PROVEN – ADJUSTED INFRINGEMENT TEST – OBJECTIVES, DUTY TO CONSULT, PROPORTIONALITY, NOT DEPRIVING FUTURE GENERATIONS

Ratio: a semi-nomadic First Nation can show sufficient occupation to prove a claim to Aboriginal title**;** policy for broad public good can justify infringement of Aboriginal rights under s 35 if there is a compelling purpose and conformity with the government's fiduciary duty; the Crown has a duty to consult in good faith with Aboriginal groups when there is Aboriginal title or potential for Aboriginal title
Facts: The province granted a commercial logging licence in 1983 on land that the Tsilhqot'in Nation, a grouping of six semi-nomadic bands, claimed was part of their traditional territory. The Tsilhqot'in applied for a declaration of Aboriginal title concerning the land at issue and claimed that there was a failure to consult.

- small size of the Tsilhqot'in population in 1846
- land in question was mountainous and could not have sustained a much larger population

Issue: What are the requirements that an Aboriginal group must show to prove that they have title to a tract of land? Did BC breach its duty to consult with the Aboriginal group in question?
Decision: appeal allowed, granting of a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations
Significance:

- First successful Title claim
- "Culturally sensitive" approach taken
  - Extends to nomadic peoples
- Duty to consult for allowing an activity becomes necessity to receive actual consent in the case of Aboriginal Title
- **Para 74:** "Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes **—** to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises."
- **Para 121:** "can't destroy the ability of the land to sustain future generations of Aboriginal peoples" & Crown to act in a way that "respects the fact that Aboriginal title is a group interest that inheres to present and future generations."

GRASSY NARROWS FIRST NATION V ONTARIO (SCC 2004) – TAKING UP OF LANDS BY PROVINCE – TREATY RIGHTS AND OBLIGATIONS APPLY TO PROVINCIAL AND FEDERAL GOV'TS

Ratio: duties and powers over treaty matters apply to Provincial and Federal governments; fulfilment of treaty promises are the responsibility of both levels of government
Facts: Treaty 3 between the Ojibway First Nation and the Dominion of Canada, Ojibway yielded ownership of their territory receiving in return the right to harvest the non-reserve lands surrendered by them until such time as that land was "taken up" for settlement, mining, lumbering etc. by the Dominion of Canada.

- The Keewatin area was annexed to Ontario in 1912.
- The Grassy Narrows First Nation challenged a forestry licence issued by the Province of Ontario that authorized forestry operations in the Keewatin area

Issue: whether Ontario can "take up" lands in the Keewatin area under Treaty 3 so as to limit the harvesting rights under the treaty, or whether it needs federal authorization to do so.
Decision: Ontario has the authority to take up lands in the Keewatin area so as to limit the harvesting rights set out in Treaty 3 – no two stage process of provincial and federal approval is required

COURTOREILLE V CANADA, [2014] F.C. 1244 – MIKISEW CHALLENGED LEGISLATIVE REFORM THAT WOULD IMPACT RIGHTS WITHOUT CONSULTATION – DECLARATION OF BREACH

- Judicial review of the sweeping reforms to environmental legislation that occurred through omnibus legislation
    - Challenged on the basis of an absence of consultation despite impact on Aboriginal rights
        - The Court sided with the Aboriginal claimants
        - Somewhat of a success in that environmental concerns were brought to light
    - **Remedy?** Declaration of breach of the duty to consult
        - Unsatisfactory remedy
        - Similar to remedy in Khadr case (s 7 infringement, SCC sided with Khadr, but the remedy was simply declaring that there had been an infringement)
- **Scope of duty to consult (p. 12-13)**
    - **Reasoning of the court:**
        - Paras. 100-104 on extent of the consultation duty
            - [100] As the Supreme Court has written in Haida Nation the duty to consult and accommodate varies with the circumstances. The nature of the exercise of that duty is to be proportionate to the circumstances.
            - [102] However, given that we have yet to see the application of these provisions to specific situations involving the Mikisew, I do not see the situation as one that would fall within the high end of the spectrum envisioned by the Supreme Court of Canada in Haida Nation. Rather, it lies at the lower end.
                - The action here by the government is tenuously connected to the actual treaty rights of the Mikisew
            - [103] I find that upon the introduction of each of the Omnibus Bills into Parliament, notice should have been given to the Misikew in respect of those provisions that reasonably might have been expected to possibly impact upon their "usual vocations" together with an opportunity to make submissions
        - Paras. 105-109 on appropriate remedy
            - [106] I see no value in giving an injunction. The scope of the terms of such an order would be almost impossible to define. The effect of such an order would place an undue fetter on the workings of government. As the Supreme Court said in Criminal Lawyers' Association of Ontario, each of the branches of government should respect their role and the limits on those roles without imposing undue fetters on the other.
            - [107] Thus, even if the constitutional nature of the duty to consult confers upon the Court jurisdiction to review the conduct at issue that led to the breach of the duty to consult, the Court should defer to the constitutional responsibilities of the legislative branch. **As with Khadr this means providing no remedy beyond a declaration.**
            - [109] In the present case, as the Omnibus Bills have now passed into law, a declaration that the parties must now consult would be pointless. However, a declaration to the effect that the Crown ought to have given the Misikew notice when each of the Bills were introduced into Parliament together with a reasonable opportunity to make submissions may have an effect on the future respecting continuing obligations to the Misikew under Treaty No. 8.

TREATY INTERPRETATION/ADMINISTRATION

- Look to the treaty to determine what rights have been granted & what accommodation is required
- Both the federal and provincial government are responsible for fulfilling treaty obligations
- Contest: treaties allow for the "take up" of land and the limiting of treaty rights (confirmed in *Grassy Narrows First Nation v Ontario (Natural Resources*), 2014 SCC 48 in the context of "harvesting")
- Treaty rights can be infringed: (1) does the action further a compelling and substantial purpose; (2) does the action account for the Aboriginal interest, which holds priority.

FIRST NATIONS CONCERNS & CLIMATE JUSTICE

- **Treaty 8, development, and climate change (p. 8-9)**
    - Treaty 8 was signed in 1899 between Her Majesty the Queen and a number of Cree and Dene communities and is the largest of the land surrender treaties, covering some 325,000 mi2 (which, for context, is approximately 50,000 mi2 larger than Texas)
    - By guaranteeing the right to hunt, fish, and trap throughout treaty lands, Treaty 8 affirms and protects a traditional way of life that is intimately connected to the land, nature, and the local environment.
    - There are 39 First Nations communities within Treaty 8, 23 of which are in Alberta.
    - Treaty 8, as a whole, is represented by the Treaty 8 Tribal Association, which has a grand chief and its own administrative bodies.
    - second commonality affecting all of Treaty 8's First Nations communities is the region's changing climate, which has warmed by 1.4ºC over the last century
    - many of the anticipated changes will be substantially negative for Canada's boreal ecosystems:
        - These impacts include: (1) a dramatic range expansion of pest insect species; (2) an increased risk of tree diseases; (3) an increased frequency and severity of both forest fires and storm weather; and (4) drought conditions in the southern boreal range (which includes Alberta).
        - Other studies report similar predictions, suggesting that the boreal forest region that covers Treaty 8 can also expect a decrease in river flow as a result of diminishing glaciers and snowpack in the Rocky Mountains, and biodiversity in the boreal region is expected to decline as ecosystems shift (largely northward) and some species find themselves unable to respond
- **Duty to consult is engaged, but limited (consider *Adam v Canada (Environment*), [2014] F.C. 1185) (p. 18-19)**
    - the Athabasca Chipewyan First Nation (ACFN) from Treaty 8 sought judicial review of the Government of Canada's decision that the "significant adverse environmental effects" of the Shell Canada Energy Jackpine Mine were "justified in the circumstances."
    - The ACFN had opposed the proposed expansion since 2007, and their concerns were bolstered when the joint provincial-federal environmental review panel operating under CEAA, 2012 concluded that:
        - the Project offered significant economic benefits and should not be delayed. In addition, the Project was likely to cause significant adverse environmental effects—some of them irreversible and inadequately mitigated—for the landscape, flora, fauna, and Indigenous peoples of the lands in question. The cumulative effects of this and other projects in the region, however, would likely result in significant harm to Aboriginal rights and the environment
    - government ultimately determined that the expansion should proceed and imposed a number of binding conditions on Shell, based largely on the joint panel's recommendations

        - Procedural right to duty of consultation was ruled to have been met…. Despite the findings that Aboriginal rights were expected to be significantly and negatively impacted and the area was already impacted by development
            - the court was satisfied that the consultation had been quite involved over a number of years, including full participation in the review panel aspect of the EA, and ultimately dismissed ACFN's application.
        - Through the course of its decision, the court went out of its way to articulate that the duty to consult does not afford an Aboriginal people with a "veto" or a "guarantee" to "everything that they wish to obtain.
- **When does consultation/accommodation require consent?**
    - Only where Aboriginal title has been shown
- **Influence of *UNDRIP* (p. 21)**
    - Recommendation for free, prior, informed, consent
    - Could lead to an expanded recognition of where consultation and consent are required

ONGOING ISSUES

Site C Dam

- Peace River Valley in NE BC: electrical generation
- dams have low CO2 emissions but ecologically speaking problematic because construction has major habitat because of upstream flooding and downstream irregularity.
- Dam may infringe on the treaty right to harvest – duty to consult and accommodate may be engaged
- Joint Review Panel Report (2014): EA, federal and provincial approval despite warnings that some impacts on Treaty 8 First Nations could not be mitigated

Northern Gateway Pipeline

- 2010: Enbridge applied for approval with the NEB
- Pipeline from Bruderheim, AB to Kitimat, BC
- Federal/Provincial approval process initiated. Federal approval granted post-EA, with 209 conditions
- Judicial review sought by 8 First Nations, largely on the basis of failed consultation

GITXAALA NATION V. CANADA, 2016 FCA 187 – DUTY TO CONSULT ON NORTHERN GATEWAY PIPELINE NOT FULFILLED

- Said that impact was on the upper end of the scale of impact on Aboriginal rights
- Required a higher level of consultation be carried out
- The Court found that the duty to consult had not been fulfilled

- Government of Canada won't appeal

ABORIGINAL ENVIRONMENTAL RIGHTS?

SAIKL'UZ FIRST NATION AND STELLAT'EN FIRST NATION V RIO TINTO ALCAN INC. 2015 BCCA

- **Facts**
    - Duty to consult issue occurring side by side with land claims (advancing claims of violation of common law rights)
    - Rio Tinto was conducting water diversions that were impacting ability of First Nations to carry out traditional activities
    - The First Nations alleged tort claims and failure to consult claims
- **At trial:**
    - Federal court struck tortious allegations in the pleadings

    - Argument was that there could not be torts alleged if the Aboriginal rights had not been recognized and declared by the court
- **Appeal allowed**
    - Higher burden was being required from First Nations than for an average Canadian citizen
    - Aboriginal right does not need to be recognized in court for there to be a tort action launched for infringement
- **Private Nuisance:**
    - "The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. *(Antrim Truck Ltd. v Ontario*, 2013 SCC 13 at para 19*)*
        - Trial court said that the Aboriginals had to show that they were the owners before they could sue for private nuisance
- **Public Nuisance:**
    - "'A public nuisance has been defined as any activity which unreasonably with the public's interest in questions of health, safety, morality, comfort or convenience': 'Klar, *Tort Law*'. … An individual may bring a private action in public nuisance by pleading and providing special damage." *(Ryan v Victoria (City*), [1999] 1 S.C.R. 201at para 52)
- **Riparian Rights:**
    - "At common law, the owner of land adjoining water such as a river has riparian rights. Those rights include the right to access the water, the right of drainage, rights relating to the flow of water, rights relating to the quality of water, rights relating to the use of water and the right of accretion."
- **Defense of statutory authority:**
    - "Whether the act causing the nuisance was expressly or implicitly authorized by statute and, if so, whether the nuisance was the inevitable result of the statutorily authorized action" *(Susan Heyes Inc. v South Coast British Columbia*, 2011 BCCA 77, para 79*)*
- **Trial court strikes claim based on no reasonable cause of action:**
    - "A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action" or "the claim has no reasonable prospect of success" *(R v Imperial Tobacco Ltd*., 2011 SCC 42 at para 17)
    - High threshold

Appeal Court's response to the trial court's decision:

- "In my view, that would be justifiable only if Aboriginal title and other Aboriginal rights do not exist until they are so declared or recognized. However, the law is clear that they do exist prior to declaration or recognition. All that a court declaration or Crown acceptance does is to identify the exact nature and extent of the title or other rights."

Reconciliation:

- "Aboriginal people are part of Canada's community, and they should not be treated disadvantageously in comparison to any other litigant asserting claims for nuisance and breach of riparian rights. Setting a separate standard for Aboriginal people before they can sue other parties in order to enforce their rights is not only lacking in principle but could also be argued to be inconsistent with the principle of equality under the *Charter of Rights and Freedoms.*"

Aboriginal Environmental Rights?

- May be driving the broader right of Canadians to a healthy environment
- Aamjiwnaang
    - Argued that there was a s 7 violation for a number of industrial developments that added up to a significant impact on the environment and human health
    - Aboriginal group settled out of court so the claim did not advance

EXISTING PROCEDURAL MECHANISMS AND CORRESPONDING LIMITATIONS

- two existing mechanisms that hold the most potential to advance climate justice in the oil sands region are the constitutional duty to consult and accommodate First Nations communities and the EA process

Constitutional Duty to Consult and Accommodate

- Crown can justify a violation through the two-step test articulated in R v. Sparrow: (1) does the action further a "compelling and substantial" purpose; and (2) does the action account for the Aboriginal interest, which holds "priority."
- appropriateness of the Crown's consultation is judicially reviewable on a reasonableness standard (i.e., reviewed for intelligibility and justifiability).

Environmental Assessment

- Canada's EA laws represent, at least in theory, "an attempt to avoid, or at least minimize, environmental damage by changing the nature of project planning, design, and implementation."
- first order concern is the extent to which climate justice concerns are required to be considered by EA legislation
    - CEAA, 2012: the overarching objective of the reform to the EA process was to streamline the process to accommodate industry's concerns that EAs were delaying business and development.
    - The government's response was dramatic, as CEAA, 2012 "eliminated between 4,000 to 6,000 environmental assessments per year
    - This made is more difficult for there to be meaningful participation by Aboriginals
- Another shortcoming in CEAA, 2012 is its narrow focus on simply mitigating the negative effects of development.
    - A more robust assessment process should go one step further and require that the proponent demonstrate how the proposed project "make[s] a positive contribution to sustainability."
- reality is that EAs continue on a project-by-project basis that largely excludes the holistic thinking required to achieve preventative and precautionary decision-making in the climate change context.

PRACTICAL SOLUTIONS

- Despite their limitations, the constitutional duty to consult and accommodate and Canada's EA processes are well-developed and entrenched aspects of First Nations relations and environmental decision-making.
- targeted reforms to these existing mechanisms is a logical starting point.
- Canada should look to UNDRIP to guide these reforms.
    - As a declaration from the General Assembly of the United Nations, UNDRIP exists as international soft law – not enforceable

Revisiting Duty to Consult

    - The added requirement of consultation for the purposes of obtaining FPIC before "adopting and implementing legislative or administrative measures that may affect them"

(Article 19) and "prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (Article 32) is arguably where Canada's process falls short.
    - Benefit of setting UNDRIP's principle of FPIC in law:
        - court would not have the same reservations about injecting itself into the legislative process and even invalidating legislation if that remedial action is statutorily authorized
        - offer a guarantee to First Nations that their worldviews and existing disparities would be fully considered

Revamping Environmental Assessment

- revamped EA law should formally incorporate both a sustainability-based assessment approach and a strategic environmental assessment (SEA).
    - ask whether the project makes a positive contribution to sustainability
    - assess cumulative effects

THE STRUCTURES OF ENVIRONMENTAL PROTECTION REGIMES

K.V.P. COMPANY LTD. V MCKIE ET AL, 1949 SCR 698

Ratio: damages and an injunction to prevent continuance of a nuisance are reasonable when the harm to the plaintiff is great enough to negate the harm of an injunction against the defendant

- Legislative intervention may or may not override a court decision

Facts: The respondents, who own land on the Spanish River, sued KVP, the operator of a pulp and paper mill up river, for pollution of the waters of the river by discharges from the mill; offensive smells created by the pollution substantially interfered with the plaintiffs' use and enjoyment of their properties

- Case relied on prior court decisions that had protected riparian rights
- Actions in nuisance, infringement of riparian rights
- Damages available: monetary damages, injunction

Court decision: appeal was dismissed, upholding damages and the injunction

- The Ontario legislature subsequently passed The KVP Co. Ltd. Act. which dissolved the injunction

STRUCTURES OF ENVIRONMENTAL PROTECTION SCHEMES

- **Private Law** – traditionally important and still relevant but not the dominate paradigm for environmental law
    - Individuals exercise personal rights against others to protect their own property or interests
    - rule in *Rylands v Fletcher*, nuisance (private and public), negligence, trespass; riparian rights [largely extinguished in western part of Canada because of *Water Act* and other statutes).
    - impacts: alters corporate behaviour, influence standards and drive voluntary action
    - limits: fails to achieve wide-spread enviro protection and does not act for the benefit of future generations

- **Public Law** – forms the lion's share of what we now understand as the corpus of modern environmental law
    - The state imposes regulatory frameworks that set environmental standards and consequences for non-compliance

        - Two underlying mechanisms:
            - A command function – setting standards for acceptable behaviour
            - A control function – ensuring compliance with those standards
    - E.g. Federal Environmental Protection Act, 1999 and its regulations; Alberta EPEA
    - Source: Statutes, regulations, approvals

PUBLIC LAW, IN ITS THREE ITERATIONS:

1. 1970s & 1st Generation Environmental Laws
    - response to catastrophes
    - early forms of licensing schemes, though still driven by industry needs
    - public not engaged except via protest
2. 1980s & 2nd Generation Environmental Laws
    - concern w/pollutants persisting & accumulating. Recognized pollutants cross media (ex. from air to H_2O)
    - recognize deficiencies in public participation and the need for transparency
    - still geared towards business but also some enviro protection in a more robust way
    - Promulgation of laws that do not cooperate well together
3. 1990s on & the Quest for a 3rd Generation of Environmental Laws
    - Normative objectives of environmental law: precaution, sustainable development, environmental rights, elimination of many pollutants/toxins, market-based incentives, extended liabilities, environmental protection, alternative measures, cumulative effects management
    - Idea that there is expectation of some regulation, but that the regulation will be cost efficient and effective
    - The government began to streamline the regulatory structures, so as to promote a market economy, and support innovations in science and technology, and govern cooperatively in pursuit of the public interest, recognizing the role of government, industry, and the public in the modern regulatory state

NORMAL REGULATORY STRUCTURES

1. **Style – Command & Control**
    a. Command: standard setting – what sort of activities are going to be regulated and how?
    b. Control: enforcement and compliance with standards
        i. compliance: determining if standards are being adhered to – requires monitoring and reporting
        ii. enforcement: the action that can be taken to bring an offending party back into compliance or to punish for the act of non-compliance
2. **Form – Legislation + Regulations/Schedules + Guidelines**
    a. Legislation: broad objectives & administrative structures
    b. Regulations: what is captured or excluded & standards – the what, where, how much of what can be released to ex. maintain water quality standard we want.
    c. Guidelines: internal policy that directs decision-making – often look like policy but if utilized in a formal capacity then they essentially gain legal status.
3. **Substance – pollution shall be regulated, NOT prohibited.**
    a. 3 steps to understanding the substance of this:
        1. Standard setting – ex. setting permissible amounts of pollutants in air/water/ground, ect. Have to be standards against which you can measure. ***CRUICAL STEP – need appropriate standards
        2. Approval issuance – can approve activities up to what the standards are.

3. Compliance and enforcement actions – quasi-criminal because significant fines or jail time but these are primarily provincial. Areas that need more attention can be addressed in the regulations.

Common feature: licensing & approval required for potentially environmentally dangerous activities

- ex. *Fisheries Act:* addition of deleterious substances to fish bearing waters is prohibited, except if authorized by approval
- political, economic, and environmental factors are all considered in determining standards and exceptions

COMMAND TOOLBOX

- Statutes – e.g. Environmental Protection and Enhancement Act
  - No effect unless regulation is put in place to prescribe specific standards and enforcement
  - Established by legislatures
- Regulations
  - Power to pass regulations and standards usually resides with executive branch of government: Cabinet
- Site-specific legal instruments
  - EPA delegates power to issue approvals and orders to a government official known as a director
  - Environmental approvals – required if an individual or company wishes to engage in certain types of activities that have potential environmental consequences
    - Failure to comply with conditions of approval may lead to prosecution and fines or penalties
  - Administrative Orders
  - May be issued against a company to impose conditions and cleanup requirements
- Policy and guidelines
  - Not legally enforceable, but can affect environmental conduct in some other ways: e.g.
    - May be adopted by the director for granting approvals for discharges to surface water
    - May be considered by courts when determining whether an alleged offender is guilty of the prohibition against discharge of a contaminant

COMMON APPROACHES TO REGULATION

1. **Media-based Responses**
   - Specific regime to protect each media of air, water, land
     - Arguably, the distinctions among the media are artificial, but mechanics of the legislation continue to separate the media
   - *Environmental Protection Enhancement Act* addresses things in a siloed way
   - Some advances have been made towards more integrative approaches:
     - Whole-facility permitting
       - Involves a review of all the environmental exposures from a particular facility taken as a whole
     - 2006 Ontario Clean Water Act
       - Statute focused on water but approach focuses on regulation of existing and future land uses with implicit and explicit attention paid to the transmedia movement of contaminants
2. **Sector-based Responses**
   - E.g. oil and gas industry specific, agriculture, manufacturing sector
   - Natural Resources Conservation Board
   - *Wildlife Act* for permits for fish, wildlife and hunting

- AER deals with oil & gas – quasi-independent from gov't, multi-function in task, issues permits, administers major structures, tasked with the public good of developing the sector.

3. **Approval-based Regimes**
    - Usually a proviso whereby the otherwise prohibited activity can occur if government permission or approval is obtained
        - The legislation or regulations establishes an approval process for permissions overseen by a designated agency
        - Approval can turn otherwise unenforceable policies, guidelines and criteria into enforceable standards

EXAMPLES OF PROVINCIAL REGULATORY SCHEMES IN PLACE - ALBERTA

1. *EPEA – can't carry on these activities without approval, has list of every facility that needs approval*
2. *Water Act*
3. *Climate Change and Emissions Management Act + Specified Gas Emitters Regulation*
4. Relevant Federal Statutes (*CEPA, 1999, Fisheries Act, Migratory Birds Convention Act, 1994*)

RESPONDING TO SOCIETAL TRENDS

- Traditional subjects of environmental protection
    - traditionally rich white men, want to consider poor and marginalized
- Environmental justice movement – bring Charter arguments
- N.I.M.B.Y. and its perversion
    - People concerned with energy generation close to them, even if that generation may be better for society as a whole

ENVIRONMENTAL PROTECTION REGIMES: COMMAND AND CONTROL

NORMAL REGULATORY STRUCTURES

Case Study – Rise and Decline of Command and Control in Ontario

- 1985 – Ontario government brought in new tough "control at source" standards aimed at eliminating discharge of industrial pollution in to lakes and rivers
    - Also created an environmental police force
- Environmental convictions skyrocketed with a success rate of over 90%
    - But by 2007, Ministry of Environment was underfunded and operating budget was 34% less than 1992-1993
    - Environmental protection responsibilities have shrunk

Normal Regulatory Structures – e.g. Walkerton Water Contamination

- Breakdown of command and control structure and E. coli ended up in the tap water system of the public
    - Caused by lack of overview, lack of funding, potentially insufficient standards and compliance enforcement
- 5 people died from the contaminated water

COMMAND: STANDARD SETTING

- Standards found in sector specific regulations and guidelines, also reflected in approvals.
- Standard setting is critical – approvals have the force of law.

1. Broad Approaches to Standard Setting - **PERFORMANCE BASED V. CONSTRUCTION STANDARDS**

- *Performance based* – pollution limit imposed upon industry, leave it to the polluter to determine how to meet the limit.
    - Benefit is there is more flexibility for industry and it **allows industry to innovate.**
    - encourage research and innovation but are more difficult to enforce
- *Construction standards* – mandate the use of approved government pollution control technology
    - *E*.g. sewage systems and scrubbers inside smokestacks
    - Less innovation and less able to develop over time to improvements, but easier to enforce and monitor

2. Setting Specific Standards – Approaches, including Franson, Franson & Lucas Model:

- **Note: these can be used within a Performance Based or Construction Standard scheme and any standard setting exercise is a balancing of scientific + non-scientific factors**

A. Environmental Quality-Based Standards

- Franson, Franson & Lucas Model – **most effective model and gold standard

Step 1 –set objectives for pollution control + uses to be protected.
(scientific, political, health related, environmental, etc)

- determine law's role in this process. What participation is available? Are there some uses that should be allowed or should it be simply prohibited? In what state is it found? What is it used for? Public good/benefit or legitimate concern?

Step 2 – formulate specific criteria, ex. make sure water is safe to drink

Step 3 – based on the criteria, set ambient quality standards

- what ambient level makes things safe but also protects the valid uses? There will be political tradeoffs, why we end up with tailings ponds – suboptimal level of pollution but necessary for the development of the resource, some important uses we want to protect
- Standards hopefully will be as rigorous as the protected uses allow.
- The more likely it is to be unsafe and the more uncertainty then the precautionary principle tells us to take a precautionary approach.
- ambient standard: what level of pollutant is in the water.

