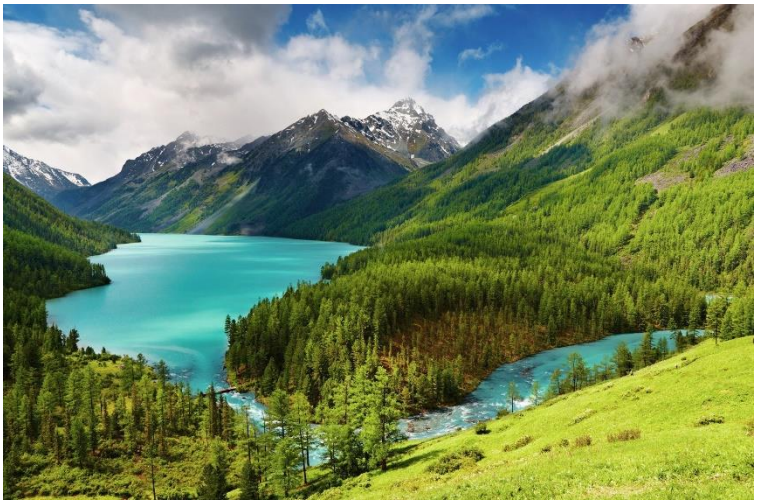

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LAW 559
Environmental Law

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CONDENSED ANNETATED NOTES (CAN)

UNIVERSITY OF ALBERTA
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PART 1: INTRODUCTION TO ENVIRONMENTAL LAW

The Environment: Ecological and Ethical Dimensions

Environmental law is aimed at the maintenance and protection of the environment, including preventative measures, and measures for mitigation. Most environmental law is influenced by government bodies, so it is heavily intertwined with administrative law. The Alberta *Environmental Protection and Enhancement Act* defines the 'environment' as "the components of the earth and includes

(a) air, land and water, (b) all layers of the atmosphere, (c) all organic and inorganic matter and living organisms, and (iv) the interacting natural systems"

Until the 1960's, all environmental law was common law. While these common law principles still exist, the Constitution offers different avenues to address environmental concerns, but also different challenges. Most notably, the issue around division of powers between federal and provincial governments is forefront. The 'environment' was not an enumerated ground in ss91 or 92 of the *Constitution Act, 1867*, so does not fall to either government. Indeed, it is shared for vestigial reasons because the creators of the Constitution did not consider the environmental issues, only the resources that caused them.

- Once it has been established who can do that, the meat and potatoes of environmental law is the rapid evolution of regulations and statutes by the appropriate government. These governments will also lay out enforcement and compliance.
    - There is the *Environmental Protection and Enhancement Act* (EPEA), but also the *Forestry Act*, *Water Act, Fisheries Act* and dozens of oil and gas legislations
- Civil society, corporations, NGO's may not play a direct role in environmental law, but they generate influence among the parties that do play a more direct role.

All bodies that play a role in environmental law are themselves shaped by social, political and economical conditions, science, ethics, culture/religion

- An ecosystem is the biological community of interesting organisms and their physical environment. Both living and non-living components are essential for the functioning of that ecosystem and the other things (ie, humanity) that depend on them.

Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Both economics and ecology are the competition of scarce resources, and many humans view environmental degradation as a necessary trade off for economic growth. It was only recently that they began to see pollution as deleterious. The human economy is integrated, contained and dependent on the ecosphere:

- Ecosphere provides all material resources
- Ecosphere performs waste assimilation
- Ecosphere provided services (aesthetic amenities and biochemical processes like photosynthesis)

This is important because chaos theory predicts that when a domain (in this case, environmental) is pushed past its natural, human managed system, it may become hostile for human exploitation and there is no guarantee the system will ever return to the stable system. We have seen this happen with climate, fisheries, and disease control.

- Consumption exceeds bioproduction. This makes wealth an illusion given the irreversible conversion of natural capital into perishable manufactured capital competing with the dissipation of toxic waste in the ecosphere. The consequence is "ecological overshoot".