Step 4 – translate ambient standards into specific limits – rules polluters have to follow

- regulations and guidelines set the actual quantity/quality of pollutants. Ex. regulations on mercury emissions.
- Usually at the source.

Step 5 – monitoring and information gathering

- hopefully the law allows for **adaptive management** – monitoring and feedback in the approval process.
- How we ensure what we set out in the approval is happening.

B. Health Risk Assessment Standards

- Determine the risks and then determine the exposure that will be permittable
    A. Links the standard under consideration to the health risks posed

B. But gathering risk assessment information is expensive, and there is a lack of data

- conduct experiments about what level of pollutant is harmful.
  A. Consider the short & long term impacts of exposure
  B. integrate precautionary principle by flipping burden of proof: instead of opponents having to prove the pollutant is harmful, have industry prove it isn't.
- Operation of the precautionary principle would support erring on the side of caution
  A. finds legal expression in international agreements such as the Rio declaration, the CEPA, Canadian Environmental Assessment Act, and a leading SCC case: Spraytech v Hudson (Town)

C. Technology Based Standards (best available technology?)

- Sets standard based on the best available technology for controlling a particular pollutant
  - Standards are developed without considering the needs of the environment, also entrenches prescribed technology, therefor discouraging innovation
  - Much difficulty in reaching consensus between industry and the government on which technology is to be used
- Example: coal fired energy generating facilities – permitted or not

D. Point of Impingement v. Source control (which standard?)

- Point of impingement model attempts to predict the impact of a pollutant once it reaches a property's boundaries, rather than at the end of the stack (ie. in the community)
  - Does not count for cumulative effects
  - Ignores fact that pollutants have negative impact as soon as they enter the environment
- Pollution Source focus:
  A. Approach calls for a change in focus from control of the quantities of pollution at the end of the pipe to prevention of the use of potentially harmful substances in the first place
  B. Normally control at the source because easier and it doesn't respect boundaries.
  C. at the source allows to control for cumulative effects.

E. Informational Standards (i.e., National Pollutant Release Inventory)

- Imposing legal requirements on industries to disclose information about their environmental practices
- Disclosure requirements are intended to provide:
  A. Information that assists regulators in researching and developing new standards
  B. Added incentive for businesses to go beyond minimal compliance requirements

CEPA, 1999

National inventory

48 The Minister shall establish a national inventory of releases of pollutants using the information collected under section 46 and any other information to which the Minister has access, and may use any information to which the Minister has access to establish any other inventory of information.

- Priorities, risk assessment, public transparency, etc.

Operation of Part V of *CEPA, 1999*

Priority Substances List

76 (1) The Ministers shall compile and may amend from time to time in accordance with subsection (5) a list, to be known as the Priority Substances List, and the List shall specify substances in respect of which the Ministers are satisfied priority should be given in assessing whether they are toxic or capable of becoming toxic.

- 5 year timeline from when a substance becomes a priority substance and when that substance's risk assessment will be completed and toxicity is established – if determined to be toxic, then that substance is listed as a toxic substance

Toxic substances
64 For the purposes of this Part and Part 6, except where the expression "inherently toxic" appears, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that

(a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
(b) constitute or may constitute a danger to the environment on which life depends; or
(c) constitute or may constitute a danger in Canada to human life or health.

- Once listed as a toxic substance, the substance can be regulated for protection through its life cycle
    - E.g. PERC compound is regulated for usage thresholds, so is lead
    - Regulated from cradle to grave – from mining, smelting and consumer product containing regulations to disposal and destruction

Definition of *virtual elimination*
65(1) In this Part, *virtual elimination* means, in respect of a toxic substance released into the environment as a result of human activity, the ultimate reduction of the quantity or concentration of the substance in the re- lease below the level of quantification specified by the Ministers in the List referred to in subsection (2).

- If risk assessment shows that substance is super toxin or super pollutant, the substance will be listed on the "virtual elimination" list
- Less than five substances on this list
- Issue is that there are very few substances that have been chosen for virtual elimination

Virtual Elimination List
(2) The Ministers shall compile a list to be known as the Virtual Elimination List, and the List shall specify the level of quantification for each substance on the List.

Implementing virtual elimination
(3) When the level of quantification for a substance has been specified on the List referred to in subsection (2), the Ministers shall prescribe the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source,…

POLLUTION PREVENTION APPROACH

- eliminate rather than regulate certain pollutants – get rid of the dirty dozen & pollutants that bioaccumulate.
- ex. ozone depleting substances (CFCs – chlorofluorocarbon). CFCs not good in any concentration so wanted to phase them out.
    - Nations met and collaborated towards the Montreal Protocol to decide to eliminate the release of CFCs
    - *EPEA* regulation *Ozone-depleted Substances and Halocarbons Regulation* to deal with this.
        - Different approach, because not permitted with approval, totally banned (subject to few exceptions, ex. fire retardant uniforms)
        - No person will permit the release of an ozone depleting substance

- don't see the general prohibition with broad caveats like in other *EPEA* regulations, instead here we see a large prohibition with limited caveats.
- sets standards for capturing, recycling and disposing of these substances

CONTROL: COMPLIANCE & ENFORCEMENT

CONTROL TOOLBOX

Tools	Key Players	Examples
1. Incentives and financial assistance	• Environmental abatement officers • Research and funding agencies	• Tax incentives • Sharing expertise and research • bursaries
2. Licenses and approvals (regulate NOT prohibit)	• Government environmental officials • Hearings tribunals (on appeal)	• A license is obtained by a chemical plant to discharge treated wastewater into a local stream
3. Administrative orders (i.e., EPOs) • Directives issued by government officials that impose legal requirements on individuals or companies to take specific action	• Enforcement officers • Government environmental officials • Hearings tribunals	• E.g. A company must thoroughly investigate and clean up the pollution discharge • E.g. company must control pollution discharges • A company must shut down operations until a solution is found
4. Prosecutions	• Enforcement officers • Prosecutors • Criminal Courts	• A company charged, convicted, and fined for discharging pollutants into a river at levels that exceed provincial standards

1. INCENTIVES & ASSISTANCE

- Green taxes to reward "greener" action by taxing pollutants or the product of polluting industry
- Subsidize industrial upgrades with public funds
- Share government innovation with private business
- Pros and Cons?
    - Large investment in a band-aid solution
    - Pros – encouraging corporations to move in positive direction that would otherwise be too expensive
    - *EPEA*, s. 13 – establish programs
        - ex. Emission trading program from the Federal Sustainable Development Strategy, 2010
            - target: transportation sector
            - implementation tool: Clean Air Strategy, gives subsidies or other transfers of money to parts of industry working on cleaner things
            - pros: may be necessary

        - cons: would rather the big players in the transportation section bear the costs
    - ex. Differential levies in the form of Green Taxes
        - rewards "greener" action by taxing pollutants or the product of polluting industry
        - carbon tax – excise levy on the production of GHG allowed under *EPEA*
        - pros: behaviours modified in the industry
        - cons: a tax that gets passed down to the consumer. Can the appropriate value be set?

EPEA, S 13:

13 The Minister may, in accordance with the regulations, establish programs and other measures for the use of economic and financial instruments and market-based approaches, including, without limitation,

(a) emission trading,
(b) incentives,
(c) subsidies,
(d) emission, effluent and waste disposal fees, and
(e) differential levies, for the purposes of protecting the environment, achieving environmental quality goals in a cost-effective manner and providing methods of financing programs and other measures for environmental purposes.

2. LICENSES & APPROVALS - **THE CARROT & STICK APPROACH:**

- *Carrot*: satisfy the regulator that your approach is sufficient and you are approved/licensed to operate (pollute)
- *Stick*: approvals/licenses will have penalties and conditions attached. Monitoring/reporting and consequences for failure to adhere.
    - *Approvals are going to be contingent on receiving new information* – approvals can be amended by the government
- Environmental Appeals Board (EAB) is the admin agency under *EPEA* (ss. 90-102).
    - if not granted reconsideration, company can file a notice of appeal with the EAB to get appeal tribunal in EAB to overturn. Appeals of the appeal tribunal go to ABQB.
- Enabling Enforcement
    - *EPEA* wants people to investigate and inspect things. Allows Minister to appoint investigators, inspectors and directors. (ss. 25 & 27, 196(1), 196-209)
    - though most investigations are started by a member of the public issuing an complaint and then it gets investigated.

EPEA:.

s 16 Administration of Act

- Except as otherwise provided in this Act, the Minister is charged with the administration of this Act.
    - Directors are granted authority to day-to-day administration

Command:

- **Environmental Approval or Registration Requirements:**
    - ss 60, 61, 64, 68, 71
        - sometimes approval is necessary, sometimes registration or notice is all that is required
    - 60 No person shall knowingly commence or continue any activity that is designated by the regulations as requiring an approval or registration or that is redesignated under section 66.1 as requiring an approval unless that person holds the required approval or registration.

        - Elevated mens rea required – higher punishment for breach
    - **61** No person shall commence or continue any activity that is designated by the regulations as requiring an approval or registration or that is redesignated under section 66.1 as requiring an approval unless that person holds the required approval or registration.
        - Strict liability
    - No approval or registration on Minister's order
        - 64(1) Where the Minister is of the opinion that a proposed activity should not proceed because it is not in the **public interest having regard to the purposes of this Act**, the Minister may at any time by notice in writing to the proponent, with a copy to the Director, order that no approval or registration be issued in respect of the proposed activity.
        - (2) Where the Minister has made an order under subsection (1) in respect of a proposed activity, the Director may not issue an approval or registration in respect of that proposed activity.
            - Public interest is defined by the broad policy goals as defined by the objectives in s 2 of the EPEA
    - 68(1) The Director may issue or refuse to issue an approval or registration.
        - (2) The Director may issue an approval subject to any terms and conditions the Director considers appropriate.
        - (3) The terms and conditions of an approval may be more stringent, but may not be less stringent, than applicable terms and conditions provided for in the regulations.
        - (4) In making a decision under this section, the Director
            - (a) shall, in addition to any criteria that the Director is required by the regulations to consider, consider any applicable written decision of the Alberta Energy Regulator, the Alberta Utilities Commission, the Board, as defined in the Agricultural Operation Practices Act, under Part 2 of that Act or the Natural Resources Conservation Board in respect of the subject-matter of the approval or registration, and
            - (b) may consider any evidence that was before the Alberta Energy Regulator, the Alberta Utilities Commission, the Board, as defined in the Agricultural Operation Practices Act, under Part 2 of that Act or the Natural Resources Conservation Board in relation to that written decision.
        - (5) The Director may issue an approval or registration for a specified period.
    - Director's power to modify
        - 71 Where the Director
            - (a) issues an approval or registration, or
            - (b) amends a term or condition of, adds a term or condition to or deletes a term or condition from an approval,
            - the Director may do so as originally contemplated in the application or proposal or with modifications.
- **Environmental Notice Requirements:**
    - ss 87 & 88
        - less arduous
        - higher penalty for higher mens rea requirement
    - Prohibition
        - 87 No person shall knowingly commence or continue any activity that is designated by the regulations as an activity in respect of which notice must be

given to the Director unless that person gives notice to the Director, in the form and manner required by the regulations, that that person is carrying on or intends to carry on the activity.

- Prohibition
  - 88 No person shall commence or continue any activity that is designated by the regulations as an activity in respect of which notice must be given to the Director unless that person gives notice to the Director, in the form and manner required by the regulations, that that person is carrying on or intends to carry on the activity.

- ***Activities Designation Regulation,* Alta. Reg. 276/2003**
  - Schedule 1 activities – require full approval
    - Waste management e.g. disposal of chemicals
    - Reclamation of major industrial activities
    - Major substance releases
  - Schedule 2 activities – requires registration
    - Certain waste management and substance release activities
    - Lower quantities and masses of substances involved than where full approval is needed
  - Schedule 3 activities – requires notice
    - (a) the construction, operation or reclamation of a Class II compost facility;
    - (b) the construction, operation or reclamation of a storage site;
    - (c) the conduct or reclamation of an exploration operation.

Administrative agency involvement

***EPEA* and the Environmental Appeals Board (EAB)**

- S. 90 – establishes the EAB
  - **Environmental Appeals Board established**
  - 90(1) There is hereby established the Environmental Appeals Board consisting of persons appointed by the Lieutenant Governor in Council.
    - (2) The Board shall hear appeals as provided for in this Act or any other enactment.
    - (3) The Board may convene a panel of Board members to conduct a hearing of an appeal and appoint a person to chair the panel.
    - (4) Where a panel is convened, the panel has all the powers of the Board and is subject to all the same duties the Board is subject to, and a reference in this Act to the Board is to be read as a reference to the panel.
- S. 91 – details what is appropriate for a "notice of appeal"
  - Automatic right to appeal permitted
  - 91(1) A notice of appeal may be submitted to the Board by the following persons in the following circumstances:
    - (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted
      - (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2), or

- (ii) by the approval holder or by any person who is directly affected by the Director's decision, in a case where no notice of the application or proposed changes was provided by reason of the operation of section 72(3);
- (b) where the Director refuses
  - (i) to issue an approval, or
  - (ii) to make an amendment, addition or deletion in respect of an approval pursuant to an application under section 70(1)(a),
- the applicant may submit a notice of appeal;…..

….

- S. 94 – requires a public hearing
  - 94(1) On receipt of a notice of appeal under this Act or under the Water Act, the Board shall conduct a hearing of the appeal….
- S. 95 – powers of the EAB
  - 95(1) The Board has all the powers of a commissioner under the Public Inquiries Act.
  - (2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:
    - (a) whether the matter was the subject of a public hearing or review under Part 2 of the Agricultural Operation Practices Act, under the Natural Resources Conservation Board Act or under any Act administered by the Alberta Energy Regulator or the Alberta Utilities Commission and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;
    - (b) whether the Government has participated in a public review in respect of the matter under the Canadian Environmental Assessment Act (Canada);
    - (c) whether the Director has complied with section 68(4)(a);
    - (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
    - (e) any other criteria specified in the regulations.

    …
  - (5) The Board
    - (a) may dismiss a notice of appeal if
    - (i) it considers the notice of appeal to be frivolous or vexatious or without merit,

    …
- S. 101 – Reconsideration by the EAB
  - 101 Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it.
- S. 102 – Privative clause
  - There is <u>no statutory right to appeal the decision of the EAB but you can apply for judicial review</u>
  - 102 Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

3. Administrative Orders

- Administrative order: Legally binding directives from government officials (usually issued by a director)
- Usually order or demand a remediation, cleanup, or some other specific action.
    - Can also require that a facility/operation be shut-down temporarily or permanently
- *Importance*: focused more on fixing the problem rather than just paying damages
- Often pursued contemporaneously with criminal prosecutions

2 types of administrative orders in EPEA:

(1) Environmental Protection Order *(more* command*)* &
(2) Enforcement Order *(more* control*)*

Typical Process:

1) Enforcement officer investigates & reports
2) Order type is determined:
    i) Control Order – stop or control an emission or discharge
    ii) Stop Order – immediate cessation of some activity due to a threat to human health or the environment - issued in more serious circumstances
    iii) Remedial Order – repair or prevent a injuries or harm to the environment
    iv) Preventative Order – reasonable grounds to believe that an order is required to prevent something from occurring

- enforcement orders can turn into court orders that lead to contempt if breached

EPEA, ENVIRONMENTAL PROTECTION ORDERS

ss 113-117

Environmental protection order for release

113(1) Subject to subsection (2), where the Director is of the opinion that

(a) a release of a substance into the environment may occur, is occurring or has occurred, and

(b) the release may cause, is causing or has caused an adverse effect,

the Director may issue an environmental protection order to the person responsible for the s ubstance.

(2) Where the release of the substance into the environment is or was expressly authorized by and is or was in compliance with an approval, code of practice or registration or the regulations, the Director may not issue an environmental protection order under subsection (1) unless in the Director's opinion the adverse effect was not reasonably foreseeable at the time the approval or registration was issued, the code of practice was adopted or the regulations were made, as the case may be.

(3) An **environmental protection order may order the person to whom it is directed to take any measures that the Director considers necessary, including, but not limited to, any or all of the following:…**

(a) investigate the situation;
(b) take any action specified by the Director to prevent the release;
(c) measure the rate of release or the ambient concentration, or both, of the substance;
(d) minimize or remedy the effects of the substance on the environment;
(e) restore the area affected by the release to a condition satisfactory to the Director;

(f) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance, or lessen or prevent further releases of or control the rate of release of the substance into the environment;

(g) install, replace or alter any equipment or thing in order to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(h) construct, improve, extend or enlarge the plant, structure or thing if that is necessary to control or eliminate on an immediate and temporary basis the release of the substance into the environment;

(i) report on any matter ordered to be done in accordance with directions set out in the order.

Emergency environmental protection order

114(1) Where an inspector, an investigator or the Director is of the opinion that

(a) a release of a substance into the environment may occur, is occurring or has occurred, and

(b) the release may cause, is causing or has caused an immediate and significant adverse effect,

the inspector, investigator or Director may issue an environmental protection order to the person responsible for the substance directing the performance of emergency measures that the inspector, investigator or Director considers necessary.

(2) Subsection (1) applies whether or not the release of the substance into the environment is or was expressly authorized by or is or was in compliance with an approval, a registration or the regulations.

Emergency measures and notification

115(1) Where an inspector, an investigator or the Director is of the opinion that

(a) a release of a substance into the environment may occur, is occurring or has occurred, and

(b) the release may cause, is causing or has caused an immediate and significant adverse effect,

the inspector, investigator or Director may take any emergency measures that the inspector, investigator or Director considers necessary to protect human life or health or the environment….

Environmental protection orders re odour

116(1) Where the Director is of the opinion that a substance or thing is causing or has caused an offensive odour, the Director may issue an environmental protection order to the person responsible for the substance or thing.

(2) Subsection (1) **does not apply in respect of an offensive odour that results from an agricultural operation** that is carried out in accordance with generally accepted practices for such an operation or in respect of which recommendations under Part 1 of the Agricultural Operation Practices Act indicate that the agricultural operation follows a generally accepted agricultural practice.

(3) An environmental protection order under this section may order the person to whom it is directed to take any or all of the following measures:

(a) investigate the situation;

(b) take any action specified by the Director to prevent the offensive odour;

(c) minimize or remedy the effects of the offensive odour;

(d) monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance or thing causing the offensive odour or lessen or prevent the offensive odour;

(e) install, replace or alter any equipment or thing in order to control or eliminate the offensive odour;

(f) construct, improve, extend or enlarge a plant, structure or thing if that is necessary to control or eliminate the offensive odour;

(g) take any other action the Director considers to be necessary;

(h) report on any matter ordered to be done in accordance with directions set out in the order.

Remediation certificates

117(1) The Director or an inspector may issue a remediation certificate in respect of land where:..

(a) a release of a substance into the environment has occurred,

(b) the release has caused, is causing or has the potential to cause an adverse effect, and

(c) remediation of the land has been carried out in accordance with…

EPEA, ENFORCEMENT ORDERS BY DIRECTOR

- Enforcement orders are stricter and punishments are instituted

210(1) Where in the Director's opinion a person has contravened this Act, except section 178, 179, 180, 181 or 182, the Director may, whether or not the person has been charged or convicted in respect of the contravention, issue an enforcement order ordering any of the following:

(a) the suspension or cancellation of an approval, registration or certificate of qualification;

(b) the stopping or shutting down of any activity or thing either permanently or for a specified period;

(c) the ceasing of the construction or operation of any activity or thing until the Director is satisfied the activity or thing will be constructed or operated in accordance with this Act;

(d) the doing or refraining from doing of any thing referred to in section 113, 129, 140, 150, 156, 159, 183 or 241, as the case may be, in the same manner as if the matter were the subject of an environmental protection order;

(e) specifying the measures that must be taken in order to effect compliance with this Act.

Court order for compliance

213(1) If the person to whom an enforcement order is directed fails to comply with the enforcement order, the Minister may apply to the Court of Queen's Bench for an order of the Court directing that person to comply with the enforcement order.

(2) This section applies whether or not a conviction has been adjudged against the person to whom the enforcement order is directed for an offence under this Act in respect of the subject-matter that gave rise to the issuing of the enforcement order.

- Court order for compliance not available for protection orders

4. PROSECUTIONS

- **Director, Inspectors, Investigators, with or without the assistance of Peace Officers, will conduct:**
    - Inspections and searches
    - Evidence seizure
    - Evidence gathering (note, it usually requires technical expertise). Turns on note taking, photo taking, sample procurement (named and labelled), comparative samples are obtained
- **Type of offence?**
    - Mostly regulatory offences, summary offences (less serious in nature)
- **Standard of proof?**
    - Strict liability: Crown shows actus reus BRD, after which onus shifts to the defendant to show on a balance of probabilities that they had acted with due diligence (took all reasonable steps)

- This standard was created in ***R v Sault Ste. Marie***, where municipality was charged for polluting waters
- Strict liability will be the presumed standard if the legislation does not specifically indicate a mens rea
    - Presumption rebutted if *mens rea* included in offence. Ex. s. 108(1) has the word *knowingly*. Higher penalty for things with higher *mens rea*.

EPEA: ENABLING PROSECUTIONS

- **ss 25 & 27 – Appointment of investigators, inspectors and directors**

  Designation of officials

  25(1) The Minister may by order designate any person as a Director for the purposes of all or part of this Act.

  (2) The Minister may, with respect to any Director, and a Director may, with respect to that Director personally, designate any person as an acting Director to act in the Director's place in the event of the Director's absence or inability to act.

  (3) The Minister may by order designate any person as an inspector or investigator for the purposes of this Act.

  Local authority inspectors and investigators

  27(1) Each local authority shall designate a sufficient number of inspectors and investigators to carry out the administration of provisions of this Act that are transferred to it under section 18.

  (2) A local authority shall immediately advise the Minister in writing of designations and changes to designations under subsection (1).
- **s 196(1) – Application for investigation**

  Application for investigation

  196(1) Any 2 persons ordinarily resident in Alberta who are not less than 18 years of age and who are of the opinion that an offence has been committed under this Act may apply to the Director to have an investigation of the alleged offence conducted.

  (2) The application shall be accompanied with a solemn declaration

  (a) stating the names and addresses of the applicants,

  (b) stating the nature of the alleged offence and the name of each person alleged to be involved in its commission, and

  (c) containing a concise statement of the evidence supporting the allegations of the applicants.
- **ss 196-209 – Enforcement powers (warrant requirements, etc.)**

PROSECUTIONS

EPEA, Offences related to the general substance release

- ss 108-110

  Prohibited release where approval or regulation

  108(1) No person shall knowingly release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval, a code of practice or the regulations.

  (2) No person shall release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval or the regulations.

  (3) For the purposes of this section, if there is a conflict between an approval or a code of practice and the regulations as to an amount, concentration, level or rate of release of a substance, the most stringent requirement prevails.

  Prohibited release where no approval or regulation

109(1) No person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.
(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.
(3) Subsections (1) and (2) apply only where the amount, concentration, level or rate of release of the substance is not authorized by an approval, a code of practice or the regulations.
(4) No person may be convicted of an offence under this section if that person establishes that the release was authorized by another enactment of Alberta or Canada.
Duty to report release
110(1) A person who releases or causes or permits the release of a substance into the environment that may cause, is causing or has caused an adverse effect shall, as soon as that person knows or ought to know of the release, report it to…

…

EPEA, Offences related to potable water

- s 148 (also EPOs available at s 150)
    - 148 No person shall release a substance or permit the release of a substance into any part of a waterworks system
        - (a) that causes or may cause the potable water supplied by the system to be unfit for any of its intended uses, or
        - (b) that causes or may cause the concentration of the substance or of any other substance in the potable water supplied by the system to vary from the specified concentration for the substance set out in any applicable approval or code of practice or the regulations.

EPEA, Offences related to pesticides, hazardous waste etc

- **ss. 157 & 163**
    - 157 No person shall sell or distribute any crop, food, feed, animal, plant, water, produce, product or other matter
        - (a) that contains a hazardous substance or pesticide in excess of the permissible concentrations as established by this Act, the Food and Drugs Act (Canada) or the Pest Control Products Act (Canada), or
        - (b) that the person knows or ought reasonably to know has been contaminated by a hazardous substance or pesticide.
    - **Prohibitions re sale, use and disposal**
        - 163(1) Subject to subsection (2), no person shall
            - (a) sell, distribute, use, apply, handle, store or transport a pesticide,
            - b) operate or clean any machinery, equipment, vehicle, aircraft or vessel used in connection with the sale, distribution, use, application, handling, storage or transportation of a pesticide, or
            - (c) use or clean a pesticide container
            - except in accordance with the regulations with respect to that pesticide and the label for that pesticide.
        - (2) If there is a conflict between any applicable provision of the regulation and the provision on the label referred to in subsection (1), the most stringent provision prevails.
        - (3) No person shall dispose of a pesticide, a mixture containing a pesticide, a thing that is treated or contaminated with a pesticide or a

container that has been used to hold a pesticide in a manner other than the manner prescribed in the regulations.

EPEA, Offences related to waste & waste management

- Part 9

Offences

Section 227 A person who

(a) knowingly provides false or misleading information pursuant to a requirement under this Act to provide information,
(b) provides false or misleading information pursuant to a requirement under this Act to provide information,
(c) fails to provide information as required under this Act, except under section 110(3),
(d) knowingly contravenes a term or condition of an approval, a code of practice, a certificate of variance, a reclamation certificate, a remediation certificate or a certificate of qualification,
(e) contravenes a term or condition of an approval, a code of practice, a certificate of variance, a reclamation certificate, a remediation certificate or a certificate of qualification,
(f) knowingly contravenes an enforcement order,
(g) contravenes an enforcement order,
(h) knowingly contravenes an environmental protection order,
(i) contravenes an environmental protection order, or…

PENALTIES

Section 228(1) A person who commits an offence referred to in section 60, 87, 108(1), 109(1) or 227(a), (d), (f) or (h) is liable

(a) in the case of an individual, to a fine of not more than $100 000 or to imprisonment for a period of not more than 2 years or to both fine and imprisonment, or

(b) in the case of a corporation, to a fine of not more than $1 000 000.

- These punishments are for offences that include a higher level of mens rea – a higher mens rea requirement justifies a more severe punishment

(2) A person who commits an offence referred to in section 61, 67, 75, 76, 79, 88, 108(2), 109(2), 110(1) or (2), 111, 112, 137, 148, 149, 155, 157, 163, 169, 170, 173, 176, 188, 191, 192, 209, 227(b), (c), (e), (g) or (i) or 251 is liable

(a) in the case of an individual, to a fine of not more than $50 000, or
(b) in the case of a corporation, to a fine of not more than $500 000.

R V SYNCRUDE CANADA LTD., 2010 ABPC 229

Facts: 1650 birds died that landed on Aurora tailings pond that had a layer of bitumen on top. Tailings pond in area where migratory birds convene and in a spot where they land. Charged under EPEA and Migratory Birds Convention Act.

EPEA

Section 155

A person who keeps, stores or transports a hazardous substance or pesticide shall do so in a manner that ensures that the hazardous substance or pesticide does not directly or indirectly come into contact with or contaminate any animals, plants, food or drink.

Migratory Birds Convention Act, 1994

Prohibition

5.1 (1) No person or vessel shall deposit a substance that is harmful to migratory birds, or permit such a substance to be deposited, in waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area.

Offence type:

- Strict liability (paras. 61-69)
- Onus (para. 70 & 72)

Defenses:

1) Technical readings of both offences (paras. 48-49)
2) Due diligence in bird deterrence (paras. 95-128)
    - Due diligence – not held to a standard of perfection, just have to take all reasonable steps. Factors:
        - industry standards
        - matters beyond control of the actor
        - alternative methods available
        - nature and gravity of the adverse effect
        - foreseeability of the effect, including abnormal sensitivities
        - alternative solutions available
        - legislative or regulatory compliance
        - the character of the neighbourhood
        - what efforts have been made to address the problem
        - promptness of response
        - skill levels expected of the accused
        - complexities involved
        - preventative systems
        - economic considerations
    - these factors didn't help Syncrude much, they were well informed (had environmental assessment that said risk to wildlife), have lots of money and deterrent mechanisms aren't expensive, knew theirs were subpar.
    - Water cannons and bird deterrence crew; crew was not in place at the start of April
    - Here, Syncrude had cut manpower, oversight, man hours, and did not have appropriate measures to meet best practices
3) Impossibility in avoiding bird deaths (para. 132)
    - Not impossible, as due diligence could have been used to deter birds from landing and it was not used at the material point in time
4) Act of God defense (para. 134 & 142)
    - convergence of bad weather and seasonal timing was argued. Court said to use this defence have to prove it was not foreseeable and then that you took every precaution and third there were no human intervention in the force of nature. Syncrude failed on second part
    - Foreseeable that weather events could have arisen that would lead birds to land on the pond at that time of the year
5) Abuse of process (paras. 150-151)
    - Can still be in compliance with terms of approval while violating legislation and Syncrude can still be prosecuted for those violations
    - compliance and abuse of process to prosecute/offends public's sense of decency or fair play – nothing like this present
6) Officially induced error (para. 158)

- Would have to point to actual comments from an official that told them that they would be immune from punishments

7) Defense of *de minimus* (para. 165)
   - Argument that law does not concern itself with trifling matters
   - This argument was not very tasteful, not very well grounded, was seen negatively by the judge and by media

Joint sentencing submission accepted by the court: **$3,000,000 penalty**

- $300,000 fine under the Migratory Birds Convention Act
- $500,000 fine under EPEA ($250,000 directed towards creative sentencing)
- $1,300,000 payment to the Avian Protection Project (U of A)
- $900,000 payment to the Alberta Conservation Association (for waterfowl habitat protection)

ENERGY & THE ENVIRONMENT

- **New approach desired**: balance of economic and energy objectives, not one at the expense of the other
  - Thinking about the precautionary principle, risks for permanent damage, future generations, using environmental standards to our economic advantage (e.g. certification and branding)

OUR CURRENT GROWTH PARADIGM

1. Economic success is measured in growth (ie. GDP/GNP)
2. Economic growth requires "energy" – could be intellectual energy but usually some sort of resource energy
3. The production and utilization of energy has environmental consequences:
   a. oil and gas: habitat fragmentation and destruction, pollution
   b. coal: stripping the surface
   c. nuclear energy: storage issues, long isotopic half lives
   d. wind energy: humming makes people nauseous, hurts birds and bats.
   e. hydro electric: dams cause issues, upstream flooding and downstream irregulation
   f. solar: almost enviro benign but some habitat destruction and storage issues.

1. FOSSIL FUELS

- Hydrocarbons C_xH_x extracted from the ground
- Conventional vs. Unconventional
  - Conventional – high fluidity, viscosity, and high propensity to flow
    - Easier to procure and to gather
    - Flows easily from area of high pressure to low pressure (drilling & striking oil)
  - Unconventional
    - Oilsand development is unconventional
      - Low viscosity, requires dilution and processing
      - Sand coated with a layer of bitumen and other heavy materials. Will not move on its own so has to be stimulated and separated before it is permeable and will flow.
      - More expensive to extract, requires more investment of energy required
      - Requires lots of water, fuel and tailings ponds for effluent pollution.
      - Can also be made permeable by in situ thermal processing. Inject a bunch of steam to heat the ground so bitumen melted off the sand and

stimulates flow into a recovery well. Then it can be pumped to the surface. No tailings ponds required.
        - ex. Hydraulic fracturing & Coalbed Methane (CBM)
            - CBM is coal containing methane, can't conventionally get at it because won't flow without being stimulated.
            - Hydraulic fracturing (fracking) stimulates it so they can access the CBM. Inject high pressure fluid into a well that includes a sand like substance to cause a bunch of fractures throughout the coal and other gas containing substances. Liquid (produced water) is then sucked out and the gas migrates and can be extracted.
            - have to manage where fracking occurs, the substrate it can occur at, the proximity to underground water, and proximity to fault lines.
                - E.g. Jessica Ernst case
- *Regulation*:
    - *Primary*: provincial environmental regulation (exploration, development, transportation, and production)
        - Intraprovincial pipeline is entirely regulated by the province
    - *North of 60 degrees*: federal government is responsible for oil and gas environmental management and regulation.
    - *Off-shore*: Shared provincial-federal development off of the Atlantic Coast (i.e., Canada-Nova Scotia Offshore Petroleum Board)
        - Joint management of the resource
    - *Direct federal regulation*: interprovincial and export pipelines (dealt with by NEB)
    - other federal regulation can impact fossil fuel production: *NEB Act; Fisheries Act; Migratory Birds Convention Act; CEPA, 1999; CEAA, 2012*
        - *CEAA, 2012* for major enviro projects. Joint fed-prov assessment has to be conducted for the project

FOSSIL FUELS (ALBERTA)

Until 2013:

- Licensing and approvals for oil and gas development was coordinated between AESRD (*EPEA*) & ERCB (oil and gas instruments)
- EA was also coordinated under *EPEA*
- If a hearing was required because of affected people, EA would form part of the evidence
- Appeals to the EAB (Environmental Appeal Board)
- Practically, when approvals were required from both, the AESRD & ERCB operated as a "single window" (MOU)
- *ERCB Act*: allowed consideration of whether the project was "in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment"
    - Sounds like sustainable development – public interest standard
    - Now eliminated in updated version of the legislation

2012-2013

- *Responsible Energy Development Act*, S.A. c. R-17.3 - created one stop shop for approvals by AER
    - Alberta Energy Regulator (AER) established. With it, cradle to grave one-stop-regulation implemented.
    - Massive board with jurisdiction over large portion of the energy and environment
        - EPEA approval, Water Act approvals all go to the AER

        - solely responsible from initial application to overseeing everything and dealing with well abandonment, reclamation, remediation, ect. Reclamation and remediation covered under *EPEA*
        - AER responsible for monitoring, inspecting and enforcing actions.
        - issues approvals and licenses under both energy statutes (*Oil and Gas Conservation Act*, *Mines and Minerals Act*, *Oil Sands Conservation Act)* and environmental statutes (*EPEA* and *Water Act*)
        - environmental appeals happen here too – sends the question to the AER that sets up a panel. Asking them to reconsider their decision, ask for a new hearing or try and get it taken up by the ABCA though strong privative clause trying to exclude judicial review. (decrease in hearings)
    - All tools under control and compliance structure available to the AER
    - Also regulates contaminated oil and gas sites, including reclamation of orphaned sites

AER – OIL SANDS CASE STUDY

- First think about what kinds of approvals/actions are needed:
    - AER & general regulatory process under *REDA, EPEA, etc.*
- First look to high level - *Oil Sands Conservation Act*, RSA 2000, c. O-7
    - Purposes to achieve conservation and prevent waste of oil sand resources of Alberta
    - Ensure orderly, efficient use of resources in the public interest
    - To appraise the oil sand resources and products of the oil sand resources
    - Assure safe and effective measures in public interest for transport, extraction, minimizing waste,..
    - Limiting waste:
        - Avoiding destruction of oil resources e.g. waste products, flaring
    - Need to get approval to construct and act on the land – approval is received by AER
- Then look to more specific rules: *Oil Sands Conservation Rules*, Alta. Reg. 76/1988
    - Standards and rules that must be complied with during each stage of the activity
- Directives (i.e., Directive 85: Fluid Tailings Management for Oil Sands Mining Projects; Directive 54: Performance Presentations, Auditing, and Surveillance of In Situ Oil Sands Schemes)
    - Set even more specific requirements
    - AER can create new standards in directives that must be followed
    - These standards are adapted over time
        - Side note: in situ oil extraction – also governed under the same Act and Rules
            - Steam assisted gravity drainage – SAGD
            - Less surface destruction
- *Pipeline Act*, RSA 2000, c. P-15
    - For constructing a pipeline, must seek separate approval under the AER
- Must also apply for approvals under the *Water Act* and the *EPEA*
- Federal approvals, as needed (i.e., National Energy Board)

FOSSIL FUELS (OTHER CONCERNS)

- Coal (electrical generation - AUC v. mining - AER)
    - AER regulates coal mines; Alberta Utilities Commission regulates coal-fired electricity generating plants
- Climate Change (provincial & federal)
    - Phasing out coal fired generation plants by 2030
- Federal Regulatory Triggers
        - *National Energy Board Act*

        - Major interprovincial and international pipelines
    - *Fisheries Act*
    - *Migratory Bird Convention Act, 1994*
    - *CEPA, 1999*
    - *CEAA, 2012*
        - Federal angle to environmental assessments may be required
        - Assessments of oil and gas facilities that are located on federal lands
        - Major interprovincial and international pipelines
- Key federal regulatory bodies:
    - National Energy Board
    - Canadian Environmental Assessment Agency
    - Department of Fisheries and Oceans

Taxation

- Royalties – low rate on gross income and higher rate on net income
    - Minimum royalty rate when oil is less than $55/barrel: %1 of gross income and 25% of net income
    - Maximum royalty rate when oil is more than $125/barrel: %9 of gross income and 40% of net income

2. NUCLEAR

- Unique energy source with unique concerns
    - Nuclear wastes must be stored for thousands of years – currently stored temporarily on site in cement casings
    - Safety concerns
- Canada is the world's second largest uranium exporter
- 2013: 17% of our energy produced by nuclear
- Regulation largely driven by international law in response to international crisis (i.e., IAEA)
- Domestic regulation under the *Nuclear Energy Act*, the *Nuclear Safety & Control Act* and the *Transportation of Dangerous Goods Regulations*

3. MINING & AGGREGATES

- Federal regulatory control over uranium mining and mining on federal lands
- Provincial regulatory control over everything else
- How mines and minerals are defined varies because of the common law and different provincial statutory schemes (i.e., *Mines and Minerals Act*, SA c. M-17 & Alberta Energy)
    - mines defined as the space around a mineral. Natural caverns are owned by the surface owners. But caverns created by the working of the mine is owned by the mineral title holder.
    - pore space and substrates is owned by gov't and always has been.
    - aggregates: surface owner owns gravel, sand, clay and marl. It can be regulated provincially though.

4. ENERGY FUTURES

The Generation of Electricity

- Provincial matter; every power source has its own environmental problems
    - Shifting approach to: promote electricity conservation and demand management, rather than simply meeting growing demand, and gradually converting to a diversity of small-scale renewable energy sources

        - Grid should be made smaller scale, localized and community based. Want solar/wind energy produced in your neighbourhood or at individual homes (for solar panels).
    - Provincial governments have more direct authority over this area
- Alberta:
    - Price of electricity is not fixed by a regulator
    - Any electricity generating facility requires approval by the AUC (*Hydro and Electric Energy Act*)
    - Also control and regulates distribution through a high voltage grid (*Hydro and Electric Energy Act*)
    - Distribution through lower voltage systems owned by municipalities or private companies
    - Retailed to us from various corporate actors
    - Innovation: *Micro Generation Regulation*, Alta. Reg. 27/2008
        - If you generate more power with solar panels than you use, you can sell power to the grid

GERMAN ENERGIWENDE (ENERGY TRANSITION)

Policy Objectives:

A – Fighting climate change
B – Reducing energy imports
C – Stimulating technology innovation and the green economy
D – Reducing and eliminating the risks of nuclear power
- Following recent nuclear disasters arising from reactors

E – Energy security
- Not depending on energy sources provided by other nations – self sufficiency

F – Strengthening local economies and providing social justice

Specific Regulations for meeting the broad policy objectives

A – Nuclear phase-out
B – Renewable Energy Act with feed-in tariffs
C – Emissions trading
D – Environmental taxation
E – Renewable Energy Heating Act and Market Incentive Program (MAP)
F – Act on Accelerating Grid Expansion
G – Energy-Conservation Ordinance (EnEV) and financial support schemes
H – Ecodesign/ErP Directive
I – International Climate Initiative

SECTORAL REGULATION AND LAND REGULATION

Sectoral Resource Development Law

- Historical focus has resulted in key problems:
    - Fragmented decision making
    - Incrementalism – decisions made on a project by project basis, each additional undertaking continues the development momentum and sets new baseline of disturbance and expectation
    - Pre-emption effect – when project is proposed, road and powerlines built before environmental assessment begins – raises a community's expectation for employment and economic benefits

- Cumulative effects – of multiple land uses and developments not anticipated and not considered from outset

FISHERIES

- Billion dollar business for Canada
- Primarily federal responsibility with significant provincial overlay (1914 case of *A.G. of BC v. A.G. of Canada*)
  - Provinces can regulate fisheries to an extent, as long as it does not infringe on federal regulations
  - So majority of regulation is done by federal government, but provinces can regulate for matters such as permitted tackle and other sport fishing standards e.g. barbed hooks
- Features international and domestic obligations
  - It is a global issue and crosses borders
- International influences:
  - *Coastal Fisheries Protection Act* – fed legislation deals w/ sedentary bottom dwelling species (scallops, clams, oysters, lobsters) and also prohibits fishing in the international Northwest Atlantic Fisheries Organization Regulatory Area
  - fed law regarding pollution in the Exclusive Economic Zone is based on the United Nations Convention on the Law of the Sea
  - federal provisions related to conservation and management of fisheries are implemented through the United Nations Fishing Agreement.
    - This agreement creates regional organizations to manage and protect straddling and migratory stocks of marine species
    - Canada participates so that we can engage in fishing in international waters for species such as the yellow fin tuna
  - Flagged vessel requirements dealt with by feds based on the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (and United Nations Fishing Agreement)
- Federal:
  - *Fisheries Act* – applies to all fish bearing wasters and embodies the federal right to impose restrictions on public fishing. Deals with habitat protection and pollution provision
- Provincial:
  - primarily licensing and management; sport fishing regulations
- Migratory fish - anadromous and catadromous species protections
    - Anadromous – migrating from salt water to spawn in fresh water – spend adult life in the ocean e.g. salmon
      - Regulatory structures in place where the fish spawn
    - Catadromous – adult fish live in fresh water and migrate into salt water to spawn e.g. many species of eels
      - Regulations apply in the jurisdiction where they spawn

AG OF BC V AG OF CANADA, 1914 – CONFIRMED PROVINCES CAN ADDRESS FISHERY ISSUES AS LONG AS NOT INTERFERING WITH FEDERAL

- confirmed provinces can dispose of fisheries issues on their own but they can't interfere with federal jurisdiction

FLETCHER V KINGSTON (CITY), 2004 ONCA – BROAD MEANING OF DELETERIOUS SUBSTANCE – FISHERIES ACT S 36(3)

- no requirement of actual harm needed to meet the definition of a "deleterious substance" for a s. 36(3) *Fisheries Act* violation, enough that it is in an area frequented by fish.

- "deleterious substance" to be broadly construed
- If it could have a harmful effect, that is sufficient to amount to the required actus reus

FISHERIES ACT

- *Fisheries Act* does not create property in fish for the federal government
  - *Fisheries Act* is applicable to all fish bearing waters and embodies the federal right to impose restrictions on public fishing
- **S. 35:**
  - "no person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery." [without advanced permission]
  - Serious harm: "death of fish or any permanent alteration to, or destruction of, fish habitat"
- **S. 36(3)**
  - "no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deposit of the deleterious substance may enter such water"
- S 38 – broad inspection powers
  - Demanding to see permits, seize or search boats
- S 40 – escalating fines from $5,000 of up to $12 million dollars for repeat offenders or 3 years in jail
- Ultimately, turns on Department of Fisheries and Oceans (DFO) being adequately funded to carry out its mandate (which it is not)
  - Department is poorly funded, budgetary restraints mean little protection is carried out

FISHERY (GENERAL) REGULATIONS (SOR/93-53)

- Open and closed fishing seasons
- Open and closed fisheries
- Vessel documentation requirements & inspections
- Province/Region Specific Regulations to address where fishing can happen, what gear can be used, etc.
- Complimented by provincial sport fishing regulations

MARINE MAMMAL REGULATIONS

Prohibitions

7 No person shall disturb a marine mammal except when fishing for marine mammals under the authority of these Regulations.

8 No person shall attempt to kill a marine mammal except in a manner that is designed to kill it quickly.

9 No person shall fish for a marine mammal without having on hand the equipment that is necessary to retrieve it.

10 (1) No person who kills or wounds a marine mammal shall

(a) fail to make a reasonable effort to retrieve it without delay; or

(b) subject to section 33.1, abandon or discard it.

(2) No person who kills a cetacean or walrus shall waste any edible part of it.

AGRICULTURE

- Another multi-billion dollar industry
- Significant environmental effects
- Trend towards mechanized industrial farming

- Problems
    - Pesticides (federal & provincial);
        - When and what chemicals can be used
    - GMOs (lack of strict regulation/labelling);
    - antibiotics in livestock (human and environmental impacts); and
    - land protection (preservation of prime agricultural land)

- **Provincial legislation:**
    - *Agricultural Operation Practices Act:* resolve disputes between farmers and the public; excludes nuisance claims
        - Limited ability to sue farmers in nuisance because of the importance of farming to the province
    - *Irrigation Districts Act:* construct, operate, and maintain irrigation works in each district for the conveyance and delivery of water
        - Avoiding nutrient loading from fertilization and irrigation activities
    - *Soil Conservation Act:* obligations to avoid soil loss
- **Federal regulation:**
    - Particular interest in pig farming and its environmental impacts
    - Transboundary shipping and trade/commerce

AQUACULTURE

- Regulated by both feds and the provinces by MOU
- Significant environmental impacts
- In the event of a conflict, case law suggests that federal regulation shall carry the day *(Morton v BC (Agriculture & Lands*), 2009 BC SC)
    - Challenge to allowing fish farming to happen under provincial regulations
- Federal action:
    - Broader aquaculture planning through action plans and some pollution control standards
- Provincial action:
    - Licensing to engage in aquaculture (may or may not account for environmental harms) and restrictions on the practice itself

FORESTRY

- 38 million hectares of Crown boreal forest in Alberta
- Crown forest stewardship achieved through the *Forests Act, Timber Management Regulation*, and the *Public Lands Act*
- The right to harvest is allocated through "forest tenure":
    - 1) Timber permit (1-5 yrs, non-renewable, volume based);
    - 2) Timber quota (20 year, renewable, area or volume based);
    - 3) Forest management agreements (20 year, renewable & area based).
    - Auction or application based
- Utilizes the creation of forest management units/forest management plans geared towards sustainable harvest
- Can come into conflict with Land Use Framework and regional planning

<u>Forests Act</u>

S. 15 Disposal of Crown timber

Crown timber may be disposed of under this Act or the regulations in one or more of the following ways:

(a) pursuant to a forest management agreement;

(b) pursuant to the sale of timber quota certificates and the issue of timber licences to timber quota holders;
(c) pursuant to a timber permit.

S. 10 Forest growth
Except as may be authorized under this Act or the regulations, no person shall
(a) cut, damage or destroy, or
(b) cause to be cut, damaged or destroyed any forest growth on forest land.

PESTICIDES

- Products used to prevent, manage, reduce or repel pests
    - Insecticides, fungicides, herbicides, rodenticides, etc.
- Nervous system disruption, habitat alteration, or reproductive suppressor
- Post-war chemical applications
- Traditional persistent organic pollutant (POP) problem.
    - Current neonicotinoid problem (impacts on bees)
        - insecticide applied to crops that is killing off pollinators which is impacting the reproductive success of plants
- Regulation:
    - **International -> Federal -> Provincial -> Municipal**
        - **International**
            - Commission for Environmental Cooperation – Canada, Mexico, USA
            - Stockholm Convention on Persistent Organic Pollutants
                - banned POPs, uses precautionary principle
            - Organisation for Economic Cooperation and Development – created pesticide programme in 1992
                - countries have a pesticide program to harmonize between countries.
        - **Federal –** designating substances as toxic or otherwise and permitting a substance's use in the country
            - Minister allowed to register pesticide in CAN if pesticide is of value and effective and requirements to safeguard health and environment are met as per Pest Control Products Act
            - *Pest Control Products Act*
                - requires pest control products to be labelled and registered
                - 15 year reassessment required (s. 16(2)).
        - **Provincial –** Pest Control Act – how pesticides can be used – quantities and timing
            - regulations implement training programs, sets out sale requirements, can set heightened restrictions for cosmetic or aesthetic pesticides
        - **Municipal** – can add further restrictions e.g. Spraytech L'tee

BIO TECHNOLOGY/ENGINEERING

- Any technological application that uses biological systems, living organisms or derivatives to make or modify products or processes for specific use
    - i.e., transgenic crops, microbes, hormone synthesis
- Genetic engineering – genetic modification of a microbe, plant, or animal to serve new or enhanced purpose
    - Examples: microbes, transgenic crops, hormones

- Risks associated with the uncertainty of how human invention will interact with the natural world
    - Reduced biodiversity
    - Disruption of food chain
    - Competitive advantage
    - Uncontrolled reproduction
    - Cross-pollination
    - uncertainty of how human intervention will interact with the natural world
- Legal Framework: **1983 Federal Strategy & integration throughout existing laws/agencies**
    - **Biotechnology governed within existing framework**
        - Canadian Food Inspection Agency
            - Responsible for agricultural products, including seeds, fertilizers, feeds
        - Health Canada – responsible for traditional and novel foods under the Food and Drugs Act, including genetically modified food
        - Environment Canada – responsibilities regarding biotechnologies under CEPA, 1999
    - **Novelty threshold**
        - Seeds, animal feed, food subject to assessment if they are novel
        - Novel product "exhibits characteristics that were not previously observed or no longer exhibits characteristics that were previously observed"
            - Experts suggest that a separate and more robust review of biotechnology products should be in place

PROTECTED AREAS

Regulated at many levels:

- International
    - International Union for Conservation of Nature (IUCN) suggests 6 dif classes from full wilderness areas down to multi-use zones
    - Convention on Biological Diversity
    - Canada's international goal is by 2020 we'll protect 10% of our coastal and marine area & 17% of our terrestrial land. Jefferies predicts we are currently at 9-10% for terrestrial protection & 0.1% for marine.
- Federal
    - *Canada National Parks Act*
        - can set aside land and use for future benefit, usually land of unique quality
    - can set aside migratory bird sanctuaries and additional wildlife areas
- Provincial
    - provincial parks. More land mass than Fed parks.
- Private land owners
    - Nature Conservancy of Canada – buys land for the purpose of conserving it

LAND USE PLANNING

Broad plans -> Rules & Controls ->Subdivision procedures -> Administrative Processes

- Key players: Provinces & Municipalities
    - prov has a broad land use framework that supersedes municipal plans
- Broad provincial plans AND broad municipal plans
- Fight happens around legal subdivision
- Land Use Planning
    - Designation of geographic areas for uses and settlement
    - Impose specific rues to control use of land

    - Control division or partitioning of lands into smaller parcels
    - Create procedures to ensure stakeholders and other affected individuals and agencies have a role in decision making
- Roles and responsibilities
    - Municipalities have primary responsibility for land use decision making
    - Provincial governments retain an overriding role
- Zoning Bylaws
    - Provide specific, legally enforceable rules and requirements for the use of the land, and for the use and location of buildings and structures on land - Local municipalities responsible for passing bylaws
- Subdivision/severance
    - Consent to sever – permission to divide a lot into two parcels for sale
    - Subdivisions – plan for dividing parcel into many plots to be sold separately

BROWNFIELD REDEVELOPMENT

- Abandoned, underused or derelict sites of previous human activity
- More efficient to redevelop these lands that to expand human footprint to green fields
- Ontario initiatives to encourage brown field development:
    - Records of site conditions
    - Grants and loans
    - Tax incentives
    - Mortgage incentives

ENVIRONMENTAL ASSESSMENT

ENVIRONMENTAL ASSESSMENT

- **What?**
    - Legislated intervention in decision-making
- **Why?**
    - Sectoral regimes are inadequate
    - Dealing with diversity, complexity
- **Goals?**
    - To change/influence project design and scope
        - Avoiding detrimental effects
    - For proponents to integrate the environment in their decision-making
        - Taking into account broader issues and complexity and diversity
    - From **cost (to be avoided)** to an **imposed consideration**
    - Transparency
- ***International Association for Impact Assessment:***
    - Defines an EA as: "the process for identifying, predicting, evaluating, and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made"

POTENTIAL FEATURES OF EA, DEPENDING ON JURISDICTION

- beyond physical processes to plans/policies – in what stage of planning should the EA happen?
- integrated social, cultural and economic considerations
- compare and contrast proposed activity with alternatives
- cumulative effects
- management of uncertainties

- mitigation only or mitigation + positive effects
- depth of public participation
- public hearings + funded interveners

EARLY DEVELOPMENT IN NORTH AMERICA

- **US Progenitor: National Environmental Policy Act, 1969**
  - Anticipation of impact + mitigation/avoidance strategies
  - Compare their proposed project to alternatives
  - Report on the outcome publicly
  - Judicially reviewable
    - Question is whether technical legality was followed
- **Canadian Progression:**
  - 1972 policy-based EA process (assessment required but implementation discretionary and no penalties for non-compliance)
  - 1982 internal review concluded it was ineffective
  - 1984 *Environmental Assessment Review Process* ***Guideline Order*** (under *Government Organization Act;* an attempt to issue guidance in a non-mandatory way—a discretionary order)
    - Government attempt to buffer up policy assessment without making it binding
    - Guidelines are usually not mandatory, but orders are; this led to ligation
  - 1980s & early 1990s: provinces start to create their own environmental assessment processes
  - Canada continues to lag
    - Likely based on the amount of resource extraction that takes place and the hesitance to add costs/delays to that activity

EARLY CASES

- 1984 *Environmental Assessment Review Process Guideline Order*, under the *Government Organization Act*
  - on face value looked like discretionary order – but see these early cases

RAFFERTY-ALAMEDA DAM CASE, 1989 FC, AFF'D 1990 FCA – GUIDELINE ORDER REQUIRING ASSESSMENT HAD FORCE OF LAW

F: argued fed enviro assessment of dam discretionary even though fed approvals issued because transboundary river.