Ecosystems are inherently autopoietic meaning that they can keep operating and transforming the necessities of life while being far from equilibrium. Notwithstanding this, any society that dissipates its host ecosystem faster than it can regenerate it will be self destructive in the end.

- The environment is an independent variable, and the economy a dependent one.

Consider the following

- Humans have thrived in the recent geological epoch, called the Holocene, which started approximately 12,000 years ago
- The extent and impact of human activity is now upsetting the Earth's natural systems. This is especially true since the "Great Acceleration" of the 1950s.

- Humanity has breached numerous planetary boundaries that define a safe operation space and have entered a new phase – the Anthropocene
- Since the Industrial Revolution (c. 1760), we have emitted various pollutants into the atmosphere. Some have direct human health consequences, some have direct animal health consequences, and a third category are classified as greenhouse gases (GHGs)
- Unfortunately GHG production is intimately connected to most aspects of our day-to-day lives

What is the law's role here, and what informs the development of proper/effective law? In theory, there are 5 basic principles for environmental justice:

1. The Right to Protection
    a. No individual should need to fear exposure to personal risk from human induced environmental degradation
2. A Strategy of Prevention
    a. Governments should aim for the elimination of risk before harm occurs
3. Shifting the Burden of Proof
    a. Entities applying for permits or activities with potentially damaging impacts to public health should be required to prove the safety of their operations
4. Obviating Proof of Intent
    a. The law should allow evidence on differential impact to infer discrimination – gross negligence to the poor or minority races constitute eco-racism
5. Redressing Existing Inequities
    a. Resources should be made available to mitigate ecological damage and compensate individuals for related health problems.

Common law environmental law actually started 1000s of years ago. Statutory environmental law goes back a couple hundred years ago, since the British Navy needed to conserve trees to build up their fleet

- The USA was always ahead of Canada for environmental statutes. This is because they had greater issues that forced the government to act – environmental law is often reactionary in nature
    - Santa Barbera oil spill that ruined beaches
    - Cuyahoga River burned for 18 hours because of all the pollutants on the surface
    - Love Canal was full of dumped toxic chemicals that leached into groundwater and got nearby residents very sick

Environmentalism: perception that the unchecked modification or utilization of resources/ecosystems and the unbridled application of technology has adverse consequences.

- This is a response to the growth-oriented demands of modern techno-industrial global society and the neo-classical conception of resources as the product of human ingenuity rather than something natural

Environment: the sum total of all surroundings of a living organism, including natural forces and other living things, which provide conditions for development and growth as well as of danger and damage

- Science: the intellectual and practical activity encompassing the systematic study of the structure and behaviour of the physical and natural world through observation and experiment
- Ecology: the breach of biology dealing with the relations and interactions between organisms and their environment, including other organisms.
    - Political Ecology: the study of the relationships between political, economic, and social factors with environmental issues and changes
- Ecosystem: community of living organisms in conjunction with the nonliving components of their environment (things like air, water and mineral soil), interacting as a system

    - Ecological Reality: the ecosphere is the source of natural capital, waste assimilation and providing services

The initial thinking of conservation ecology was that actions are right when they tend to preserve integrity, stability and beauty of the biotic community. It is wrong when it does the opposite.

- This has been replaced with 'systems thinking' where complex natural systems cannot be managed for stability since they are inherently always changing.
- They must be approached as dynamic entities that operate in a non-linear fashion and that can be difficult to predict and model

Modern thinking says we need to think of natural systems that are complex and unstable. Linear models (things should look as they do now) need to be replaced with non-equilibrium paradigms. We should see natural systems as capable of adapting and changing over time to improve adaptability and resiliency.

- We want a forest that can survive a forest fire and grow back stronger.
- The climate system is not stable since there are natural variations, but they are to be managed so we do not ruin their capacity to change over time.
    - If we stay in sustainable zones, you are allowing the environment to change as it must
- Might not be possible to reconstruct an 'idealized' nature, so we have to manage what we have
- Dynamic systems are subject to both chaos, catastrophe and feedback.