- decision established that assessment guideline orders had the force of law (Rafferty-Alameda dams, Saskatchewan)
  - Confirmed by the SCC in the Oldman River case in 1992

CANADIAN WILDLIFE FEDERATION CASE, 1989 – FEDS REFUSED TO DO ASSESSMENT – INJUNCTION ORDERED

F: Applicants sought an injunction b/c feds said wouldn't do an assessment b/c there was a valid provincial assessment.

- Court ordered injunction

FRIENDS OF THE OLDMAN RIVER SOCIETY, [1992] 1 S.C.R. 3 AT 71 – ENV. ASSESSMENT REQUIRED

- "Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision making…. The basic concepts behind environmental assessment are simply stated:

- 1) early identification and evaluation of all potential environmental consequences of a proposed undertaking;
  - Undertaking – any physical development
  - Does not include broader policy decisions such as budget decisions
- 2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation."

- SCC said EA needed. Don't need a purely environmental statute to give rise to an EA.

MODERN ENVIRONMENTAL ASSESSMENT

- Stepwise deliberation process
- Incorporate environmental logic into "conceiving, selecting, designing, reviewing, and implementing any proposed undertaking that could have important effects"
- Completed in anticipation of the broader approval process; prior to irrevocable decisions being made

Step by Step Approach - Alberta:

1. Environmental Assessment
   a. If it works well, there can be preventative measures instituted at this stage to avoid detrimental effects
2. Public Interest Decision
3. Approval (+Conditions)
4. Compliance + Enforcement

Who drives the assessment framework?:

- Proponent driven but overseen by government agencies
  - E.g. company drives the assessment process, carries out the assessment, which will then be approved by the board

Streams:

1. quick assessment – for projects that at a glance don't appear to have major effects or are not common
   - got rid of in fed assessment processes in 2012 (even though 90% of activities fell here)
2. comprehensive assessment – heightened level of scrutiny, Minister will set more requirements

Stumbling blocks – 4 Key Questions:

- What "undertakings/projects" are to be assessed?
- What is the nature/scope of what must be assessed?
  - Discrete impacts or cumulative effects
- How to ensure government/public scrutiny and public participation?
- How do results impact undertaking/project implementation?

FACTORS IN THE ASSESSMENT

Key question: is the proposed activity "acceptable"?

- What are the significant adverse effects?
- Can these effects be justified in the circumstances?

Advanced (mostly limited to physical projects):

- Integrated social, cultural and economic consideration
- Compare and contrast proposed activity with alternatives
- Cumulative effects
- Management of uncertainties
- Mitigation only *or* mitigation + positive effects
- Depth of public consultation/participation
- Public hearings + funded interveners
    - Public hearings only at the approval stage, not at the environmental assessment stage

ALBERTA'S ENVIRONMENTAL ASSESSMENT WITHIN THE REGULATORY PROCESS

Process:

1. Proposed Activity
2. Subject to Environmental Assessment? – look to the Regulations & ask the Director
    a. Exempt – no assessment
    b. Mandatory
        i. Requires EA
    c. Discretionary
        i. Screening and decision made to either:
            1. Not require EA
            2. Require EA
3. Environmental assessment
4. Terms of Reference
5. Technical Review

EPEA – EA PURPOSES

S. 40: Purposes of Environmental Assessment Process

The purpose of the environmental assessment process is

(a) to support the goals of environmental protection and sustainable development,

(b) to integrate environmental protection and economic decisions at the earliest stages of planning an activity,

(c) to predict the environmental, social, economic and cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the proposed activity, and

(d) to provide for the involvement of the public, proponents, the Government and Government agencies in the review of proposed activities.

ENVIRONMENTAL ASSESSMENT (MANDATORY AND EXEMPTED ACTIVITIES) REGULATION

- First order of business – what *must* go through the EA process?
    - Director of Environmental Assessment – proponent submits to the Director to ask whether a proposed activity requires an assessment
- Starts with the proponent submitting a "Project Summary Table" to the Director of Environmental Assessments
- Schedule 1: Mandatory Activities
    - E.g. dams larger than 15m, oil sands upgrader, pesticide plant, cement plant, steal plant, large landfills, coal mines, tourism facilities next to sensitive sites receives

- Schedule 2: Exempted Activities (Minister can mandate)
    - Water wells, transmission lines, small industrial factories, some sewage disposal systems
- Non-Scheduled Activities: Discretionary (Screening)

EPEA – DECISION TREE

s. 44(1) Initial Review by Director

Where a proponent or a proposed activity is referred to the Director under section 41, where the Director gives a notice under section 43 or where a proponent on the proponent's own initiative consults with the Director in respect of the application of this Division to a proposed activity, the Director shall,

(a) if the proposed activity is a mandatory activity, direct the proponent by order in writing to prepare and submit an environmental impact assessment report in accordance with this Division, or

(b) if the proposed activity is not a mandatory activity,

(i) make a decision that the potential environmental impacts of the proposed activity warrant further consideration under the environmental assessment process and require that further assessment of the proposed activity be undertaken, or

(ii) make a decision that further assessment of the proposed activity is not required and, if it is an activity for which an approval or registration is required, advise the proponent that it may apply for the approval or registration.

s. 45(1) Whether environmental impact assessment report required

Where the Director decides under section 44(1)(b)(i) that further assessment of a proposed activity is required, the Director shall, in accordance with the regulations,

(a) prepare a screening report regarding the need for the preparation of an environmental impact assessment report, and

(b) decide whether preparation of an environmental impact assessment report is required.

* This decision is not to be made until the period for filing a Statement of Concern has passed (see next slide)

* Minister can intervene and require an environmental impact assessment report at any step along the way (discretionary)

***EPEA* – Public Notice**

s. 44(6) Any person who is directly affected by a proposed activity that is the subject of a decision of the Director under subsection (1)(b)(i) may, within 30 days after the last notice under subsection (5) or within any longer period allowed by the Director in the notice, submit a written statement of concern to the Director setting out the person's concerns with respect to the proposed activity.

- Public notice made via newspaper or radio
- Directly affected – defined by physical proximity
    - Argument that this should be more broadly defined; for example, pipelines and climate change can arguably effect many people not immediately affected
    - This is a weakness with the process

S. 48: Terms of reference

- Where a proponent is required to prepare an environmental impact assessment report, the proponent shall prepare proposed terms of reference for the preparation of the report in accordance with requirements specified by the Director and shall submit the proposed terms of reference to the Director.
    - **Includes:**
        - Transportation infrastructure

        - Water management, air emissions controls, waste management controls, reclamation controls
        - Create a baseline assessment – describing the current state of the area:
            - Wildlife, diversity, forest cover, water, air quality
        - Public safety implications
        - Socioeconomic considerations
        - Cultural considerations
    - The Director reviews the Terms of Reference and publishes
        - Gives feedback to the proponent, who then develops the impact assessment report

S. 49: Contents of environmental impact assessment report – created by proponent

- Site selection process
- Baseline environmental factors
- Description of positive and negative outcomes for socioeconomic and cultural factors
- Analysis of potential impacts
- Analysis of human health concerns
- Comparison to alternatives
- Health and safety and contingency plans
    - Again, this report is reviewed and published to receive feedback

Technical Review

- Integration of the impact assessment report
    - **S. 51:** Provision of further information
    - **s. 52:** Mandatory publication of EIA

Off to the broader Approvals process

- based on public feedback on the impact assessment report and terms of reference and a review of the report, approval and conditions

FEDERAL ENVIRONMENTAL ASSESSMENT

CEAA, 2012

- CEAA, 1995
    - Approval/assessment was triggered for federal lands and federal legislation
- CEAA, 2012 + Regulations Designating Physical Activities
    - The approach was streamlined and eviscerated
        - previously looked at a broad range of adverse enviro effects but now just focused on issues within the direct regulatory authority of the federal government
        - result is fewer federal EAs with a much narrower scope of assessment.
        - A thorough assessment of projects will not take place under *CEAA, 2012* unless there is agreement to carry out a joint federal/provincial EA.
    - Justification for amendment?
        - Streamlining, reducing the number of approvals required by reducing triggers
        - Wanted less federal involvement
    - How was it rolled out?
        - Made more similar to the Albertan EPEA
        - Schedules of listed activities that required approvals

MININGWATCH CANADA V CANADA [2010, SCC] – MINE/MILL PROPOSAL SCREENING RATHER THAN COMPREHENSIVE STUDY – JUDICIAL REVIEW OF DFO DECISION SUCCESSFUL

- Company applied for proposed mine, mill to BC Assessment Board, and applied for proposed tailing pond dams to federal Department of Fisheries and Oceans
- Department of Fisheries and Oceans scoped the project as to exclude the mine and mill and, given this, concluded that a comprehensive study was no longer necessary and that the assessment would proceed by way of screening
- MiningWatch filed an application for judicial review of the decision to conduct a screening rather than a comprehensive study.
  - The Federal Court allowed the application, concluding that the responsible authority had breached its duty under the CEAA by scoping the environmental assessment so that it only required a screening.
  - The court quashed the decision to issue permits and approvals and prohibited further action by the responsible authority until it had conducted public consultation and completed a comprehensive study pursuant to s. 21 of the CEAA.
- The Federal Court of Appeal set aside the decision.
- SCC allowed the appeal
  - By conducting a screening, the responsible authority acted without statutory authority.
  - appropriate relief is to allow the application for judicial review and declare that the responsible authority erred in failing to conduct a comprehensive study.
  - No further relief is warranted.
  - The focus of MiningWatch's interest as a public interest litigant is the legal point to which the declaration will respond and there is no justification in requiring the proponent of the project to repeat the environmental assessment process

THE FUTURE OF ENVIRONMENTAL ASSESSMENT

1) **Upward harmonization**
   - Broad-based agreement across Canada about a common approach
   - Provincial assessments should be more similar to each other and more similar to the federal assessment
2) **Cumulative effects and Strategic Environmental Assessments (SEAs)**
   - Focus on the bigger, broader questions
   - Kicking in for larger scale policy decisions, not just physical actions
     - E.g. decision to increase oil sands development
3) **Sustainability-based assessment**
   - "Contribution to sustainability test" that requires "lasting net gains" and should lend itself to revealing the "best option"
     - Gains rather than just minimizing negative impacts
   - Goes beyond asking whether impacts are justified to asking whether there are lasting impacts
   - Some Joint Panel Reviews have tended towards this approach
     - Occur when the triggers for review occur at both the federal and provincial level
     - Occurred more often under the old CEAA; the CEAA 2012 allowed for provincial deferral, which becomes an issue calling for upward harmonization

SPECIES AT RISK

WELCOME TO THE ANTHROPOCENE – REDUCED POPULATIONS

- **WWF *Living Planet Report* (2016)**
  - Compared to 1970 baseline levels, 58% reduction in wildlife populations
  - Land-based: 38% reduction
  - Ocean-based: 36% reduction
  - Fresh-water based: 81% reduction
  - We are on track to lose 67% of wildlife populations by 2020
- Mass extinctions through history connected to major incidents in climate or natural disasters
- Extinctions positively correlated with extinction rates

COMPREHENSIVE RESPONSE NEEDED

- Manage direct threats
  - E.g. avoiding hunting into extinction
- Manage indirect threats
  - E.g. preserving habitat, minimizing pollutants to not impact on natural life cycles of a species
- Account for biological characteristics
  - Suiting the laws to specific species e.g. fish reproduce with many offspring; some species such as elephants produce few offspring and invest heavily
- Protect habitat in a preventative manner
    - National and Provincial parks
    - Marine protected areas
    - Resource extraction (i.e., update the EA process to account for cumulative effects of multiple projects, both new and pre-existing, on ecosystems. Discard the case-by-case approach for a regional assessment approach)
    - Level of planning e.g. watershed level management rather than drawing purely human boundaries

WHY A FEDERAL RESPONSE?

1. Species as the building blocks for healthy ecosystems
2. International obligation under the Convention on Biological Diversity (CBD) to develop and maintain the laws necessary to protect threatened species – Canada signed on in 1992
3. Avoid a provincial patchwork (note: provincial laws do exist)
    a. only have Wildlife Act in AB that is pretty much just used for hunting regulations. ON has good species at risk act.
4. Produce a federal/overall recovery plan
    a. Wildlife crosses borders; not tied to single provinces

- Federal land in provinces: national parks, exclusive economic zone off the coast (feds have a hook for all aquatic species, primarily for ocean species), Indian reserves, military bases, post offices. 94% of land in AB is not federal.
- Migratory birds may effectively be dealt with federally, also fisheries and ocean species.

SPECIES AT RISK ACT

- *Convention on Biological Diversity*: Canada signed and ratified in 1992
- *Species at Risk Act*: passed in 2002 after 3 previous federal attempts to pass endangered species legislation died on the order paper

- Reflects a compromise between industry, landowners, First Nations, political parties, and the Canadian public

Two ways to preserve species:

1. in situ measures – protect animals in the wild
2. ex situ measures – gene banks, zoos, seed banks, ect. to account for species lost in the wild. *SARA* focuses on in situ.

Tension: should species protection be a POLITICAL decision or a SCIENTIFIC decision?

- Note on the Canadian approach – very much a heel dragging and lagging approach
- Science should be engaged and should be used as a basis for the political decision - ultimately politicians need to make the decision and be expected to balance economic, social, and scientific information/values
- The legislation can allow for scientific recommendations, and rules for how the political decision must be made, with discretion (reasonable) – a political decision can be challenged and face judicial review – it can be held that the government decision was not reasonable or did not follow proper procedure

Preamble:

- "Canadian wildlife species and ecosystems are also part of the world's heritage and the Government of Canada has ratified the United Nations Convention on the Conservation of Biological Diversity..."

Section 6:

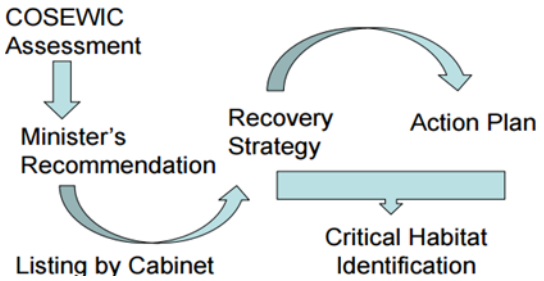
Purposes

- The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened

FEDERAL JURISDICTION

- Generally concerned with all species, but in particular "federal species" [aquatic species and migratory birds] and those species on "federal lands" [First Nations reserve, national parks, military bases, post offices]
- Can be extended to provincial lands through a "safety net" when the province lacks laws to protect species by agreement (s. 11), when existing laws are ineffective (s. 34 & 61(1)), or by emergency order (s. 81)
    - Extension can be made by the Minister
    - Few situations where this safety net has been implemented
        - E.g. first safety net was cast in Alberta to protect habitat of the Sage grouse

SARA PROCESS



Timeline:

- **Hurdle 1: getting listed**
    - 1. COSEWIC Assessment
        - Releasing of status report
    - 2. Ministers' recommendation
        - Minister of Fisheries and Minister of Environment
    - 3. Cabinet Listing – if don't respond in 9 months, the species becomes listed
- **Hurdle 2: recovery strategy and action plan**
    - 4. Recovery strategy
        - Requires there to be critical habitat identified
    - 5. Action Plan
        - Between recovery strategy and action plan, there needs to be critical habitat identification and protection for there to be meaningful action

(1) COMMITTEE ON THE STATUS OF ENDANGERED WILDLIFE IN CANADA (COSEWIC) ASSESSMENT

- Populated by experts in "conservation biology, population dynamics, taxonomy, systematics or genetics or from community knowledge or aboriginal traditional knowledge of the conservation of wildlife species" (s. 16)
- Triggered by production of a "Status Report" (s. 21)
- Anyone can apply to COSEWIC for a species assessment (s. 22(1))
- Must produce an assessment within 1 year of status report on the species (s. 23)
- Recommends "legal listing" of each assessed species by the end of each year
    - So COSEWIC is making a recommendation
- Assessment process modeled on international criteria (IUCN)

Special Concern, Threatened, Endangered, Extirpated…

- Extirpated: no longer exists in the wild in Canada, but exists elsewhere in the wild.
- Endangered: facing imminent extirpation or extinction.
- Threatened: likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction.
- Special Concern: may become a threatened or an endangered species.

(2) MINISTER RECOMMENDATION: POWER TO AMEND THE LIST RESTS WITH "GOVERNOR IN COUNCIL, ON THE RECOMMENDATION OF THE MINISTER"

- Section 27(1.1): accept assessment and list; decide not to list; refer back to COSEWIC for further evaluation
- 9 months for the Cabinet to decide, otherwise COSEWIC listing prevails
- List contained in Schedule 1 to *SARA*
- Reasons to be provided in the Public Registry
- Ministers engaged: DFO and EC

Basic Prohibitions Upon Listing

- S. 32: "Killing, harming, etc., listed wildlife species" & "Possession, collection, etc."
- S. 33: "Damage or destruction of residence"
- S. 58: "Destruction of critical habitat"
- **Exceptions?**
    - Special concern species not covered (endangered, threatened, extirpated are included)
    - Not applicable to provincial lands (70% of listed species on 94% of Canada's land-base)

        - What usually happens is that provinces subsequently add the species to their Wildlife Act to protect habitat
            - can have conservation agreements with provinces under s. 11
        - can intervene and make ss. 32 and 33 apply in the province through safety net (s. 34) and can make a critical habitat protection order under the other safety net (s. 61(4)) if provinces don't have measure in place to protect the species (s. 34), residences (s. 34) or their critical habitat (s. 61)
    - S. 34: "Application-certain species in provinces" AKA the "safety net"
        - If the province does not take action, federal government can institute the safety net

3) RECOVERY PROCESS: RECOVERY STRATEGY

- S. 37: "Recovery Strategy". Mandatory unless a recovery is not "technically and biologically feasible"
    - If species is too far gone to be effectively recovered, no recovery strategy is necessary
    - If possible, identify: threats to species and its habitat; critical habitat to extent possible; population and distribution objectives to aid recovery
- S. 42(1): **1 year** to post a "proposed recovery strategy" **for endangered species** and **2 years** for a "**threatened or an extirpated species"**
    - Minister must report on the implementation and progress on the recovery strategy within five years from its posting
- S. 38: Precautionary Principle endorsed as a driving factor in the recovery strategy process
- S. 43: Statutory allowance for public comment (60 days) and final plan (30 days)
- "Critical habitat" assessment becomes crucial (s. 41)
- Minister must report on the implementation and progress of the recovery strategy within 5 years from its posting (s. 46)
- Recovery strategy is to be based on scientific information and NOT socio-economic considerations
    - recovery strategy is a broad strategy to address threats to the species. Identifies:
        - threats to species and its habitat
        - critical habitat to extent possible
        - population and distribution objectives to assist with recovery

4) RECOVERY PROCESS: ACTION PLAN

- Mandatory (s. 47). Goal is to operationalize/implement the Recovery Strategy by specifying concrete recovery strategies. Provides detailed action measure to achieve survival and recovery of the species:
    - further identifies critical habitat and destruction activities
    - measures proposed to protect the critical habitat
    - methods to monitor species recovery
    - identify socio-economic costs and benefits
- socio-economic considerations here – looks at what is actually feasible based on the scientific recovery strategy
- Critical habitat again rests at the core of recovery actions

Recovery Process: Critical Habitat

- **Take away:** MUST move to protect critical habitat on federal lands/waters and can choose to do so outside of federal lands
    - So they MAY move to protect critical habitat on provincial lands – via s. 34
    - Must an imminent threat to a species

- **The key stage is getting a recovery strategy created – because when that recovery strategy is produced, there will thereafter be critical habitat protection put in motion**
    - So, the Minister can delay the production of a recovery strategy
    - You can bring a judicial review if the Minister delays outside the permitted timelines in the Act for producing
        - Court makes a determination that the actions of the government are unlawful and order action

Critical Habitat is the Golden Egg & it becomes legally identified through:

- must be identified in the public registry within 180 days (s. 57) after the recovery strategy or action plan
- s. 57 – purpose
- s. 58(1) – destruction prohibited
- s. 58(2) – protected areas
- s. 58(5) – Order or statement (of how habitat will be protected or what remedial action will take place or if there will be an Emergency Protection Order)
- s. 80 – Emergency orders (public or private lands) if species facies imminent threat
    - 80 (1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species
    - if species faces imminent threats the Minister must make the recommendation for an Emergency Order

PERSISTENT PROBLEMS

- Reassessment by COSEWIC has to happen at least every 10 years; species are 2X more likely to be re-designated as more threatened than less threatened at that second assessment
    - So improvements are rare
- Separation of scientific designation & legal designation is significant (i.e., 445 listings from 551 assessments)
- Critical habitat protection secured for only 5% of listed species
- Economic factors can lead to egregious decisions through the Regulatory Impact Analysis
- DELAY, DELAY, DELAY!
    - Majority of recovery strategies and action plans are past their time limits and can be challenged

LITIGATING SARA

- **Judicial review - what is it?**
    - Review of an administrative decision (e.g. AER or the Minister) by the courts
        - Held accountable to the law
        - E.g. Roncarrelli – making decisions outside his permitted scope of power
    - You have to make an application to the court to apply for a judicial review
        - Must pass initial hurdle of receiving standing to argue – have some merit to your case
        - Then must argue the merits of your case
    - Questions of law – judged on correctness
    - Question of fact - judged on reasonableness
        - Decision need only to have fell within a reasonable range of decisions
    - Interpretation of enabling legislation – probably legal issue – will likely be judged on the correctness standard
- **Judicial review – what remedies are available?**
    - Declaratory relief (right violation, wrong decision was made)

- Quash decision and remit for reconsideration
- Order of manadamus – order that compels action; an order to make a decision

- **Public interest litigants – who are they?**
  - Advancing a test case for the public good – not for individual or personal gain
  - E.g. Friends of the Oldman River – judicial review of decision not to require EA

ALBERTA WILDERNESS ASSN V CANADA (2009 FC) - SAGE GROUSE – FEDS ORDERED TO IDENTIFY CRITICAL HABITAT – S. 80 EPO ORDERED

Facts: application for judicial review of the 'Recovery Strategy for the Greater Sage-Grouse in Canada' (the Recovery Strategy) posted by the Minister of the Environment under the Species at Risk Act, S.C. 2002, c. 29 ("SARA")

- Basis: failure to identify any critical habitat
- The standard of review was one of reasonableness

Decision: application for judicial review is allowed as the decision of the respondent, to the extent that it fails to identify any critical habitat, is unreasonable

- Exclusion of critical habitat delineation was unreasonable

Reasons:

- NOT discretionary under s 41(1)(c) for the Minister to identify critical habitat – it was mandatory to identify critical habitat
  - Claim by the Minister: unable to identify critical habitat
  - Court accepted the application for judicial review
- Dr. Aldridge's "source habitat" model presented the necessary detail
- Why the federal government would have been hesitant to identification of the habitat:
  - Farmland and oil and gas activity in southern Alberta
  - Little federal land in southern Alberta
  - Identifying critical habitat would potentially cause a jurisdictional dispute between the federal government and the provincial government

Following the decision:

- 2014: Emergency Protection Order issued
  - In the face of imminent threats (s 80 of SARA) to the survival of a species that necessitates immediate action, competent minister makes recommendation to the Cabinet to issue an emergency order

ENVIRONMENT DEFENCE CANADA V CANADA (DFO), (2009) 2009 FC 878 – NOOKSACK DACE

Ratio: recovery strategies must identify "critical habitat, to the extent possible, based on the best available information"

F: brought judicial review of failure to comply with s. 41(1)(c) for Nooksack dace (minnow) based on the rule of law for critical habitat geospatial delineation was removed from proposed Recovery Strategy

- The Recovery Strategy created by the Minister did not identify critical habitat while identifying loss of habitat as one of the main threats to the Nooksack dace's survival, and recommending habitat protection in ensuring the species' survival and recovery.
  - All the Minister did was say that future action was recommended
- Critical habitat geospatial delineation removed from the proposed Recovery Strategy by the Minister
  - Why did they do this?
- Once critical habitat is identified, it would make action to protect that habitat necessary
- standard of review: correctness, question of law

- Court analysis informed by obligations on the Convention for Biological Diversity and the precautionary principle (s. 38), and the exact wording of s. 41 to see what is required.
- held illegal, wording includes "must" so contrary to the rule of law and the precautionary principle

Decision: declare that the Minister acted contrary to law by failing to meet the mandatory requirements of s. 41(1)(c) of SARA in the Final Recovery Strategy for the Nooksack Dace.

- Held: Illegal; contrary to the Rule of Law and the precautionary principle

Reasons:

- Standard of review? Correctness. Re: A question of law
    - Most of these decisions should be measured on the standard of correctness in the judicial review
    - If there is an obligatory requirement, courts will tend to hold the minister to the standard of correctness
    - Interpretation of the legislation supports a standard of review of correctness, although the courts have also applied reasonableness in previous cases
    - Know the difference between the standards and be able to comment about it on the exam if a fact pattern arises
    - Reason, reason, reason… proceed on the basis of a standard of review on the basis of correctness
- Recovery strategies must, inter alia:
    - describe the species and its needs,
    - identify the threats to its survival and threats to its habitat; and
    - identify "critical habitat, to the extent possible, based on the best available information" including examples of activities likely to result in the destruction of critical habitat (s.41) (a), (b) & (c).

GEORGIA STRAIT ALLIANCE V CANADA (DFO) 2012 FCA 40 – MINISTER CAN'T RELY ON DISCRECTIONARY PROVISIONS IN FISHERIES ACT FOR PRESERVING CRITICAL HABITAT - ORCAS

Ratio: Minister cannot rely on cited provisions of the Fisheries Act as measures for preserving critical habitat where such provisions are subject to ministerial discretion

F: Judicial review based on failure to protect critical habitat as required by s. 58(5) for orcas. Minister suggested that *Fisheries Act* protections from s. 35 & 36 were sufficient.

- Subsection 58(5) of the SARA provides that the Minister must make an order under subsections 58(1) and (4) protecting the critical habitat of listed endangered or threatened aquatic species if such critical habitat "is not legally protected by provisions in, or measures under, this or any other Act of Parliament".
- standard of review: correctness, question of law because interpretation of legislation.
- *Fisheries* Act is discretionary, can't rely on a discretionary provision to fulfill a mandatory requirement. Court said s. 36 of *Fisheries Act* might qualify as sufficient existing measure if the existing measures persuade us to believe they are protecting habitat but we don't have that here.
- Illegal action, obligations not discharged.

Decision: Ministerial discretion does not legally protect critical habitat within the meaning of section 58 of the Species at Risk Act, and it was unlawful for the Minister to have cited provisions of the Fisheries Act in the Killer Whales Protection Statement where such provisions are subject to ministerial discretion

Reason:

- S. 58(5): Minister must make an order to protect critical habitat or file a statement indicating how existing enactments protect it
    - Mandatory for any critical habitat on federal lands and can be extended to provincial lands under an emergency order
- Minister suggested that *Fisheries Act* protections from s. 35 & 36 were sufficient. Were they?

- S. 35 allows for the Minister's discretion in permitting some destruction of fish habitat/entry of deleterious substances into waters
- As opposed to the mandatory requirement under s 58(5) that says that protection must occur
- So relying on discretionary protection as a mandatory protectionary measure is not sufficient and is incorrect
- Minister held to a strict standard

WESTERN CANADA WILDERNESS V. MINISTERS OF FISHERIES AND OCEANS AND THE ENVIRONMENT, 2014 FC 148 – 4 SPECIES WITH HABITAT UNDERLYING PROPOSED PIPELINE

- Judicial review sought on lack of protections and recovery strategies for a few species
- Species were carefully picked because their habitat would be crossed by the proposed pipeline, so the goal was to frustrate the development
- The applicants seek declaratory relief regarding the Ministers' conduct and orders of *mandamus* to compel the Ministers to perform their statutory duties in relation to the four species
  - Wanted an order of mandamus to force the Ministers to act in accordance with their duties and act within their specified time limits for actions
- [90] The Supreme Court of Canada has observed that adherence to the rule of law is a major feature of the Canadian democracy: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at para. 31.
  - Moreover, as Chief Justice Fraser observed in her dissenting opinion in *Reece*, the rule of law allows citizens to come to the Courts to enforce the law as against the executive branch of government.
- [91] Chief Justice Fraser went on to observe that "... [C]ourts have the right to review actions by the executive branch to determine whether they are in compliance with the law and, where warranted, to declare government action unlawful.
  - This right in the hands of the people is not a threat to democratic governance but its very assertion": at para. 159.

ALBERTA'S BOREAL CARIBOU – STATUS OF 7 HERDS

- Populations are declining – some by <70% in the past 15 years
- High levels of habitat disturbance (62-85%)
- Won't last 40 years without immediate aggressive action
- Loss of these herds would increase the risk of extinction for the entire species
- Species was listed but no critical habitat was delineated and protected; no EPO was issued

Alberta Wildlife Act

- Very limited protection, no protection of habitat
- 1960s style management approach, rather than a recovery approach
- Focused primarily on hunting, trafficking and possession of wildlife
  No legal requirement to protect Caribou habitat
- Various policies but no mandatory or concrete action required
  - E.g. Alberta Woodland Caribou Recovery Plan, Woodland Caribou Policy of Alberta, LARP – land use planning

ADAM ET AL V CANADA, 2011 FC 962 – BOREAL CARIBOU – JUDICIAL REVIEW SUCCEEDED – RESULTED IN FINAL RECOVERY PLAN BUT NO S. 80 EPO

Facts: Applicants are First Nation bands, Request made to the Minister for an emergency protection order (s. 80); Request denied!

- EcoJustice went to Federal Court to compel the Minister to act, arguing that the Minister has a mandatory duty to recommend an emergency order where evidence of imminent threats to survival or recovery exists (recall: 20-40 year projection)
- Minister's position: there are no imminent threats to the survival of Boreal Caribou because the current range and conditions are sufficient for 27 out of the remaining 57 herds in Canada
    - Wanted to avoid mandatory protections in Alberta
    - Therefore, we can lose Alberta's populations and still have boreal caribou
- Standard of review: standard or reasonableness

Decision: Judge held this to be unreasonable and remitted it back for reconsideration; final Recovery Strategy produced but no emergency order
    - Not an appropriate decision in light of the threats
    - EPO not engaged, it would have expanded critical habitat protection to provincial lands

Post-Decision:

- June 2016: Alberta's Caribou Action Plan (just under 5 million hectares designated for protection + other action)
- Action all began from a request for a judicial review

BABBITT V. SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, Supreme Court of the United, 1995 – interpretation of takings – included habitat modification

Ratio: "taking" or "harm" of a species includes habitat modification

Facts: Parties who were allegedly dependent on forest product industry brought action against Secretary of Interior and Fish and Wildlife Service (FWS) director, challenging regulation promulgated by Secretary under Endangered Species Act (ESA). The United States District Court for the District of Columbia, found regulations valid, and plaintiffs appealed. The District of Columbia, Court of Appeals initially affirmed, but on petition for rehearing, affirmed in part and reversed in part.

- Endangered Species Act of 1973 (ESA or Act) makes it unlawful for any person to "take" endangered or threatened species, § 9(a)(1)(B), and defines "take" to mean to "harass, harm, pursue," " wound," or "kill"

Decision: upholding the definition of taking or harm as interpreted by the Secretary to include indirect harm or habitat modification

Reasons:

- Secretary's definition of "harm," within meaning of ESA provision defining "take," as including "significant habitat modification or degradation that actually kills or injures wildlife" was reasonable.
    - ordinary meaning of "harm" naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species – indirect harm
    - ESA's broad purpose of providing comprehensive protection for endangered and threatened species supports the reasonableness of the Secretary's definition

CLIMATE CHANGE

- Approach:
    - any law and policy approach needs to be cross sectoral and integrated to deal with the problem, as it is integrated across sectors and government
- Current economic system – predicated upon endless economic growth and expansion and resource extraction – by definition, it is unsustainable
    - Negative externality – cost imposed on society or another person that is not internalized by the party that creates that cost – one party benefits while another is harmed, and the party that benefits is not forced to bear any burden of the cost
        - E.g. pollution

SCIENCE & ECONOMICS

THE BASICS OF CLIMATE CHANGE SCIENCE

The Earth's Atmosphere

- Accumulation of greenhouse gases in the atmosphere increases the reflection of heat back to earth's surface

Atmospheric Threats

- **Climate change is not the first atmospheric threat:**
  - Acid rain (SO2 & NOX)
  - Ozone depletion (Cl /Fl destroy stratospheric O3)
  - Smog (surface O3)
  - Particulate matter (coal-fired electricity)
  - Mercury and heavy metals (smelting activity, i.e., *Smith v. Inco Ltd.*)
  - All of these issues could be resolved by pinpointing certain compounds and specific industries, which differs from climate change

Climate Change

- **Contributors:**
  - Fossil fuel combustion, deforestation, land use changes, agriculture, animal husbandry, ocean destabilization, natural variation, consumption patterns
- **Consequences:**
  - Desertification, altered ocean currents, ocean acidification, sea level rise, altered precipitation patterns, increased incidences of extreme weather, melting ice caps, altered species habitat/ecosystems, famine, disease, etc.

COMPONENTS OF THE CLIMATE SYSTEM

1. **Atmosphere** – gases mixed in the troposphere, stratosphere and mesosphere, water vapour concentrated in the troposphere
2. **Oceans** – slower circulation than the atmosphere, but does store/release great amounts of energy as heat and acts as a carbon sink.
3. **Cryosphere** – frozen areas of high reflectivity that increase the overall reflectivity of Earth (albedo)
   - Incoming short radiation is absorbed by the Earth and emitted back as long wave radiation. Greenhouse gases (CH_4, H_2O, CO_2) absorb long wave radiation in the atmosphere and it increases the energy in the atmosphere → warming effect. Ice reflects back short waves so it does not add that energy into the atmosphere because GHG do not absorb short wave radiation.
4. **Lithosphere** – geo-physical dimensions of our planet – crust and upper mantle
5. **Biosphere** – Earth's flora and fauna
   - phytoplankton in the ocean and forests are carbon sinks b/c they take up carbon and release oxygen

Solar Engine

- Greenhouse gases are not transparent to longwave radiation – so, short wave radiation from the sun reflected by earth's surface becomes longwave radiation, and is retained in the atmosphere to a greater degree as the amount of atmospheric greenhouse gas increases

Climate v. Weather

- *Weather*: "Weather is what conditions of the atmosphere are over a short period of time"

- *Climate*: "climate is how the atmosphere 'behaves' over relatively long periods of time" – usually refers to 30-yr periods
- *Climate change*: "changes in long-term averages of daily weather"

Climate Change v. Global Warming

- Some areas are predicted to warm, others are predicted to cool
- Some areas are predicted to become more arid, others are predicted to become wetter

Basics

- Tyndall (late 19th Century) experimented with "coal gas" and found it is not transparent to long wave radiation
- fossil record indicated changes in climate in different regions
- Ice ages explained by alterations in solar intensity
    - Increases and decreases in CO2 – volcanic eruptions, large meteor impacts
- Natural variations of earth's change in temperature 40,000-100,000 years called Milankovich cycles.
    - based on how Earth moves around sun –orbit shape changes, coupled with tilt of the Earth
- 1963 – Keeling predicts that doubling atmospheric CO_2 could lead to a 4^0C temp increase
- paleoclimatology: ratios of oxygen isotopes suggests different temperatures (mechanism: the heavier molecule only evaporates with hotter temperatures) – proving large scale changes

We Have Upset the Trend?

- 2016 set to be the warmest year on record
- Highest ratio of carbon dioxide in the atmosphere on record (in ppm)
- Temperature increase has mirrored the CO2 increase
- We were on trend to experience a mini ice-age
- Question was whether we upset the natural trend of fluctuating temperatures – answer is yes

UNDERSTANDING THE TREND

- **Emergent CO2 primacy theory**
    - Largely focusing on CO2 in the atmosphere
- The climate science problem is exacerbated by limits to application of the scientific model
    - Difficult to model earth's climate in a lab setting
- Coupled Ocean-Atmospheric
    - Models predicting overall effects by combining predictions modelled for oceans and the atmosphere
- *Climate sensitivity:* how resilient is the system to CO2 alterations
    - somewhat unknown – are there natural mechanisms that will operate to provide some corrections for climate change – feedback loops, carbon capacity, etc.
- By 2100 we could have an increase in temperature as high as 4-6 degrees (unlikely but catastrophic) but are definitely trending to pass 2 degrees (highly probably and problematic)

PREVAILING "MULTIFACTOR EXPLANATORY THEORY"

- Preferred alternative theory to the CO2 primacy theory
- **Uncertainties:**
    - Clouds & their albedo impact
    - Models that are not responding as predicted
    - Carbon soot – decreasing the albedo

- Natural variability & climatic sensitivity
- Positive and negative feedbacks
    - Positive feedbacks e.g. melting permafrost – releasing methane, reduced snow and ice pack – reduced albedo
    - Negative feedbacks e.g. clouds in the atmosphere, treeline moving towards poles

THE BASICS OF CLIMATE CHANGE ECONOMICS

Climate Change Economics

1) Present expenditure to benefit future generations
2) Present expenditure to primarily assist the developing world
3) Present expenditure with uncertain future benefits
4) Present expenditure further disadvantages present generations
5) Engrained status quo (consumers & producers)
6) Corporate & scientific manipulation
7) Political reluctance
    - Political cycles are short and the problems are long term – thinking about re-election

Climate Change & Our Faulty Paradigm

- We measure societal success in terms of growth
- GDP: total value of good and services produced over a time
- Is growth a false indicator of health?

The Steady State Economy

- Premised on mildly fluctuating population and consumption levels
- Depends on depends on finding the right balance / dynamic equilibrium
    - maintain ecosystem health and life-support services
    - extract renewables no faster than replenishment
    - consume non-renewables no faster than alternatives become available
    - produce waste no faster than it can be recycled or assimilated

REGULATORY OPTIONS

INTERNATIONAL COMMITMENTS

UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)

- 197 member states
- Entered into force on 21 March 1994
- FRAMEWORK convention that favours cooperation over liability
    - Control/enforcement mechanisms have never been a strength of international bodies like the UN
- goal: stabilize GHG concentrations in atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner [found in article 2]

KYOTO PROTOCOL (1997)

- Brought about by the UNFCC but was a stand-alone treaty on its own

- Annex A – GHG that are to be limited (CO_2, CH_4, N_2O, HFCs, PFCs, SF_6, NF_3)
- Annex B – the industrialized countries that are limited in their emissions of Annex A gases
  - Developed nations were required to reduce emissions by greater amount than undeveloped countries
  - Undeveloped countries had lesser targets
- Art 3(1)- Annex B states are to, in the aggregate, reduce emissions by 5.2% below 1990 in the first implementation period (2008-2012)
  - Reduction target with reference to baseline level date and an implementation date
- This corresponded to a 30% reduction below current levels
- Entered into force in 2005 when 55 countries accounting for 55% of global GHG emissions had ratified (Canada ratified in 2002)

***Kyoto Protocol* (1997) – How it operated**

- Did not operate through liability
- **Operates through:**
  1) Clean Development Mechanism (Art 12)
  2) Joint Implementation (Art 6)
  3) Emissions Trading (Art 17)
     - Contemplated a cap and trade system

"COPENHAGEN ACCORD" (2009): COP 15

- Not legally binding but "taken note of"
- Seeks to limit increase to 2 degrees (again)
- National targets voluntarily established
- Canada: 17% reduction from 2005 GHG levels by 2020 through a sector by sector approach. Here, Canada aligned itself with the USA in a mirror-image response
  - Looks like Canada will fail spectacularly
- *Kyoto Protocol* (1997): 2nd Commitment Period (2013-2020) – 18% reduction by 2020 compared to 1990 levels for participating nations

PARIS AGREEMENT (2015-2016)

- Agreement is unlike Kyoto in that it makes each nation commit to reducing emissions, not just industrialized countries
  - Every party that ratifies must give emission reduction target
  - Countries are bound to enact domestic legislation to meet their goals
  - No enforcement mechanisms
  - Did not set a global emissions budget
- Goal is to peak emissions in 5 – 10 years and by the mid-21st century, begin removing CO_2 from the atmosphere

***Paris Agreement*, functionally:**

1) GHG emissions to peak ASAP (pre-2050)
2) 2050 onward, focus on balancing and removing
3) GLOBAL participation through the key legal mechanism called the Nationally Determined Contribution. Obligated to take (domestic) measures to achieve, and to update every 5 years. Voluntary cooperation between states is encouraged, as appropriate
4) No enforcement or sanction

This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (this is the new goal)

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production;

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development.

2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances

RECAP: CANADA'S GLOBAL COMMITMENTS

- **Kyoto Protocol**
  - Canada's goal was a 6% reduction below 1990 by 2012
  - We withdrew and are not partaking in the second iteration
- **COP 15 "Copenhagen Accord" (2009)**
  - Canada's goal : 17% overall reduction from 2005 GHG levels by 2020 through a sector by sector approach (612 mT). Here, Canada aligned itself with the USA in a mirror-image response
  - Voluntary, not compulsory
- **Paris Agreement**
  - Intended Nationally Determined Contribution – 30% reduction from 2005 levels (523 mT/yr) by 2030
    - Strong rhetoric but current policies will not meet the objective – nowhere close
  - Well below 2 degrees is the target (probably somewhere around 400 mt)

APPROACHES AVAILABLE FOR REDUCING EMISSIONS – C & C SYSTEM AND CARBON PRICING

- 1) Command and control system
  - E.g. no more coal fired power generation plants
- 2) Carbon Pricing
  - Cap and trade system
    - Companies that reduce carbon output will have credits that they can sell to companies that produce more than what the permitted level
    - But there is no international market for carbon
      - There are some regional markets
    - First – you need a legislated ceiling on overall CO2 emissions (a cap on emissions)
      - Can be provincially set or federally set
      - May include everyone or just big polluters, industrial actors
      - Everyone is granted a certain number of units which add up to the permitted cap
      - There is an incentive to be under the cap to be able to sell his allotted carbon units

        - A polluter would have to show that they either stayed under the cap or purchased enough carbon credits
        - Each year
    - Carbon levy
        - $/ton on carbon produced
        - Carbon tax
            - Each year, the government will increase the carbon price

SECTORAL GHG ACCOUNTING

- 44% from stationary sources (electrical generation & fossil fuel mining/upgrading)
- 27% from domestic transportation
- 9% from fugitive gases (venting and flaring)
- Remaining 20% from other industrial processes, agriculture, and waste disposal

CONSTITUTIONAL FRAMEWORK

FEDERAL:

s. 91 – P.O.G.G. (national concern *(Crown Zellerbach)* & emergency)
- Federal government can regulate dumping in local sea waters because of inter-provincial/international impacts
- Emergency – must be a true emergency or war/famine situation
    - However, it could end up being a case where greenhouse gases become a serious enough issue to constitute an emergency to permit regulation by the federal government

s. 91(2) – Trade & Commerce

s. 91(3) – General taxation
- Federal government can impose an indirect or direct tax
- Federal government has said that they will impose a carbon levy in 2020 if provinces don't institute their own levy or cap and trade system

s. 91(27) – Criminal Law *(R v. Hydro-Quebec)*
- Challenge to the federal authority to impose sanctions for releasing pollutants under CEPA 1999
- Challenge failed; federal government can legislate for release of pollutants classified under CEPA

s. 92(10)(c) – Declaratory power ("for the general advantage of Canada")
- Used this to justify regulation for nuclear energy
- May also be able use this provision to regulate renewable energy
- This is a caveat subsection – s 92 otherwise describes provincial government powers

PROVINCIAL:

s. 92(2) – Direct taxation

s. 92(13) – Property and civil rights

MUNICIPAL:
- Not prescribed but action is possible (i.e., anti-idling by-laws, green building codes, etc.)

CANADA'S FEDERAL APPROACH

What we do not have:

1) A national climate change plan (pan-Canadian framework remains a goal; initiated with a base price: $10/tonne by 2018 and $50/tonne by 2020)

2) Federal climate change legislation – don't have a Canadian climate change act
- We have traditional regulatory measures attempting to influence greenhouse emissions

What we have:
- *Canadian Environment Protection Act, 1999* – good for acutely toxic substances
- Many regulations, some examples:
  - *Passenger Automobile and Light Truck Greenhouse Gas Regulations*
  - *Heavy-duty Vehicle and Engine Green House Gas Emission Regulations*
  - *Renewable Fuels Regulations*
  - *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*

CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999 S. 64 "TOXICITY DESIGNATION"

CONTROLLING TOXIC SUBSTANCES

For the purposes of this Part and Part 6, except where the expression "inherently toxic" appears, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that

(a) have or may have an immediate or long term harmful effect on the environment or its biological diversity;
(b) constitute or may constitute a danger to the environment on which life depends; or
(c) constitute or may constitute a danger in Canada to human life or health.

- 2005 GHG Listing: Carbon dioxide, Methane, Nitrous oxide, Hydrofluorocarbons, and sulfur hexafluoride
- Recall: Schedule 1 listing invokes federal regulatory authority to control import, export, use, release, and disposal
  - Once listed on schedule 1, federal government has the authority to regulate

CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999 REGULATIONS – CRIMINAL LAW POWER IN ACTION:

- Regulations Amending the Passenger Automobile and Light Truck Greenhouse Gas Regulations
  - Regulate the permitted fuel efficiency for new vehicles
  - Tightening restrictions on vehicle efficiency
- Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations
- Renewable Fuels Regulations
  - Certain percentage of fuel must be from a renewable source (biofuel, canola oil, vegetable oil)
  - Gasoline percentage – 5% renewable; diesel percentage – 2%
  - The 5% renewable requirement reduces carbon emissions by 2 Mt annually – which is very little
- Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations
  - Limit on the CO_2 that can be released per unit of energy generated – an efficiency requirement
  - Also phased out old technologies
- Each of these regulations is associated with corresponding actions that began in the United States
- **2014 Greenhouse Gas Emissions Reporting Program**
  - Required reporting of emissions to the government

ENERGY EFFICIENCY ACT

- *Energy Efficient Act* – performance and labeling standards for consumer goods that are "energy using products that are imported into Canada or shipped across provincial borders for the purpose of sale or lease"
- Implemented by *Energy Efficiency Regulations*
- Covers household appliances, heating and cooling equipment, small motors, and lighting
- Captures 71% of electricity used for household purposes and 50% used for industrial/commercial purposes
- Effective tool to shape consumer preference and gradually tighten emission controls

CEAA, 2012: ENVIRONMENTAL ASSESSMENT PROCESS

- **Recall:** federal EA limited to the listed activities
- If the project qualifies, then, in accordance with section 19, project proponents must consider "environmental effects", defined to include "any change the project may cause in the environment" and "any change to the project that may be caused by the environment" and then feasible mitigation measures
    - So new projects have to demonstrate some mitigation measures

Problem with the environmental assessment process:

- Environmental assessments account for on site, upstream emissions but not downstream resources
- New LNG (liquid natural gas) plant approved in BC
    - This was argued as having a positive impact by selling natural gas to countries that are currently burning coal (exchanging dirty for cleaner fuel)
    - But the process for processing LNG is very energy intensive – would produce a large amount of emissions

PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT V. CANADA (ATTORNEY GENERAL), 2008 FC 598 – ENV. ASSESSMENT SENT BACK TO PANEL – NO DETAILS ON MITIGATION PROVIDED

- Kearl oil sands project recommended for approval, sent back by the Federal Court upon judicial review
- Joint review panel was struck
- Agencies recommended government approval of the facility
    - Environmental assessment said that the company had stated that it would move to negate any emissions – move towards to zero emissions
        - No details on how that mitigation would be technically or practically feasible – the Pembina Institute challenged that measure
        - The Court struck down the decision of the panel and sent it back to the panel; there needs to be some basis for the panel's decision to approve the proposed mitigation measures
    - This showed the supplemental role of the environmental assessment process in regulating emissions

ROOM FOR FURTHER ACTION

- *Canada Transportation Act* – federal government with primary regulatory authority over air, marine, and rail transportation, administered by the Canada Transportation Agency
- *Mandate:* "competitive, economic and efficient national transportation system that meets the highest practicable standards and contributes to a sustainable environment"
- Administers tariffs and permits
- Possible to institute stringent efficiency standards

CHALLENGES TO CANADA'S FEDERAL APPROACH

- *Kyoto Protocol Implementation Act* – 2007 Private Members Bill
  - Took few measures and ineffective actions
- International Human Rights Petitions
- Domestic litigation against the federal government

FRIENDS OF THE EARTH V MINISTER OF THE ENVIRONMENT, 2008 FC 1183– INTERPRETATION OF DUTY OF GOVT TO ACT UNDER THE KPIA – APPLICATION DISMISSED

F: application for judicial review seeking declaratory and mandatory relief in connection with breaches of duties arising under *Kyoto Protocol Implementation Act*. Argued Act mandates feds set up a plan that meets our *Kyoto* requirements.