<u>Sustainable Development</u>

We are using more than the Earth can provide. That has consequences that continue to occur. There is also a justice component, because Canada uses 4 Earths worth of resources, whereas Africa doesn't use more than one.

- How long can that be sustained? Eventually something has to tail off that causes decrease in quality of life and human existence

Important sustainability vocabulary:

- Pollution: all waste that is being emitted into the environment that can have harmful, deleterious impacts
- Resilience: capacity of the Earth to resist or absorb deleterious human emissions. Questions on how resilient our climate systems are. Are there thresholds that lead to spiral, or another tipping scale?
- Complexity & Uncertainty: environment systems being complex, human understanding of them is always changing. Cannot be determined what will happen to Earth's climate systems if X happens. Law does not like uncertainty, and can often be ill fit to handle complexity
- Self Regulation: Corporations regulating themselves
- Command and Control Regulation: A working way of 'set a limit, stay within it'. Going beyond the limit will result in some consequence (usually a fine). Mostly achieved statutorily.
- Adaptive/Reflexive Regulation: regulations that are mercurial to the context in question. Given modern systems thinking and the ever changing nature of Earth, the regulations about the environment must also be subject to change over time
- Precautionary Principle: Where there is the potential for a particular harm, cost effective regulations are justified even if full knowledge of the consequences remain uncertain. If there is uncertainty in any form, and the potential for grave consequences, regulation is justified.
- Polluter Pays Principle: When looking to assign who pays, costs find their way back to the person who produced the pollution. Pollution is often an externality so this can be hard
- Environmental Justice: Marginalized and racialized people will receive disproportionately fewer benefits and more harms of environmental exploitation.
    - Intergenerational justice: the impacts we leave for future generations

    - Intragenerational justice: within the current population, the lesser fortunate people are more hurt
    - Interspecies justice: the impact that we are having on other species and the pressures we put on them (pollution/extinction)
- Preservation: Not using a resource and keeping it maintained
- Conservation: Using a resource without excess waste
- Place/Spaced Based Protection: the preservation or conservation of a specific area
    - National parks or marine parks for example
- Cooperation: environmental issues are shared, and thus meaningful progress must be made via working together; environmental issues do not follow any political boundaries.

Canadian Environmental Protection Act, 1999, SC 1999 c 33

Section 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

(a.1) take preventive and remedial measures to protect, enhance and restore the environment

(b) Take the necessity of protecting the environment into account in making social and economic decisions

(c) Implement an ecosystem approach that considers the unique and fundamental characteristics of ecosystems

(d) Endeavor to act in cooperation with governments to protect the environment

(e) Encourage the participation of the people of Canada in the making of decisions that affect the environment

(f) Facilitate the protection of the environment by the people of Canada

(g) Establish nationally consistent standards of environmental quality

(h) Provide information to the people of Canada on the state of the Canadian environment

(i) Apply knowledge, including traditional aboriginal knowledge, science and technology, to identify and resolve environmental problems.

(j) Protect the environment, including its biological diversity, and human health, from the adverse effects of the use and release of toxic substances, pollutants and wastes

(j.1) protect the environment, including its biological diversity, and human health, by ensuring the safe and effective use of biotechnology

(k) Endeavour to act expeditiously and diligently to assess whether existing substances or those new to Canada are toxic or capable of becoming toxic and assess the risk that such substances pose to the environment and human life and health

(l) endeavour to act with regard to the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada

There is a lot to unpack in section 2 of *CEPA*, and it appears quite broad. This is by design, the environment is everywhere, and the protections it must have are thus quite extensive. Perhaps the most important thing in the section is the use of the precautionary principle in s2(1)(a)

- It has also been modified, as we see from s2(1)(j.1) with the inclusion of biotechnology (vaccines, crops).

- It embodies a change of thinking that nature was meant to be contained and resources were only of value when brought into human use, to a more interconnected, dynamic sight of humans with nature. Rachel Carson found the 'control' of nature phase one of arrogance, when only for the convenience of man.
    - Deep ecology is an offshoot of ecological sensibility; it goes beyond a pure scientific ecology, where we should be looking deeper for a way to root ourselves in the environment and return to something that is natural
    - The law should reflect this. Non-human entities, can have legal rights (ie, corporations), why can't elements of the environment?