- Court said no, language is ambiguous and does not create this obligation
- Court said that ultimate accountability can only be found in the ballot box – no legal liability

TURP V. MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA - 2012 FC 893 – ALLEGED ILLEGALITY OF WITHDRAWAL FROM THE KYOTO PROTOCOL - DISMISSED

F: application for judicial review of decision of feds to withdraw from international protocol on climate change.

- Nothing in *Kyoto Protocol Implementation Act* set a requirement not to withdraw.
- We have a justiciability question (not a political questions doctrine like the US)

ALBERTA'S APPROACH

- Opted to NOT regulate through *EPEA* (although it can be engaged re: EIA since GHG are one factor to be considered during the process)
  - Have not regulated greenhouse gases as pollutants
- Regional GHG thresholds under the ALSA / LUF have not been set
  - Alberta Land Stewardship Act and Land Use Framework
  - Could set regional limits on greenhouse gases

CLIMATE CHANGE AND EMISSIONS MANAGEMENT ACT (2003)

- efficiency based reduction – GHG emissions to be reduced per unit of production. Emissions aren't set to an overall cap but the emissions are relative to a unit of production (ex. per car).
- ***Put another way, GHG emissions are reduced 50% below 2005 levels per unit of production* by 2020**

Specified gas emission targets

3(1) The specified gas emission target for Alberta is a reduction by December 31, 2020 of specified gas emissions relative to Gross Domestic Product to an amount that is equal to or less than 50% of 1990 levels. – An energy efficiency target, not a cap or a reduction

(2) The Lieutenant Governor in Council may make regulations

(a) establishing interim specified gas emission targets for Alberta;

(b) establishing specified gas emission targets and interim specified gas emission targets for different specified gases and for different sectors of the Alberta economy for the purposes of meeting the specified gas emission target for Alberta referred to in subsection (1).

***Climate Change and Emissions Management Act* (2003)**

Section 4 – Sectoral Agreements (targets, specifications, per unit emissions, etc)

Section 5 – Emission Offsets

- Pay offsets if you cannot reach efficiency targets

Section 6 – Mandatory Reporting

Section 10 – Climate Change and Emissions Management Fund

- Offsets would be paid to the public coffers

SPECIFIED GAS EMITTERS REGULATION - TELLS US WHAT THE ACT COVERS.

- Requires facilities that emit 100,000 tonnes or more of greenhouse gas emissions (GHG) to annually reduce site-specific emissions intensity by 12%
- allows for a net GHG increase in GHG emissions in the short term, increased pollution so long as the increase is efficient
- Captures 45% of provincial emissions
- **2015 amendment:**
  - Reduction increases to 15% as of January 1, 2016 and 20 as of January 1, 2017

Acceptable compliance techniques:

- **Make improvements at their facility to reduce emissions**
- **Use emission performance credits generated at facilities that achieve more than the required reductions**
- **Purchase Alberta-based carbon offset credits**
  - a carbon offset credit is a 1 tonne reduction in GHG emissions from a independently verified GHG project. Range in scope and involves implementation of a new management practice, technology and/or control systems that reduce emissions of a given process.
  - GHG projects listed in the Alberta Emission Offset Registry (AEOR) are quantifiable reductions of emissions, and are verified by an independent 3rd party
  - To date, over 33 million carbon credits have been issued
  - offset should be something that did not exist but for the investment by the company – ex. maintaining forest carbon sink, fuel switching, ect.
- **contribute to AB's Climate Change and Emissions Management Fund** (pay a fine to exceed limits)
  - $30 per tonne over the reduction limit as of Jan 1, 2017
  - CCEMF ($20 as of Jan. 1 2016 and $30 as of Jan. 1, 2017)
  - money put back into sustainable initiatives

ALBERTA'S NEW APPROACH

- Old emission intensity targets are still in place, but other objectives and strategies have now been engaged

Articulated in a Climate Leadership Report:

1. Implementing a new carbon price on greenhouse gas pollution (carbon levy on fuel use)
2. Phasing out coal-generated electricity and developing more renewable energy
3. A legislated oil sands emission limit – first time that a cap has been instituted
4. Employing a methane emission reduction plan

1. IMPLEMENTING A NEW CARBON PRICE ON GHG POLLUTION [CARBON TAX]

- Existing regulation means this carbon price is applied to large scale industrial emissions (allocated [output or value-added], tradeable, off-settable, and fund purchases)

- Implemented further through the *Climate Leadership Implementation Act* in the form of direct taxation, borne by consumers for fossil fuel combustion
- Revenues from the carbon pricing to be used for renewable and sustainable development projects
    - Revenue neutral – government does not make money, because any money made is used to offset other taxes paid
    - In Alberta, the tax is not necessarily revenue neutral
- Off-sets afforded to low income users
- Carbon levy: $20/tonne in 2017, $30/tonne in 2018
    - This translates to increased fuel prices for gasoline and diesel
- Legislation mandates that provincial revenue is to be invested in emission reduction strategies to promote mitigation and adaptation efforts
    - Projected to generate $9.6 billion over 5 years

2. PHASING OUT COAL-GENERATED ELECTRICITY AND DEVELOPING MORE RENEWABLE ENERGY

- 2013 electrical generation accounted for 17% of total GHG emissions; most from coal
- 8 coal mines; 5 produce coal for Alberta's electricity
- Alberta produces more coal pollution than all other provinces combined
- 12 of 18 coal fired power plants will retire under current federal regulations, by 2030; remaining 6 could have lasted until the 2050s (because those coal fired plants used new technology).
    - Federal government just announced that coal-fired plants will be phased out by 2030 as well, with an exception given to atlantic provinces
- Alberta brought in plan for a full phase out by 2030 with industry-wide carbon pricing help drive the shift to renewables; driven by the "zero emissions by 2030" policy
- To be replaced as follows: 1/3 by renewables; 2/3 by natural gas

3. A LEGISLATED OIL SANDS EMISSION LIMIT

- 2014: 24% of Alberta's emissions and 9% of total national emissions
    - The old approach allowed oil sands to continue increasing emissions as long as they became more efficient overall
- A $30/tonne carbon price will be applied to oil sands facilities. Goal is to drive reduced emissions and carbon competitiveness
- A legislated <u>emissions limit on the oil sands of a maximum of 100Mt in any year</u>, legislated in the proposed *Oil Sands Emissions Act*
    - This is not much of a limit – under business as usual, we will not produce this much for a long time
- This cap will not be met for at least 15 years (currently under 70Mt/year)
    - If we want to meet our Paris climate agreement targets, we need much lower cap
- Contains exemptions for co-generation of the electricity used at oil sands facilities
- New upgrading facilities (i.e., after Dec 31, 2015) will be subject to a separate 10Mt limit.

4. EMPLOYING A METHANE EMISSION REDUCTION PLAN

- Methane is 25x more powerful as a greenhouse gas than carbon dioxide
- Canada is the 4th largest global emitter of methane from oil and gas activity
- **Alberta to reduce methane emissions from oil and gas operations by 45 per cent by 2025 by:**
    - Applying new emissions design standards for methane control in new approved facilities
    - Developing a 5-year voluntary Joint Initiative on Methane Reduction and Verification.

- This initiative will include Alberta industry, environmental groups and Indigenous communities and it will take action on venting and fugitive emissions from existing facilities,
- including enhanced measurement and reporting requirements for new and existing facilities

COMPARE AND CONTRAST: GHG (CO2) VS TRADITIONAL POLLUTION (PESTICIDES)

- International law has driven law in Canada- it has been more influential on specific environmental pollutants like pesticides than for more integrative problems like greenhouse gases
- Both pesticides and greenhouse gases are pollutants – legislation for one has been effectively dealt with by command and control while greenhouse gases have not

- **International law driver**
    - *UNFCCC/Kyoto Protocol/Paris Agreement* v. *Stockholm Convention on Persistent Organic Pollutants* [2004] (pesticides: Aldrin, DDT, Endrin, Heptachlor)
    - Precaution, sustainable development, science-based decision making, intergenerational equity
- **Authority & implementation**
    - Pesticides: criminal law power; trade and commerce
    - *Pest Control Products Act*: science-based national registry that prohibits the use, manufacture, sale, import/export, of un-listed products. Listing based on human/environmental health risk assessment
        - Products that end up on the list are permitted as being safe or justified
            - The products listed in the Stockholm Convention are not on this list
        - We have a rag tag approach for climate change and greenhouse gases; no overarching, cooperative approach
- **Cooperative or combative federalism**
    - Complimentary or additional provincial action *(EPEA & Pesticide Sales, Handling, Use and Application Regulation)*; provincial and municipal bans on cosmetic pesticide use *(*Ontario's *Cosmetic Pesticide Ban Act*; 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), SCC 2001*)*
    - Each province and municipality has different regulations for greenhouse gas emissions – federal government and provinces have taken their own approaches
    - For pesticides, this is not the case: each level has their own legislation but the provinces further and are in accordance/informed by the federal legislation, rather than being combative
        - Provinces are permitted to be more stringent than the federal government
        - Municipalities are also permitted to take their own complimentary actions

CLIMATE CHANGE: READING NOTES

CLIMATE LEADERSHIP REPORT TO THE MINISTER

CARBON COMPETITIVENESS REGULATION

- Carbon pricing is the most flexible and least-cost way to reduce emissions as it encourages reductions in emissions to occur in whichever ways best suit individual processes, abilities and circumstances for households and businesses, while not forcing specific technologies, actions or outcomes.
- **Our proposed Carbon Competitiveness Regulation would:**

- broaden the carbon pricing signal in Alberta to cover approximately 90% of the province's emissions, up from less than 50% today;
- provide a consumer rebate to mitigate the impacts of carbon pricing on low- and middle-income Albertans, fund complementary emissions-abatement programs and, where applicable, support a sound and just transition for labour and communities and strategies to protect small- and medium-sized businesses;

Specific recommendations include:

For large industrial facilities, the existing Specified Gas Emitters Regulation (SGER) should be replaced in 2018 with a Carbon Competitiveness Regulation (CCR), in which a carbon price is applied to industrial emissions.

- Sector-specific, output-based allocations of emissions rights should be used to mitigate competitiveness and employment impacts in trade-exposed sectors and to protect electricity consumers from significant and unnecessary rate increases.

Revenues from the carbon price should be used for defined purposes. The program as suggested would lead to net revenues reaching approximately $3 billion by 2018 once the end-use emissions pricing has been fully phased-in, and potentially rising to over $5 billion by 2030. The Panel recommends that this revenue be used for four purposes.

a) To offset impacts on low and middle income households by providing them with a bi-annual consumer rebate

b) To double-down on additional carbon emissions reductions by investing in the complementary policies listed below to reduce emissions intensity of our electricity and oil and gas production, to increase the pace of technological innovation and thus add value to our resources, and to improve the energy efficiency and resilience of our homes, businesses, and communities;

c) To support transition needs of workers and communities and to enable full inclusion of Aboriginal communities d) To provide incremental fiscal capacity for other government priorities including infrastructure

Complementary Policies

- Electricity – Phasing Out Coal, Phasing in Renewables
- Oil and Gas – Pricing Carbon and Reducing Emissions from Methane
- Energy Efficiency and Energy-Resilient Communities
  - Encouraging efficiency by municipalities
- Technology and Innovation
- Full Inclusion of Aboriginal Peoples
  - recommend that government assist in the development of a centre of Aboriginal peoples' knowledge which can act as an important information resource as Aboriginal peoples partner with the province on a government-to-government basis in implementing Alberta's climate change policies, including essential future work on climate change adaptation.

CLIMATE CHANGE ESSENTIALS – MCCARTHY TETRAULT

- There is wide variation among national plans in terms of scope and ambition.
- Member nations are required to put forward a plan, but as noted above, the pledges by countries to reduce emissions are voluntary and there are no legal requirements around how – or how much – countries should reduce emissions.
- That said, negotiators have built certain legally binding commitments into the Paris Agreement, including a requirement that countries present updated plans every five years (starting in 2020) with ever-tightening emission reduction targets.

- Countries will also be required to undertake a global stocktake in 2023 (and every five years thereafter) to assess their collective progress toward achieving the goals of the Paris Agreement.

Climate Change – Demystifying the Terminology

- Greenhouse gases (GHG) are naturally occurring gases in the earth's atmosphere that trap some of the sun's heat and prevent it from escaping into space, thus insulating the earth.
- Essentially, the carbon budget represents the amount of carbon dioxide emissions the world can emit while still having a likely chance of limiting global temperature rise to 2 degrees Celsius above pre-industrial levels.

Carbon Pricing Market Mechanisms

- two main types of carbon pricing mechanisms available to policymakers: emissions trading systems (ETS) and carbon taxes.
  - with an ETS, the quantity of emission reductions is known, but the price is uncertain.
  - With a carbon tax, the price is known, however the quantity of emissions reductions is uncertain.

Emissions Trading Systems

- Emissions trading is a market-based approach used to manage GHG emissions by providing economic incentives for participants to reduce emissions.
- Regulated entities that reduce their GHG emissions below their target will require fewer allowances and can sell any surplus allowances to generate revenue.

Carbon Tax

- A carbon tax puts a price on each tonne of GHG emissions generated from the combustion of fossil fuels.

Emission offsets

- Emission offsets are quantified and sold in tonnes of CO2e and can be bought or sold through brokers, online retailers or trading platforms
- Anyone can purchase emission offsets to balance their GHG emissions.
- As a result, demand for emission offsets around the world has led to a large and growing carbon market, which is divided into two segments:
  - (1) compliance market, which includes government-regulated programs (such as the European Union ETS) that require regulated entities to reduce their emissions; and
  - (2) voluntary market, which covers activities that are not required by government regulation as part of mandatory GHG reduction programs (or activities that are above and beyond what is required by regulation).

Climate Change Policy in Canada

- May 2015, Canada submitted its Intended Nationally Determined Contribution (INDC) to the UNFCCC Secretariat, pledging a 30% reduction from 2005 levels – approximately 523 Mt – by 2030
- proliferation of regional climate initiatives to fill the void left by national inaction on climate change.
  - Early regional initiatives such as the Western Climate Initiative (WCI) and the Regional Greenhouse Gas Initiative (RGGI), have given way to larger regional initiatives such as the Under 2 MOU, which brings together states and regions willing to make key emission reduction commitments and to help galvanize action at the international level.
  - the Pacific Coast Collaborative (PCC), which is a framework for co-operative climate action that was established in 2008 by BC, Washington, Oregon and California.
    - PCC members have agreed to develop or maintain a price on carbon and to align carbon policies, where feasible, in areas that include: clean energy, emergency management, regional transportation, research and innovation, and sustainable regional economies.

- On the east coast, the New England Governments/Eastern Canadian Premiers (NEG/ECP) Annual Conference (NEG/ECP Conference) has been instrumental in setting regional emission reduction targets for the Atlantic provinces.

Provincial Action

- British Columbia
  - Three of the more prominent policies included the introduction of a revenue neutral carbon tax, a carbon neutral government initiative and the implementation of a low carbon fuel standard.
  - Covering over 70% of provincial emissions, the BC carbon tax is considered the most comprehensive tax of its kind in North America.
  - The tax is currently set at $30 per tonne of CO2e and is designed to be revenue neutral
- Alberta
  - A carbon price will be applied across all sectors, starting at $20 per tonne on January 1, 2017 and moving to $30 per tonne on January 1, 2018.
  - This price will increase in real terms each year after that. On-site combustion in conventional oil and gas will be levied starting January 1, 2023 while that sector works to reduce methane under the government's new Joint Initiative on Methane Reduction and Verification.

FILLING THE GAPS IN CANADA'S CLIMATE CHANGE STRATEGY: "ALL LITIGATION, ALL THE TIME..."? - CAMERON JEFFERIES

- executive inaction
  - most pertinent example is systemic ministerial delinquency pursuant to Canada's Species at Risk Act ("SARA").
  - Once listed on Schedule 1, SARA is clear: the competent Minister must prepare a proposed, and then final, recovery strategy in accordance with timelines prescribed by law.

WHY LITIGATION MAY BE THE SOLUTION

- First, tort-based nuisance claims and other claims seeking damages awards are able to compensate those that have been directly and severely impacted.
- Second, successful constitutional or human rights litigation has the potential to force legislative changes or executive actions, the benefits of which ultimately extend beyond those directly engaged in the litigation

CLIMATE CHANGE LITIGATION WITH CANADIAN CONTENT

- Petitions to the Inter-American Commission on Human Rights
  - Inter-American Commission on Human Rights (the "IACHR") is an autonomous regional human rights body that exists under the Organization of American States.
  - first petition was lodged against the United States by the Inuit Circumpolar Council (the "ICC," then known as the Inuit Circumpolar Conference) on December 7, 2005. This petition alleged that the United States, as the world's largest GHG emitter, violated a number of human rights of the Arctic's Inuit residents, including the rights to culture, property, life and security, health subsistence and inviolability of the home.
  - Petition was ultimately rejected by the IACHR on the threshold issue of admissibility
- Domestic Canadian Climate Change Litigation
  - Canadian courts do not subscribe to the American Political Questions doctrine, nor does Canada have a strict constitutionally entrenched separation of powers.
  - Rather, the justiciability analysis turns on an assessment of whether the issue at hand "possesses a sufficient legal component to warrant a decision by a court"
  - Turp v. Minister of Justice and Attorney General of Canada

- Friends of the Earth v. The Minister of the Environment
- **Novel approaches**
  - innovative human rights-based litigation
  - possibility of engaging strategic climate change litigation using section 7 of the Charter - implicit right to a healthy environment
  - claimants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person.
    - SCC has indicated that what is a required is "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant];"
  - Once they have established that section 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental Justice.
    - recent jurisprudence cements that this assessment turns on whether the impugned action is arbitrary, overbroad, or has consequences that are grossly disproportionate to its objective

SELECT ISSUES IN MONITORING, COMPLIANCE, AND ENFORCEMENT: HOLDING OFFENDERS ACCOUNTABLE

THE STRANDS OF ENVIRONMENTAL LAW

1) Criminal & Regulatory Law (State regulation; State prosecution)
- What sanctions are available?
- What is the form of the offence?
- Ultimate utility

2) Administrative Law (public interest intervention & judicial review)
- Standard of review? Powers? Standing to be a party?

3) Common Law of Torts (private citizen action)

CRIMINAL LAW AND REGULATORY OFFENCES

- No direct criminal law provisions for environmental offences
  - So criminal provisions act tangentially to environmental offences
- In the event that there is a serious injury or loss of life then the State may pursue criminal charges
- Criminal negligence (ss. 219, 220, 221) – using hazardous substance in a way that endangers people
- Common nuisance (s. 180) – substance released causing harm, usually health issues

CRIMINAL LAW – BENEFITS AND DRAWBACKS

Benefits:
- Criminal stigma
- Accompanied by the full force of the law
- Can be brought against corporate actors that have control over corporate policy
  - So, in Lac Megantic, both the company, conductors, and corporate decision makers could be held liable

Drawbacks:
- Onerous burden of proof (Beyond reasonable doubt)
- Prosecutorial discretion & triage
  - Must be in the public interest and likely to succeed before prosecuting
  - Environmentally related offences don't fall on the important side of the triage priority list
    - Murder, sexual assault, etc. are given priority

CRIMINAL NEGLIGENCE

219 (1) Every one is criminally negligent who

(a) in doing anything, or
(b) in omitting to do anything that it is his duty to do,
shows wanton or reckless disregard for the lives or safety of other persons.
(2) For the purposes of this section, duty means a duty imposed by law.

- Example: **Lac-Mégantic Oil Railway Disaster**
  - Derailed, large release of oil into the soil and many people died – widespread pollution
  - Transport train was loaded with crude oil
  - There was a breaking error
  - Train entered center of city and derailed
  - Prosecutions under both the Fisheries Act, criminal negligence, and most seriously, criminal negligence causing death
  - Train company now bankrupt, trust fund for victims

CAUSING DEATH BY CRIMINAL NEGLIGENCE

220 Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable
(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
(b) in any other case, to imprisonment for life.

CAUSING BODILY HARM BY CRIMINAL NEGLIGENCE

221 Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

COMMON NUISANCE

- Public nuisance was first articulated in the criminal law
- Common nuisance is the criminal law form of public nuisance
- So even a private tort in public nuisance should be brought by the attorney general because of its connection to the criminal code

180 (1) Every one who commits a common nuisance and thereby
(a) endangers the lives, safety or health of the public, or
(b) causes physical injury to any person,
is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Definition
(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby
(a) endangers the lives, safety, health, property or comfort of the public; or
(b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

REGULATORY OFFENCES

- *Regulatory offences* came to be an area where punishment *without specific intent* made sense.
  - would trigger the defence of mistake of fact or reasonable care
- Likely only able to justify *no fault* liability for very minor infractions

REGULATORY OFFENCE STANDARDS

***R v City of Sault Ste Marie*, 1978 SCC**

1. True crimes *(actus + mens rea)*

2. Strict liability *(actus* to be proved with defence of reasonable care/mistake of fact on a balance of probabilities*)*
    1. Permits defence of due diligence
3. Absolute liability (no fault or negligence required)

***Levis (Ville) v Tetreault,* SCC 2006**

- prosecutions (enviro regulatory offences fall here) is strict liability, thus presumption of defences of due diligence and mistake of fact available.

REGULATORY OFFENCES
EPEA – ACTIVITIES REQUIRING APPROVAL

Prohibition

60 No person shall knowingly commence or continue any activity that is designated by the regulations as requiring an approval or registration or that is redesignated under section 66.1 as requiring an approval unless that person holds the required approval or registration.

- Knowingly – imports higher mens rea, more severe punishment permitted

Prohibition

61 No person shall commence or continue any activity that is designated by the regulations as requiring an approval or registration or that is redesignated under section 66.1 as requiring an approval unless that person holds the required approval or registration.

- No "knowingly" so no heightened mens rea, meaning strict liability is presumed, defence of **due diligence permitted**
- There will be a lesser penalty

Analogous prohibitions for activities requiring notice

EPEA – RELEASE OF SUBSTANCES

Prohibited release where approval or regulation

108(1) No person shall knowingly release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval, a code of practice or the regulations.

(2) No person shall release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval or the regulations.

(3) For the purposes of this section, if there is a conflict between an approval or a code of practice and the regulations as to an amount, concentration, level or rate of release of a substance, the most stringent requirement prevails.

Prohibited release where no approval or regulation

109(1) No person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.

(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect. – removed "knowing" requirement

(3) Subsections (1) and (2) apply only where the amount, concentration, level or rate of release of the substance is not authorized by an approval, a code of practice or the regulations.

(4) No person may be convicted of an offence under this section if that person establishes that the release was authorized by another enactment of Alberta or Canada.

R V AUTO BODY SERVICES RED DEER LTD., 2014 ABPC 168 – PROOF REQUIRED BY CROWN - RELEASE OF A SUBSTANCE CHARGE UNDER THE EPEA S. 109

- Autobody services allowed for release of water in a large amount that flooded farmland, making it unfarmable for several years

[123] In order to convict the defendants of Count 1 the Crown must prove the *actus reus* of that offence beyond a reasonable doubt.

- The Crown must prove beyond a reasonable doubt that the defendants:
  (a) released or permitted the release of a substance;
  (b) into the environment;
  (c) in an amount, concentration or level or at a rate of release;
  (d) that causes or may cause;
  (e) a significant adverse effect.
    - Must be non-trivial, beyond de minimis

Adverse effect: [137] "Adverse effect" is defined in section 1(b) of EPEA to mean "impairment of or damage to the environment, human health or safety or property".

[141] … "adverse effects" to be "more than trivial".

Causation: [146] The common law rule [for causation] as stated by the Supreme Court of Canada in *R v Smithers*, 1977 CanLII 7 (SCC), [1978] 1 SCR 506 is that is the impugned conduct must be at least a contributing cause outside the de minimis

Substance: [154] Section 1(mmm) of EPEA defines "substance" to include, inter alia, any matter capable of becoming dispersed in the environment.

Environment: [155] Section 1(t) of EPEA defines "environment" to include the components of the earth and to include, inter alia, air, land and water.

EPEA – DUTY TO REPORT RELEASE

110(1) A person who releases or causes or permits the release of a substance into the environment that may cause, is causing or has caused an adverse effect shall, as soon as that person knows or ought to know of the release, report it to

(a) the Director,
(b) the owner of the substance, where the person reporting knows or is readily able to ascertain the identity of the owner,
(c) any person to whom the person reporting reports in an employment relationship,
(d) the person having control of the substance, where the person reporting is not the person having control of the substance and knows or is readily able to ascertain the identity of the person having control, and
(e) any other person who the person reporting knows or ought to know may be directly affected by the release.

EPEA - DUTY TO TAKE REMEDIAL MEASURES

112(1) Where a substance that may cause, is causing or has caused an adverse effect is released into the environment, the person responsible for the substance shall, as soon as that person becomes aware of or ought to have become aware of the release,

(a) take all reasonable measures to
  (i) repair, remedy and confine the effects of the substance, and
  (ii) remediate, manage, remove or otherwise dispose of the substance in such a manner as to prevent an adverse effect or further adverse effect,
  and
(c) restore the environment to a condition satisfactory to the Director.

EPEA - RELEASE OF SUBSTANCES PROHIBITED

148 No person shall release a substance or permit the release of a substance into any part of a waterworks system

(a) that causes or may cause the potable water supplied by the system to be unfit for any of its intended uses, or

(b) that causes or may cause the concentration of the substance or of any other substance in the potable water supplied by the system to vary from the specified concentration for the substance set out in any applicable approval or code of practice or the regulations.

EPEA – HAZARDOUS SUBSTANCES AND PESTICIDES – E.G. R V SYNCRUDE CANADA (TAILING PONDS/DUCKS CASE)

Storing and handling

155 A person who keeps, stores or transports a hazardous substance or pesticide shall do so in a manner that ensures that the hazardous substance or pesticide does not directly or indirectly come into contact with or contaminate any animals, plants, food or drink.

EPEA – GENERAL WASTE OFFENCES

General prohibition

176 No person shall dispose of waste except

(a) at a waste management facility, or in a container the contents of which will be taken to a waste management facility, that is the subject of the appropriate approval, registration or notice required under this Act, or

(b) in accordance with the written authorization of the Director.

- **Also prohibitions against waste dumping on public land (s 178), public highways (s 179), on water or ice (s 181), or another person's land (s 182)**

EPEA – HAZARDOUS WASTE

Disposal of hazardous waste

192 No person shall dispose of hazardous waste except in accordance with an approval, a code of practice or a registration or as otherwise provided for under this Act.

EPEA - LIMITATION PERIOD

226 A prosecution for an offence under this Act may not be commenced more than 2 years after the later of

(a) the date on which the offence was committed, or

(b) the date on which evidence of the offence first came to the attention of the Director.

OFFENCES

227 A person who

(a) knowingly provides false or misleading information pursuant to a requirement under this Act to provide information,

(b) provides false or misleading information pursuant to a requirement under this Act to provide information,…

REGULATORY OFFENCES - PENALTIES

228(1) A person who commits an offence referred to in section 60, 87, 108(1), 109(1) or 227(a), (d), (f) or (h) is liable

(a) in the case of an individual, to a fine of not more than $100 000 or to imprisonment for a period of not more than 2 years or to both fine and imprisonment, or

(b) in the case of a corporation, to a fine of not more than $1 000 000.

- These are the offences with higher mens rea requirement

(2) A person who commits an offence referred to in section 61, 67, 75, 76, 79, 88, 108(2), 109(2), 110(1) or (2), 111, 112, 137, 148, 149, 155, 157, 163, 169, 170, 173, 176,188, 191, 192, 209, 227(b), (c), (e), (g) or (i) or 251 is liable

(a) in the case of an individual, to a fine of not more than $50 000, or

(b) in the case of a corporation, to a fine of not more than $500 000.

- These are the strict liability offences

(3) A person who commits an offence referred to in section 178, 179, 180, 181 or 182 is liable

(a) in the case of an individual, to a fine of not more than $250, or

(b) in the case of a corporation, to a fine of not more than $1000.

…

REGULATORY OFFENCES - DUE DILIGENCE DEFENCE AND LIABILITY

229 No person shall be convicted of an offence under section 61, 67, 75, 76, 79, 88, 108(2), 109(2), 110(1) or (2), 111, 112, 137, 148, 149, 155 (storage of hazardous materials), 157, 163, 169, 170, 173,176, 188, 191, 192, 209, 227(b), (c), (e), (g) or (i) or 251 if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission.

Liability of directors and officers

232 Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted for or convicted of the offence.

- Liability is cast broadly for potential parties who can be held liable

FISHERIES ACT

Serious harm to fish

35 (1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.

(2) For the purposes of this Act, serious harm to fish is the death of fish or any permanent alteration to, or destruction of, fish habitat.

Throwing overboard of certain substances prohibited

36 (1) No one shall

(a) throw overboard ballast, coal ashes, stones or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on;

Deposit of deleterious substance prohibited

S. 36(3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water

deleterious substance means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water

Punishment not otherwise provided for

- **Section 78 Except as otherwise provided in this Act, every person who contravenes this Act or the regulations is guilty of**

(a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding one hundred thousand dollars and, for any subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both; or

(b) an indictable offence and liable, for a first offence, to a fine not exceeding five hundred thousand dollars and, for any subsequent offence, to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both.

S. 78.6 establishes the Due Diligence defence

PRIVATE PROSECUTIONS

- criminal prosecutions are rare – usually only occur when there is serious injury or loss of human life
- regulatory prosecutions – more common but still very rarely proceeded with because:
    - lack of man power
    - lack of resources
    - triage effect
    - not treated as seriously by prosecutors
- Every citizen has the right to initiate a private prosecution against a person, or an entity, who allegedly violates the Criminal Code or a legislated statute that provides for penalties for violation. - This is what occurred in R v Syncrude
- The Attorney General can step in on a private prosecution, and then simply stay the charges if they wish. - Still comes down to prosecutorial discretion whether the action proceeds

Prosecutorial Discretion

- Decisions made on the basis of likelihood of conviction and public interest

SENTENCING - APPROACHES

1. Traditional Approach

- Fines that are sufficient to secure deterrence (modified by aggravating and mitigating circumstances)
- Fine or sanction monetarily

2. Re-vamping the Traditional Approach

- Increasing fines; diversion processes; "creative sentencing"
    - Creative allocation of the fines to support research, preservation, or remediation/reclamation
    - Taking out an advertisement in a national paper and explain the wrong (dry cleaner's case)
- creative sentencing – focusing on restoring the environment and diversion processes (move them out of court)
    - EPEA s. 234(1)

CREATIVE SENTENCING UNDER *EPEA*

Court orders relating to penalty

234(1) When a person is convicted of an offence under this Act, in addition to any other penalty that may be imposed under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects:…

R V UNITED KENO HILL MINES LTD, 1980 (YUKON)

- Goal of regulatory offences: change behaviour to promote sustainability

- **The main factors that will be considered:**
  - Liability net will generally be cast quite wide (corporate and personal)
  - Sentencing will vary based on whether we are dealing with an individual or a corporation
  - Punishment shall vary based on the nature of the environment affected and the extent of damage inflicted
- **Other factors that a court will consider:**
  - Degree or criminality; diligence towards compliance; remorse of actor (actions to remedy/voluntary reporting/participation of corporate executives); size and wealth of corporate actor; prior record; evaluation of available sentencing tools (what else is available)

ADMINISTRATIVE LAW

RECOURSE TO THE COURTS

- Recall: the role of prosecutions (federal and provincial / criminal and regulatory) (+ limited private prosecution)
- Recall: court action and the pursuit of remedy is not limited to criminal/regulatory prosecutions
- **Examples:**
  1. Judicial review asks the courts to consider the appropriateness/legality of administrative decision-making
  2. Environmental cases can be civil actions advanced as the application of traditional torts; still available today

ADMINISTRATIVE PROCESSES

Generally concerned with procedural fairness:

1. reasonable notice of a proposed decision and key issues against affected parties;
2. a fair opportunity to be heard, orally, or in writing; and
3. an impartial decision maker

- Goal of balancing fairness and efficiency. Some of the rigors of the traditional court process will be relaxed in the administrative sphere.

Generally:

- No automatic right of appeal administrative decisions to the court; look to see if granted by statute, or you have to use your common law right to apply for judicial review
  - look for a statutory right (see s. 45 *Responsible Energy Development Act*) or seek judicial review
  - for judicial review, you need standing (*Finlay v Canada*, SCC 1986)
  - Two possible forums of appeals:
    - Another administrative tribunals
    - Appeals to court
- hold *de novo* hearings
- may allow for oral and/or written submissions
- hearings, when allowed, will be public
- to participate as an individual you have to be "directly affected"
  - whether an individual is directly affected varies from case to case. Generally, to be directly affected a person must prove that the effects upon them are greater than the average Albertan
- can challenge Minister orders (*Fenske v Alberta (Minister of the Environment)*, 2002 ABCA, though court found the Minster's order was not unreasonable)

- Two standards of review (*Dunsmuir*): correctness and reasonableness with more and more deference given to administrative decision makers (sometimes even with statutory interpretation that should be a question of law and thus should use correctness!)

INSTANCES/STRANDS OF ADMINISTRATIVE REVIEW OF SPECIAL INTEREST FOR ENV. LAW

1. Review of a decision made by a Minister/Director under environmental legislation by an administrative body created for that purpose (i.e., *EPEA's* Environmental Appeals Board)
2. Substantive review by the courts. Statutory right of review/common law right of judicial review. Pertains to a decision made under environmental legislation by the Minister/Director or administrative tribunal

1. REVIEW OF A DECISION BY MINISTER/DIRECTOR
EPEA - ENVIRONMENTAL APPEALS BOARD ESTABLISHED

90(1) There is hereby established the Environmental Appeals Board consisting of persons appointed by the Lieutenant Governor in Council.

(2) The Board shall hear appeals as provided for in this Act or any other enactment.

- Also applies to appeals under the *Water Act*

(3) The Board may convene a panel of Board members to conduct a hearing of an appeal and appoint a person to chair the panel.

- Group of experts, not judges; may be scientists, engineers, etc.

(4) Where a panel is convened, the panel has all the powers of the Board and is subject to all the same duties the Board is subject to, and a reference in this Act to the Board is to be read as a reference to the panel.

NOTICE OF APPLICATIONS AND PROPOSED CHANGES

72(1) Where the Director receives

(a) an application for an approval under section 66,

(a.1) an application for registration under section 66 or a notice under section 87 or 88 and the Director has given notice under section 66.1 that the application or notice is deemed to be an application for an approval,

(b) an application under section 67(2) in respect of a change to an activity, or

(c) an application under section 70(1)(a) to amend a term or condition of, add a term or condition to or delete a term or condition from an approval,

the Director shall, in accordance with the regulations, provide or require the applicant to provide notice of the application.

Statement of concern

73(1) Where notice is provided under section 72(1) or (2), any person who is **directly affected** by the application or the proposed amendment, addition, deletion or change, including the approval holder in a case referred to in section 72(2), may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or the proposed amendment, addition, deletion or change.

- The Director then makes a decision on the approval/addition/modification

Notice of appeal

91(1) A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

(a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2),

Where the Appeal moves forward:

s. 94 – Hearing of Appeal

s. 95 – Powers of Board

s. 98(1) – Decision of the Board – confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make

- broad authority of the board

s. 102 Privative Clause Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

2. Substantive Judicial Review

- Look for a statutory right *or* seek judicial review

1. STATUTORY RIGHT OF APPEAL

Statutory right from *Responsible Energy Development Act*:

- **Appeal on a question of jurisdiction or of law**
  - **45(1)** A decision of the Regulator is appealable to the Court of Appeal, with the permission of the Court of Appeal, on a question of jurisdiction or on a question of law.
  - So there is a limited ability to appeal decisions of the Board to the Court of Appeal

2. COMMON LAW JUDICIAL REVIEW

- **Traditional rule – person must have:**
  - Property interest
  - Personal health interest; or
  - Pecuniary (financial) interest
- ***Finlay v Canada*, SCC 1986** enunciates the (discretionary) public interest standing test that relieves some of harshness of traditional standing
  - The test is discretionary & should not be confused with blanket permission for public interest groups

Public Interest standing to bring judicial review requires:

1. Serious legal issue to be determined
2. Applicant with "genuine interest as a citizen"
   - Particular knowledge or expertise; having invested time and work on the issue
3. No other reasonable/effective manner to get the serious legal issue before the court

***Standard of review*: correctness or reasonableness.**

- **Correctness** – the Court will determine the correct outcome that should have been reached
  - Does not show deference to the decision maker's reasoning process

- **Reasonableness** – the Court will not interrupt the decision made below if it is within a range of reasonable decisions
    - Less probing review of the decision making process used by the decision maker
    - Within a range of reasonable, acceptable outcomes
- More and more we see discretion being afforded to administrative decision makers as courts tend to employ the reasonableness standard. Generally unwilling to second guess the decision-maker
    - Factors that determine standard of review:
        - Privative clause
        - Expertise of the decision maker
        - Policy vs technical issue
        - Law vs fact

- However, for **questions of law (including statutory interpretation), courts should employ the correctness standard**
    - Shift in the environmental context has been towards using a correctness standard

We have seen substantive public interest judicial review at work in the following cases (know the cases):

- *Alberta Wilderness Assn v Canada*
- *Environment Defence Canada v Canada (DFO)*
- *Georgia Strait Alliance v Canada (DFO)*
- *Allan Adam et al v Minister of the Environment et al*
- *Western Canada Wilderness v. Ministers of Fisheries and Oceans and the Environment*
- For each of these cases, the public interest standard was met
    - Also seen in *Ing v City of Toronto* (ban of shark fins in restaurants by municipal governent; challenged by judicial review)

FINLAY V CANADA, SCC 1986 – PUBLIC INTEREST STANDING DISCRETIONARY

- standing is discretionary
- with a judicial review, a private individual may not sue for declaratory or injunctive relief without the consent of the AG unless they can show what amounts to a sufficient private or personal interest.
- Have to show sufficient personal interest in the legality of the decision.

OTHER WAYS TO ADVOCATE BEFORE THE COURTS - INTERVENTIONA

Interventions

- Participation by a party that is neither a defendant or plaintiff

Ways to intervene in a case:

1. **Added Party**
    i. Apply for status – **test:** direct legal interests adversely affected *or* adversely affected
        - Applicant must establish that they have an interest in the subject matter or that they may be adversely affected by the judgment in the proceeding
    ii. If successful, become a party (submit evidence, cross-examine)
    iii. Exposed to adverse cost awards – if you are a burden to the process
2. **Friend of the Court *(amicus curiae)***
    i. Apply for status – test: able to assist the court in resolving issues before it
        - Not as onerous as becoming an added party
    ii. If successful, not granted party status; limited to submitting evidence
3. **Public Interest Intervention**

i. Common in *Charter* litigation and allowed when the court would benefit from different perspectives on the issue at hand

COMMON LAW OF TORTS IN THE ENVIRONMENTAL CONTEXT

AVAILABLE CAUSES OF ACTION

1) Trespass – "Trespass – "invasion of property"
2) (Private) Nuisance – unreasonable interference with use and enjoyment of property
3) (Public) Nuisance – public right or community at large is impacted
4) Riparian rights – quality and quantity of water
5) Strict liability *(Rylands & Fletcher)*
    1) People who bring onto their land for their own use anything likely to do harm if it escapes
    2) The thing brought upon their land must constitute a "non-natural" use of the land
6) Negligence – duty, standard, causation, foreseeability
7) Statutory causes of action
    - Limited and narrow in scope
    - Anyone can bring an action for violation of an environmental law
    - Must first request an investigation
    - Defendants not liable if they show due diligence
    - No damages available to plaintiffs

Causation

1) Usually the most difficult obstacle to a successful action
2) Causation requires "but for" causation proved on a BOP

TRESPASS TO PROPERTY

- Intentional and direct entry onto another person's land, or placing or allowing some substance or material onto that land
    - Technically, trespass to the body torts also apply e.g. battery, assault, but not really applicable in the environmental context

Elements of the tort:

1. Any direct and intentional invasion
2. Of property
3. By another person or any substance or object
4. In the absence of legal authorization

Actionable *per se* (i.e., do not need to prove actual damage to maintain a successful action)

- Do not need to prove that damage occurred, but if you can't show actual harm, may be limited in amount and kind of damages

Remedies: damages (nominal or general) and injunctive relief

Hole v. Chard (1894) – liability for discharging sewage into a river that crossed the plaintiff's property
Friesen v. Forest Protection Ltd. (Nova Scotia 1978) – aerial pesticide application

- Combatting spruce budworm
- Pesticide spread to private land and appeared to be trespass
- Farming family sought damages for trespass

Other situations: ash from a sawmill, deposition of rocks & waste, escaped water.

- Kinds of damages – clean-up costs

Main limitation is the directness requirement

- Did the contaminant/pollution arrive directly as a result of the defendant's action or was it deposited consequentially/indirectly?
- Drift scenarios (air or water currents): *Smith v. Inco*
  - A release and emission upwards, caught by wind and drifted onto another property – not direct enough
  - Could make an argument that there is foreseeability in wind and water direction
  - Still leaves room for negligence since no intent is required for negligence (but isn't that the same for trespasss?)
- Difficult to find a principled justification to maintain the directness requirement moving forward

NUISANCE

- Justice Rinfret remarked that "[p]ollution is always unlawful and, in itself, constitutes a nuisance."
  - Groat v Edmonton (City) 1928 SCR 522 at 532.
- **Classes of Nuisance**
  - (1) Public Nuisance: protecting the public from harm/damage
  - (2) Private Nuisance: landowners/occupiers protected from unreasonable interference caused by another

(1) PUBLIC NUISANCE

- An activity that unreasonably interferes with the public's interest in questions of "health, safety, morality, comfort or convenience" *(Ryan v. Victoria (City)*, SCC)
  - Question of fact that examines the extent of the inconvenience, the character of the neighbourhood, and the difficulty in reducing the risk
- harm involves injury to or interference with public rights, a situation in which individual litigants have no automatic entitlement or standing to pursue a claim.
  - Attorney general is usually the one who must start a public nuisance claim
  - **Quasi-penal tort:**
    - Available by right to the Attorney General
    - Available to a private party that has the Attorney General's consent
    - Available to a private party without the Attorney General's consent if they can demonstrate a "peculiar" or "special" damage
      - This is usually what has to happen because the AG will usually not pursue on their own

Environmental context:

- Interruption of the following rights allows for a public nuisance claim to be brought:
  - navigation; fishing in public waterways; enjoyment of beaches/shorelines

TATE & LYLE INDUST. LTD. V. GREATER LONDON COUNCIL – PUBLIC NUISANCE FROM POLLUTING RIVER THAMES

- dredging of the Thames by a sugar refinery and by the city
  - Sugar factory along the Thames
  - Tate brought action against Greater London Council for infringing on navigable rights for dumping in the river
  - Tate had to dredge the river to continue to be able transport their goods using the Thame river

MAIN HURDLES: STANDING – 1) AG DISCRETION, 2) SPECIAL DAMAGES TEST – HICKEY V ELECTRIC REDUCTION COMPANY OF CANADA

- 1) Attorney General's discretion to deny consent
- 2) Restrictive "special" damage test: ***Hickey v. Electric Reduction Company of Canada*:** fishermen suffered similar harm due to the pollution of a bay; as such, did not suffer any special damage
    - Collapse of fishery; fishermen brought public nuisance claim
    - Court said: no because everyone accessing the water was impacted in the same way; you don't meet the special damages test because you have not felt a special damage compared to the rest of society
    - Must suffer special injury to gain special damages – e.g. damage suffered must be different to an individual than the sufferance of all of the other resource users
- Note: interference with treaty/Aboriginal rights may be enough to constitute special damage as per *Saik'uz First Nation v. Rio Tinto Alcan*
    - Trial judge said that rights had to be proven before First Nation could pursue tort claim
    - Upper Court said no, aboriginal rights or title need not be proven before a tort claim can be made for interference

(2) PRIVATE NUISANCE

Classic statement:

- a private nuisance is an activity that results in an unreasonable *and* substantial interference with the use and enjoyment of land
    - Must be tangible damage
    - Must be a substantial interference - more than an inconvenience
- Goal: striking a balance between competing land uses
- Reasonableness to be considered in all situations, be it loss of amenity or actual physical harm
- Also look at the gravity of the harm, severity of interference, character of the neighbourhood, and sensitivity of the plaintiff

Classic circumstances: noises, odours, fumes, vibrations, etc.

- ***Groat v. Edmonton*, 1928 SCC**: "pollution is always unlawful and, in itself, constitutes a nuisance"
    - Strong statement from the court that pollution would constitute a private nuisance

Available remedies:

- Injunction and damages
- private nuisance claim offers the prospect of redress against environmental harm almost in direct proportion to the self-interest of the individuals affected.
- Other nuisance situations: sewage that escaped a septic lagoon; orchard fruit trees damaged from salt applied to an abutting highway; pesticides applied to non-target lands

Defences:

- evidence indicating that plaintiffs are abnormally sensitive to interference or perhaps that the plaintiff consented in some way to the nuisance.
- Statutory authority (municipalities)
- Defense that it was an inevitable consequence of expressly authorized statutory authority which attracts implicit legislative protection.
    - This turns on an assessment of whether there were alternate methods of conducting the activity *(Tock v. St. Johns)*
    - Plaintiff's challenge – to show that were other less damaging ways to carry out the activity

***GROAT V. EDMONTON*, 1928 SCC**: "POLLUTION IS ALWAYS UNLAWFUL AND, IN ITSELF, CONSTITUTES A NUISANCE"

- Strong statement from the court that pollution would constitute a private nuisance

- Facts: Grout family had a farm with stream running though their land – used the water for their domestic use, for their farm animals, and for some irrigation
    - The City of Edmonton started polluting the stream via storm drains, sewage, etc.
    - Stream could no longer be utilized by the family
    - Family sued the family in nuisance and in riparian rights
    - City was ordered to otherwise divert the flow from city streets and prohibit further leaking into the stream

TOCK V ST. JOHN'S (CITY) METROPOLITAN AREA BOARD – STATUTORY AUTHORITY DEFENCE

- where a blocked sewer operated by the defendant municipality resulted in flood damage to the plaintiff homeowner
    - language of the statute that gave authority to the municipality was considered by the Court to be permissive and not mandatory.
- Defendant must negative that there are alternate methods of carrying out the work
- Defendants may, however, enjoy more explicit immunity from nuisance claims on the basis of express legislative exclusions
    - E.g. typical in agricultural operations

SMITH V INCO LIMITED (ONCA)

Facts: residents in Ontario lived near a nickel refinery; they brought a class action against the refinery, alleging that property values had not increased compared to those of local municipalities because of concerns over nickel deposits in the soil

- class action based on trespass, public and private nuisance, and strict liability
- trial court found refinery liable in strict liability and private nuisance; ordered $36 million in damages

Decision: overturned the ruling

- **Example of the barrier of material physical damage**
    - "Under the common law of nuisance, sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in the larger community.
        - Sometimes, however, the party causing the adverse effect can be compelled, even if his or her conduct is lawful and reasonable, to desist from engaging that conduct and to compensate the other party for any harm cause to that person's property."
    - **Court not satisfied that the nickel particle deposition constituted physical damage of the land; needed "actual, substantial, physical damage to land" or levels that posed a risk to health and well-being**
        - Basically saying that private property rights cannot support a private nuisance claim unless there is direct material damage
        - mere chemical alteration of soil was not enough to count as physical harm or damage to the property
- nickel refinery was not a "non-natural" use of the land, so strict liability argument of *Rylands v Fletcher* failed
- could not show a detrimental health impact on persons or the environment

NUISANCE VS TRESPASS

- Trespass is actionable per se, meaning no need for proof of actual harm
    - But plaintiff must show directness of trespass e.g. Smith v Inco
- Nuisance – requires some proof of harm, but less of a problem with directness (showing that pollution came from the defendant)

RIPARIAN RIGHTS E.G. MCKIE V KVP, GROAT V CITY OF EDMONTON

- Landowners whose land borders a natural watercourse are entitled to take action to ensure the maintenance of the quality and quantity of the adjacent water supply
- Those land owners whose land is adjacent to or transected by a naturally occurring watercourse are "entitled to the water of his [her] stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality" *(John Young v. Bankier Distillery Co*, 1893*)*
- Seems to offer strict protection to property rights in water
    - Protecting usufructuary water rights
- Recall: *McKie v. KVP Co.*, 1949
    - Court sided with the plaintiff, but the legislature later expressly permitted the pollution
- Still available but modified by statutory water licensing schemes

STRICT LIABILITY (*RYLANDS V FLETCHER*)

- Liability for non-negligent conduct (i.e., even despite of reasonable conduct)
- *Rylands & Fletcher* – textile mill with underground water reservoir; burst and flooded neighbouring coal mines

Traditional statement of the law:

- (1) those who engage in highly dangerous (albeit legal) activities bear the costs if something goes wrong; and
- (2) non-natural use of land requirement (not present in the land's natural condition)

Hurdles:

- 1) non-natural use of land *(Smith v. Inco)*;
- 2) remoteness/foreseeability of damages *(Cambridge Water Co.)*
    - Also recognized in Canada

NEGLIGENCE

Negligence definition: Failure to exercise due care that results in harm to the plaintiff who is owed a standard of care

Elements of Negligence: 1) **Injury** or damages to the plaintiff, 2) must exist a **duty of care** owed by the defendant to the plaintiff, 3) Breach of the applicable **standard of care**, 4) **Causation**: breach of care must have caused the injury, 5) Not only must the breach of standard of care caused the injury in factual terms, it must also be proximal in cause (it must be closely connected and foreseeable) – **remoteness**

- Available in instances of inappropriate handling or storage of contaminants/pollutants
- **Proof of damage required;** factual causation can be difficult; personal/property damage compensable, financial loss may or may not be – harder to get compensation for pure financial loss
- Negligence can accrue to government agencies, too
    - Recall Ernst decision – suing AER predecessor and Alberta Environment as moderator
    - *Sevidal v Chopra* litigation arose in connection with the purchase of a residential property that had been contaminated several decades earlier with radioactive soil
        - Atomic Energy Control Board had found radioactive contamination on their property
        - Information not disclosed to purchasers
        - AECB was found liable for negligently misrepresenting the condition of the property under the doctrine of Hedley Byrne
        - Damages otherwise resulting 1mm the defendant's negligence may be reduced where the plaintiff's own negligence was a contributing factor

BERENDSEN V ONTARIO, 2009 ONCA 845 – FAMILY FARM, BURIED WASTE, NEGLIGENCE FAILED – NOT REASONABLY FORESEEABLE

- Family farm brought lawsuit against Ontario, claiming that the province had buried road waste which had contributed to damages to their farm – health of themselves and their cattle harmed
- Cause of action was in negligence for burying potentially toxic material near source of water and failing to remediate
- **Decision:** trial court ruled in favour of the plaintiff
    - ONCA overturned the decision
    - Negligence failed: damage that occurred was not reasonably foreseeable from burying waste in the 1960s

GOVERNMENT REGULATORY NEGLIGENCE

- Common law Crown immunity in tort has been abolished by statute: ***Crown Liability and Proceedings Act, s. 3; Proceedings against the Crown Act, s. 5***
    - The Crown can now be held liable in tort as if it were an ordinary person
- Acts of government employees or agents that would give rise to liability for a private person do not generally raise special considerations (eg, foreseeable injury to person or property)
- Government tort liability for acts specific to government, such as regulation, however, can raise difficult questions

Government Liability in Negligence

- SCC case law indicates that the framework for establishing a duty of care is the same for both private parties and government actors (***Cooper v Hobart; R v Imperial Tobacco***)

Proximity of relationship to create a duty of care:

- Normally, a relationship of proximity with respect to acts of government regulation must be found in the statute (***Cooper v Hobart***)
    - Duties owed to the general public are seen to be incompatible with a duty of care in relation to a specific subset of the population (***Cooper v Hobart; R v Imperial Tobacco***)
    - It is possible for a relationship of proximity for the purposes of negligent misrepresentation to be established through interactions giving rise to reasonable reliance, as long as this relationship is not negated by the statute (***R v Imperial Tobacco***)

Residual Policy Factors that negate duty of care:

- Even if a prima facie relationship of proximity is established, this may still be negated by residual policy factors
    - An important residual policy factor in government liability cases is the principle that the government should be immune from negligence liability for "core policy" decisions
        - Idea of only by liable for operational decisions (***Kamloops v Nielsen; Imperial Tobacco)***
        - Core policy decisions are decisions grounded in social, economic, or political considerations (***Imperial Tobacco***)
        - These decisions are usually made by legislatures or government officers whose job requires them to assess these kinds of considerations (***Imperial Tobacco***)

CLASS ACTIONS

- group of similarly impacted property owners usually, with an individual litigant representing the class.
- One plaintiff – the representative plaintiff – brings one action on behalf of all affected landowners
- Must have the class certified or approved by the court

- Class has to be certified, and they have to be able to demonstrate that there are common issues and the class action approach is the most appropriate way forward. (*Inco* was class action)

HOLLICK V TORONTO (CITY), 2001 SCC – CLASS ACTION CERTIFICATION FAILED

F: Landfill with fumes and emissions impacting residents around it. Looking to get certified as class to bring class action.