Environmental Law has a lot of ethical underpinnings. While the environment was always seen as a resource something subject to human domination in Judeo-Christian Western traditions, this is not the universal view. Many Indigenous cultures viewed nature as something integral to themselves.

- Contemporary thinking is challenging the validity of that approach
- Resource conservationism: wise resource use and ideas of sustainability
- Wilderness preservationism: nature as a sanctuary, with the beauty and wonder of the wild
- Moral extensionism: inclusion of animals/plants/environment into our moral community
- Ecological sensibility: we are all part of one moral community ('deep ecology')
    - Proposes a sense of connectedness and biocentric equality

Environmental law makes sense for a lot of different reasons: a pluralistic compromise. Science is often the root, and tell us why things are happening, and a vehicle to justify regulatory intervention.

- In the absence of science, ethics/morals may justify regulatory intervention
- Innovation (technical and scientific) are both intimately connected to regulatory controls and governance structures
- New branch of law that responds to external forces and challenges application of some of the basic tenets of our legal system

Where does environmental law's legitimacy come from?

1. Economic models and utilitarian justifications
    a. Cost-benefit analysis, efficient resource allocation
    b. Transaction costs, information costs, free riding and externalities
    c. Holistic accounting that includes community values (that can be passive) in its efficiency discussion
        i. Ecosystem services dimension
        ii. Aesthetic/spiritual dimension
        iii. Benefits of knowing that 'nature' exists
2. Non anthropocentric considerations
    a. Biocentrism: animal welfare (sentience) & intrinsic value (subject of a life).
    b. Ecocentrism: focus on ecosystems as a product of evolution. Regulate to maintain processes
    c. Intrinsic value: everything that has life should be entitled to respect

There is no constitutional requirement that environmental law be based upon the best available science (let alone that it even exists). Science is not value-neutral, and thus not beyond public scrutiny. However, it is legitimate because it constrains political choice

- Resist the temptation to import revisionist or romanticized visions of ethics, morality or religion
- Develop and implement environmental law in a manner that accords with long term objectives and an ecologically informed conceptualization of sustainability

Environmental Justice

Environmental justice is an umbrella term that describes an evolving set of ideas, theories, debates, principles, litigation strategies, and law reform initiatives that examine and critique the connection between environmental burdens and identify factors including race, gender and socio-economic status.

- It works to understand and frame the processes, biases, and structural inequalities that explain the distribution of environmental harms and benefits between people and communities
- It confronts the privileges and experiences of modern environmentalism (parks, wilderness, nature, development, etc)

This concept all started in 1982 in Warren County, North Carolina. Highways were lined with waste that was illegally dumped. The government approved to move the waste to a dump next to a community which was predominantly black and low income.

- The toxic waste was high in PCBs, which has significant risks to humans, particularly youth
- This was called an 'insidious' form of racism that is systemic in nature

The first principles of environmental justice were drafted by the First National People of Color Environmental Leadership Summit. It had 17 principles that included:

- Substantive and procedural guidelines
    - Substantive: issues were being disproportionately more deleterious to certain people who do not cause them
    - Procedural: these people cannot participate in the process to address these issues for a variety of reasons (income, accessibility, inclusion)
- Preventative and remedial in operation
- General (large scale climate change) and specific in application (Indigenous group land uses)
- Connected to forms of systemic race discrimination as found in housing, employment, education, municipal services and law enforcement

From a legal perspective:

- Phase I: describe and reflect on the issue; an attempt to develop a lens through which to examine legal and environmental issues
- Phase II: create methods to address both the procedural and substantive aspects. Metrics and methodologies interested in addressing the underlying/systemic conditions
    - Substantive: inequalities in burden/benefit distribution and experience (how, legally, is the environmental pie divided?)
    - Procedural: unequal and unfair opportunities to participate in decision making (resource based)
    - Recognition: unbalanced power relationships and institutional settings influences by colonialism and capitalism.