- SCC said not a class b/c a variety of claims (*Inco* was a class b/c all property owners claiming value had fell). Here different residents arguing different things, health issues, property value issues, contamination issues, ect.
- Difficult to get a class certification in the environmental context because best dealt with on a case by case basis

KINDS OF DAMAGES

- Special damages
  - Easily and objectively quanitified
- General damages
  - Not easily quantified – loss of enjoyment, future effects, pain and suffering, etc.
- Punitive damages
  - Awarded to punish the defendant
- Equitable relief: injunctions and declarations

DIFFICULTIES WITH PRIVATE COURT ACTIONS

- David Boyd points out how courts tend not to contribute to furthering environmental protection goals:
  - Historical bias toward private rather than public interests
  - Absence of constitutional environmental rights
  - Lack of access to the courts
  - High costs of litigation
  - Judicial deference to government decisions
  - Low penalties for environmental offences
  - Standing to pursue claims
  - Proving causation
  - Limited ability to challenge political decisions
  - Certifications for class actions – not always readily provided
    - Benefits of class actions:
      - Economic use of judicial resources
      - More likely to impact tortfeasor's behavior
      - Increased access to justice

ENVIRONMENTAL RIGHTS

AN ENVIRONMENTAL BILL OF RIGHTS & ACCESS TO INFORMATION

DIFFERENT PERSPECTIVES OF ENVIRONMENTAL RIGHTS

Human Rights

- Argument that environmental rights are human rights – need clean water and healthy environment to live

Democratic citizenry: What Rights / Obligations?

- Right to vote – environmental platforms
- Personal contributions/obligations

Free Standing Bio-centric Rights What Rights / Obligations?

- Focus on the environment, not human centric – environment itself has rights

Anthropocentric Environmental Rights

- Most likely to succeed for environmental protection/rights: human right to a healthy enviro, right to ecosystem services, clean air & H_2O, etc.
- "Give me but one firm spot on which to stand, and I will move the earth." **- Archimedes**

THE AMERICAN RIGHTS-BASED EXPERIENCE

US CITIZEN SUIT PROVISIONS

- Environmental statutes can give citizens the power to prosecute
- This citizen suit provision is found in US equivalents of SARA, CEAA, Fisheries Act, etc.

<u>US Citizen Suits</u> – not like Canadian private prosecutions, there is a statutory grant of power that gives private citizens enforcement capability.

- This citizen suit can be triggered when the state has failed to pursue prosecutions. If successful in maintaining a citizen suit, the court will award you costs.
- One way costs – if you are unsuccessful you won't get costs award against you.
- Considered a civil prosecution so the standard of proof is b.o.p. (Canadian private prosecutions have to p.b.r.d. – even if pursuing regulatory offences)

- **Benefits:**
  - facilitating citizen involvement in environmental policy making, influencing judicial interpretation of key environmental provisions, and enhancing the legitimacy of environmental laws and law-making processes.
  - easier to be successful than Canadian prosecutions because:
    - reduced standard of proof (p.b.r.d. vs b.o.p.)
    - less financial strain with costs award.
  - Can serve as a stimulus for private and public action
- **Features/limitations**
  - Must give notice to the government; the government (AG) can choose to step in
  - This right can be cut off from the citizen if they can prove that they are already diligently prosecuting (which can include considerable foot dragging)
  - Usually you are seeking injunctive relief

CANADIAN ANALOGS – NO EFFECTIVE CITIZEN SUIT PROVISIONS

- no Canadian laws contain "private attorney-general" or "citizen-suit" provisions modeled on those prevalent in American law.
  - Federally, while the Canadian Environmental Protection Act contemplates the right of a citizen to commence an environmental protection action, due to the limited and constrained nature of this right it has never been used
- potential to pursue private prosecutions has effectively been nullified by the government policies that oblige the Attorney General, as a matter of course, to assume conduct of all such cases;
  - a practice that almost invariably culminates in the prosecution being stayed.
  - Also high burden of proof – BRD – deters citizens

1) *CEPA, 1999:* ENVIRONMENTAL PROTECTION ACTION

17 (1) An individual who is resident in Canada and at least 18 years of age may apply to the Minister for an investigation of any offence under this Act that the individual alleges has occurred.

- So you can apply to prompt an investigation to the matter by a Minister

Circumstances when an individual may bring an action

22 (1) An individual who has applied for an investigation [s. 17] may bring an environmental protection action if

(a) the Minister failed to conduct an investigation and report within a reasonable time; or

(b) the Minister's response to the investigation was unreasonable.

(2) The action may be brought in any court of competent jurisdiction against a person who committed an offence under this Act that

(a) was alleged in the application for the investigation; and

(b) caused significant harm to the environment.

- So you can bring an environmental protection action but the Minister has to do very little to meet her obligations
- This provision has yet to be successfully followed

2) PRIVATE PROSECUTIONS

- "The right, if any, of a private prosecutor to prosecute another person is very limited and is clearly restricted by the provisions of the *Criminal Code* to cases where the Attorney General opts not to intervene"
- "The criminal process is not the preserve of the private individual."
    - It is the domain of the public interest: person accused + person affected + broader societal concerns

KOSTUCH V. ALBERTA (ATTORNEY GENERAL) (1995), 128 D.LR. (4TH) 440 (ALTA. C.A.) – CHALLENGED AG DECISION TO INTERVEN AND STAY PROSECUTION - DISMISSED

- The dispute at the centre of this litigation related to construction of the Oldman River Dam
- This case arises as an appeal from the dismissal of the apellant's application for an order setting aside the entry of a stay of proceedings by the Attorney General of Alberta with respect to a private prosecution she had filed.
- Kostuch alleged that the provincial Crown and others involved in the construction of the Oldman River dam were in violation of subsections 35(l) and 40(b) of the Fisheries Act.
- She claimed further that the AG's decision to intervene and stay her prosecution constituted a violation of section 7 of the Charter.
    - She also submitted that the power of the court to review the exercise of prosecutorial discretion by the Attorney General was not limited to cases of flagrant impropriety.

Decision: Appeal dismissed

- my view that it will not and cannot include the unrestricted right on the part of a private prosecutor to continue a criminal prosecution in the face of an intervention by the Attorney General

Reason:

- **prosecution policy established by the Attorney General of Alberta contains a two-fold test:**
    - (1) the evidence must be such that there is a reasonable likelihood of conviction when the evidence as a whole is considered; and
    - (2) whether the public interest requires prosecution
- learned Chambers Judge found that the Alberta Government had acted in good faith in approving the construction of the dam.
- test for review of prosecutorial discretion remains that of flagrant impropriety, and is not unreasonableness

THE CANADIAN EXPERIENCE

- *Early 1970s*: ENGOs emerged and challenged a lack of public participation in environmental governance/decision-making
- *Late 1970s*: The push for an environmental bill of rights began
- *Charter* Negotiations: Free standing right to a "clean and healthy environment" considered at Standing Committee; rejected
- 1984: first proposal for a Federal Environmental Bill of Rights (since revived in 2009, 2011, and 2013-2014)
- Environmental Bill of Rights type documents in QB, ON (since 1993-94) and MN (promised)

- broad normative purposes in these statutes (see ON example page 368 of textbook)
- these enviro rights bills have focused on public empowerment – individual rights

BILL C-634: AN ACT TO ESTABLISH A CANADIAN ENVIRONMENTAL BILL OF RIGHTS

- This did not become law, but this is how it has been proposed multiple times:

Purpose

6. The purpose of this Act is to

(a) safeguard the right of present and future generations of Canadians to a healthy and ecologically balanced environment;

(b) confirm the Government of Canada's public trust duty to protect the environment under its jurisdiction;

- public trust duty – not really a public trust duty found to exist in Canada
- In the United States, there is a public trust doctrine that allows citizens to sue the government over the government mismanaging public resources – started with water issues, ongoing litigation over atmospheric issues

(c) ensure all Canadians have access to

(i) adequate environmental information,

(ii) justice in an environmental context, and

(iii) effective mechanisms for participating in environmental decision-making;

(a) provide adequate legal protection against reprisals for employees who take action for the purpose of protecting the environment; and

- whistleblower protection

(e) enhance public confidence in the implementation of environmental law.

Rights and Obligations

Right to Healthy Environment

9. (1) Every resident of Canada has a right to a healthy and ecologically balanced environment.

Government's obligation

(2) The Government of Canada has an obligation, within its jurisdiction, to protect the right of every resident of Canada to a healthy and ecologically balanced environment.

- Both positive and negative obligations

Duty to protect the environment

(3) The Government of Canada is the trustee of Canada's environment within its jurisdiction and has the obligation to preserve it in accordance with the public trust for the benefit of present and future generations.

- Ability to sue for current impacts and future likely impacts

* Public Trust: American common law doctrine applicable to public water and lands (including resources)

PROVINCIAL ACTION

- Quebec, Ontario (*Environmental Bill of Rights, 1993*, S.O. 1993, c. 28), and Manitoba (Bill 20: *The Environmental Rights Act*)
- In Territories and Quebec, statement of rights have been made but little done to unpack those rights

Common Focuses of Bills of Rights:

- Broad normative purposes (p 368)
- Specific Focus of Public empowerment, major themes:
  - Participation rights
  - Court access
  - Whistle-blower protection

- Accountability

THEMES OF ENVIRONMENTAL RIGHTS FROM ONTARIO ENVIRONMENTAL BILL OF RIGHTS

1) public participation rights

a) right to receive Notice & opportunity to comment on proposed statutes/regulations
- public is notified of proposals and instruments through information posted on the Environmental Registry

b) A caveated right to seek leave to appeal a decision on an instrument
- gives an ability for interested individuals (not just directly affected individuals) to challenge approvals.
- before a challenge will be heard, an individual suggesting they are interested must show:
  - Does the person have an interest in the decision – that is, a relationship, history, or involvement with the subject matter of the decision?
  - Does it appear that there is good reason to believe that the decision is unreasonable, having regard to the relevant law and gov't policies?
  - Does it appear that the decision could result in significant harm to the environment?

c) A right to request to review of an existing law or instrument
- if you think an existing enviro law or regulation is ineffective, you can make a request to the ministry in charge of implementing that statute for a review of the law/regulation.
- Generally it is discretionary if the minister wants to take it on, though.

d) A right to request an investigation into a potential violation of an environmental law
- instead of taking up a public prosecution, the bill of rights is giving you a way to request the gov't initiate an investigation.
- If decision by gov't is not to investigate they have to give written reasons why not.
- Analogous to CEPA, s 17

2) court access
- can create new civil actions (or change old ones)

a) **Ability to sue for "significant harm to natural resources"** – akin to USA citizen suits. Fairly strict process for engaging in this civil action, due diligence defence available.
  - High threshold, new way to access existing instrument, rarely advanced

b) **Lower thresholds for public nuisance actions** – don't have to show more affected than the public at large, this now says ANYONE that suffers a loss as a result of public nuisance can bring a claim.
  - Alleviates the issue of requiring a person to have experienced special loss to be able to sue for environmental harm under public nuisance

c) **Right to seek public interest judicial review**
- Right to review a government decision
- Meaning that onerous public interest standing would not need to be met before applying for a judicial review of government decisions on these issues

3) whistle-blower protection
- added guarantees beyond wrongful termination lawsuit.
- this is absent from most enviro statutes
- broad scope for who you can hold liable – can prosecute an employee, officer, director, company, ect.
- gives statutory protection against possible retribution by employer
  - 35(1) An employer must not take or threaten to take adverse employment action against an employee for
    - (a) applying for a review under section 8 or an investigation under section 10;

- (b) seeking the enforcement of any Act or regulation that seeks to protect the environment
- (c) providing information to an appropriate authority for the purposes of a review, investigation or hearing under this Act; or
- (d) giving evidence in a proceeding under this Act.

4) accountability

a) **Environmental Commissioner** – watch dog position created by the Bill of Rights, this individual monitors the implementation of enviro statutes and the effectiveness of the enviro bill of rights itself and reports back to the legislative assembly.
   - Based on the recommendations you may see amendments or improvement of implementation of the bill of rights.

b) **Statements of Environmental Values** – any implicated ministry making decisions about the environment has to provide a statement of environmental values.
   - Ministers have to consider that statement at every reasonable step to ensure the environment is considered whenever decisions that might significantly affect the environment are made.
   - Uncertain if you can have a judicial review of these. But one way to start things if their justification is unreasonable.

ACCESS TO INFORMATION:

How do interested parties generally access information?

1. Environmental statutes – mandating disclosure (i.e., *CEPA, 1999's* National Pollution Release Inventory)
   a. General rights of any resident to have access to specified kinds of environmental information
2. General Access statutes – what can be or must be produced (ex. *Freedom of Information and Protection of Privacy Act*).
   a. You can make a FOIP application for making information available that was gathered e.g. water quality tests
   b. Try and make an application that the gov't has a duty to provide this.
3. Notice and disclosure – right to notice and disclosure of the against you in civil and criminal proceedings (procedural fairness)

PROBLEMS WITH BILLS OF RIGHTS

- Easy to change
- Not interpreted as broad and purposively as Charter rights

CONSTITUTIONAL RIGHT TO A HEALTHY ENVIRONMENT

United Nation on Recognizing New Rights – and how it applies to enviro context

- Looking to UN Commission on Human Rights, Resolution 1986 – recommended these factors for assessing whether or not to recognize new human rights:

1. Consistent with existing human rights – similar to s. 7
2. Fundamental in nature – yes, we rely on it as animals
3. Premised on the inherent dignity of the human person – maybe your dignity as a human is at risk if you don't have clean water to drink, ect.
4. Can provide effective implementation machinery – yes, have had some troubles in past but it is possible
5. Attracts broad international support – yes! Most countries have some sort of constitutionalized enviro right

COST-BENEFIT ANALYSIS

Benefits

- impetus for stronger environmental laws (constitutional supremacy stated in s. 52 of *Constitution, 1982)*
- improve enforcement (equivocation is not an option: substantive & procedural)
    - ensure that governments establish and adequately resource systems for implementing, monitoring compliance with, and enforcing environmental laws and regulations.
- safety net (gap filling in the absence of specific legislation) – application of precautionary principle
    - delays in issuance of legislation
    - addressing new threats quickly
- prevent statutory rollbacks (place enviro law "above the vicissitudes of everyday politics" & set a base level of protection)
    - difficulty of amending the constitution
- pre-enactment screening
    - all new laws screened for compliance before they come into force and have negative impacts
- strengthen democracy (enhance access to information and participatory rights)
- foster accountability (enhance judicial oversight & remedy)
    - being able to hold the government accountable for inaction or poor responses to problems
    - expands the remedies available
- re-balance the economic-social-environmental equation – will increase significance of enviro considerations in gov't decision making
    - level playing field with competing rights
- environmental justice (re-distribute environmental benefits and burdens by protecting minorities from majoritarian action) – poor marginalized communities would benefit the most from having enviro rights
    - providing a minimum standard of environmental quality for all members of society
- educate & represent societal values (towards acceptance as a fundamental right necessary to fully enjoy other human rights) – help people understand we have a right to a clean environment and future generations do too

Costs – and some arguments disagreeing

- vagueness (mere assertion does not establish acceptable thresholds & appropriateness of ambiguity)
    - rebuttal to this critique is that constitutional provisions are by necessity brief and inherently vague – similar to exiting Charter rights
- economic threat (environmental trump card?) – chasing away investment, stopping development
    - but we know rights are rarely absolute with s. 1, we also know that with the notwithstanding clause.
    - It would likely change economic activity though, corporate structures would have to adjust.
- redundant – NO! this class demonstrates this is not the case
    - 1) route to environmental rights already exists through s 7
    - 2) existing Canadian environmental laws are adequate and that tort law (which deals with nuisance and negligence) already offers the same remedies for environmental harm
- undemocratic - in its transfer of authority from politicians to unelected judges ("rights serve as a check on democracy and democracy serves as a check on rights")

- well what are rights? they are meant to serve on a check to democracy because these are things we hold individually or collectively.

- justiciability (unelected judges lack social spending and program creating power)
  - claiming that issues raised by the right to a healthy environment are not justiciable, meaning not appropriate or suitable for adjudication by a court
  - *Operation Dismantle*. If there are rights engaged that is well within the domain of our judicial branch, it is an obligation for the judiciary to consider those things. Obvs not all issues would be justiciable but that is the case of many rights that somethings have to be determined on a case by case basis whether or not something is justiciable.
  - Courts apply the principles of proportionality and reasonableness in cases that call for a careful balance between the economic and social rights of individuals and the public interest
- Excessive focus on individuals
  - unnecessarily focuses a public good discussion on individuals – yes there are commons out there getting air and water from the same sources, but there will be individuals that will be suffering more.
  - But, we can have both individual rights and public good considerations as a whole.
- Floodgates – in Canada we don't see endless litigation. Tests and thresholds you would have to meet to be able to litigate these cases.
  - Yes, there would be an initial surge in litigation but they would set precedent.
- Dilution of existing rights – Charter rights are often organic (arise through broad ground surging response over long duration, not just the idea of an interest group or a particular political party), have to constantly advance, think about women's rights, racial segregation, same-sex marriage, ect.
- Anthropocentric (does this impede progress towards rights held by nature?)
- Bound to fail (constitutional amendment, in itself, would not save a single forest or wetland– paraphrasing J.B. Ruhl)
  - Problem is a global one, not an individual one, so constitutionalizing an individual right to a healthy environment may be ineffective

OPERATION DISMANTLE V R, 1985 SCC – JUSTICIABILITY OF RIGHT CLAIM – S. 7 - DISMISSED

F: peace group said s. 7 right was violated by the USA missile storage/testing in Alberta

- majority Dickson says not susceptible to proof so shouldn't try to interpret, not getting into justiciability here. Causal link btw gov't action and increased threat of nuclear war cannot be proven
- concurring Wilson says judicial obligation to deal with cases that may infringe rights. Just no evidence of that being the case here (looked at a justiciability analysis and found no infringement)

3 PATHWAYS FORWARD

1. FORMAL AND DIRECT AMENDMENT THROUGH FEDERAL AND PROVINCIAL AGREEMENT (*CONSTITUTION ACT, 1982*, PART V AMENDING FORMULA)

- Direct constitutional amendment would be the most powerful outcome
- likely would have to use s. 38 general amending formula (7/50 Rule) –7 provs containing 50% of the pop
- **options:**
  - clarify s. 7 includes right to healthy enviro;
    - usually s. 7 limited to negative obligations, not positive
  - add a stand-alone right to a healthy enviro to the *Charter;*

- follow France and include a new detailed Charter of Environmental Rights into the constitution
- difficult but not impossible, has been amended a few times in the past (e.g. 1983 amendment to s. 25 and 1993 amendment to s. 16(2))
- But don't forget about Meech Lake Accord (1987) & Charlottetown Accord (1992) – linkage problems.
  - Problem of linkage:
    - People are going to want new social and economic rights too, can't have isolated minor amendments.
    - Though David Boyd suggests narrow, focused changes that have high levels of public support have high chance of success.
- It is important to note that the requirement of Senate approval for an amendment can be overridden.
- If 180 days (6 months) pass after the House of Commons adopts its authorizing resolution and the Senate has not concurred, the House may adopt a second resolution, eliminating the need for Senate approval

2. LITIGATION SEEKING A COURT'S DECLARATION THAT THE RIGHT TO A HEALTHY ENVIRONMENT IS IMPLICIT IN AN EXISTING CONSTITUTIONAL PROVISION (S. 7 LIKELY)

- *Vriend v Alberta.* [1998] SCC – s. 15, read in discrimination based on sexual orientation. This case shows you don't need to have to have an official amendment to add something to the *Charter*.
- **argue right to healthy environment valid interpretation of s. 7 security of the person.**
  - while s. 7 often engaged in criminal context, ***Chaoulli v Quebec*, 2005 SCC** clearly demonstrates its applicability beyond the criminal context (dealt with health insurance and hospital wait times)
  - s. 7 test:
    - deprivation of life, liberty or security of the person has occurred
    - said deprivation does not accord with the principles of fundamental justice (principles also open for interpretation)
      a. overbreadth, vague, grossly disproportionate, arbitrary
  - ***Gosselin v Quebec*, 2002 SCC suggests** it may be possible to interpret s. 7 as putting a positive obligation on the state to ensure each person sustains life, liberty, and security of person in special circumstances
    - dissent already found positive obligation to meet basic needs

<u>Other Challenges</u> (w/ litigation)

- Standing
  - either a directly affected interest (e.g., adverse health effects) or public interest standing, which is at the court's discretion.
- Link to an alleged gov't action that violates a person's rights (investment, activity on public land, approval/license)
- alleged harm must be significantly connected to the gov't action in question
- violation must be contrary to the fundamental principles of justice
- gov't can justify a breach in accordance with s. 1 (though s. 7 likely requires super exceptional circumstances, such as natural disasters, outbreak of war, epidemics, ect.)

Signs of hope for living tree doctrine to expand definition of s 7:

-
- **Friends of the Oldman River**, the Supreme Court found that Ottawa had failed to follow its own rules governing environmental assessment and stated that: "the protection of the environment has become one of the major challenges of our time"
- **Spraytech v Hudson:** the court upheld a municipal pesticide bylaw, endorsed the precautionary principle as a key element of environmental management, and stated, "Our common future, that of every Canadian community, depends on a healthy environment"
- Canadian courts are relatively open to considering principles and precedents from other jurisdictions - Constitution to grow and evolve along with social changes

LOCKRIDGE ET AL. V ONTARIO (CHEMICAL VALLEY CASE) – S 7 AND S 15 CHALLENGE OF APPROVAL DECISION FOR NEW REFINING FACILITY – SETTLED IN SUMMER OF 2016

- Approval of factory on new land surrounding First Nation reserve
- Petrochemical refining site
- Argued s 15 and s 7 infringement for environmental injustice and infringement upon security of person and life
- In approving the additional facility, cumulative effects were not considered; only considered the impact of the one additional facility – the air pollution in the valley is already significant

3. OTTAWA/PROVINCE INITIATES A JUDICIAL REFERENCE

- Ask for the court's opinion on a hypothetical question absent any actual dispute
- SCC has heard more than 70 references (ex. Persons case, *Reference Re: Senate Reform*)
- a reference Re:
    - Right to a Healthy Environment that asks "does s. 7 of the *Charter* include an implicit right to live in a healthy environment"
    - OR "does the presence of mercury in the blood, fat or other tissue of Canadians violate s. 7?"
    - Do Canadian governments have a constitutional duty to ensure clean air, safe water, and other elements of a healthy environment?
- environmental group or coalition could formally request that the federal government initiate a reference to the Supreme Court to determine whether the right is implicit in the constitution.