We could learn so much from other legal traditions. For example, Anishnaabe Natural Law calls for justice for all beings of Creation, including ancestors and future generations, with corresponding roles and responsibilities.

- Their natural law affords agency and entitlement to all beings - past, present and future.
    - Agency is considered and making collective and individual decisions
    - Broader conceptualization of justice than the procedural and substantive hurdles.
- Collective decision making

From a Canadian perspective, environmental justice is connected to colonial dispossession and cultural violence. It can sometimes be obfuscated by focusing on class-based distinctions and the cultural

perception of a "Canadian Mosaic". But, even in this Mosaic, Canada is most heavily influenced by English and French systems.

- Spatial organization and racial segregation exists through the system of reserves and legal subordinations of the *Indian Act* and associates policies and programs.
- Spatial discrimination also exists along the lines of industrial clustering and its impact upon self-determination
    - Many of the impacts of the Oil Sands are the Chipewyan who live off the land that is being increasingly degraded

Example: boil advisories in First Nation communities. This is an intersection with law, there are inadequate laws or ineffective institutions and decision-making processes. Canada has yet to produce jurisprudence that directly grapples with the idea of environmental justice or the principles of environmental justice. What legal avenues exist?

- *Charter* challenges? Section 7 violation possible
    - Section 7 gives a right to life, liberty and security of the person
        - Water is essential and a determinant of health
    - But section 7 is usually not for positive rights (can't demand the government take actions). But, there have been cases of positive rights, like homelessness or medical assistance in Quebec.
        - It has been tried, but it isn't the easiest argument.
        - *Lockridge v Ontario (Director, Ministry of the Environment)*
            - Sarnia's "Chemical Valley" is the largest aggregation of petro-chemical upgraders, which was a hot spot for air pollution that disproportionately impacted the Aamjiwnaag First Nation and its reserve land.
            - The claim challenged the constitutionality of permits issued by the Ministry of the Environment to Suncor.
            - The basis was that the decision failed to account for cumulative environmental impact and violated constitutional protections.
                - Cumulative: impacts were greater than the sum of their parts
                - A huge issue in climate litigation
                    - Court stated that all that was at stake was one regulatory approval, not the cumulative pollution at large that the applicants opposed.
            - Could s7 be used to quash the government decisions? There were a lot of preliminary challenges, adverse security costs awards from both applications, so it ended up settling.
    - Even after *Grassy Narrows*, there is still no clearcut jurisprudence on what is protected in environmental law in Canada.
- Climate Justice?
    - The next step, and where a lot of litigation goes
    - The concept of environmental justice has been adopted and mobilized by climate activists and climate litigants under the auspices of the "climate justice movement"
    - Climate justice seeks to stabilize the Earth's climate system for the benefit of all, but is working to specifically recognize the disproportionate impact of climate change on racialized minorities.
    - Action has centered around warming in the Arctic, expansion of the Trans-Mountain pipeline, and youth-focused litigation arguing that current emission reductions are inadequate
        - Example: litigation right now if Doug Ford's *GGPPA* plan is ambitious enough and whether that violates young people's rights to a healthy environment

- Law Reform?
    - If Courts are inadequate to answer the questions, we may have to turn to law reform instead
    - Creation of stand-alone legislation that creations regionally appropriate commissions or committees to investigate environmental injustices (pas and present, including funding for participants) and recommend remedial action
    - Inclusion of 'right to a healthy environment' in Canadian law. This could take different forms:
        - Express inclusion in the *Charter*
        - Express inclusion in federal legislation
        - Express inclusion in provincial legislation

<u>Implementing Sustainability</u>

Sustainability is the overarching prime objective of environmental law. If we can be sustainable, it fulfills ecological and ethical problems.

- Sustainability used to be considered the balance of the environment, society and economics
    - This is actually untrue, since those three pillars are not weighed the same in our society
    - Economy and social interests trump our environment every time
    - The goal of environmental law is to actually balance that environmental pillar with the others

Professor Klaus Bosselmann is well known for his musings on sustainability:

- Analogizes sustainability to the principle of justice, something that is both simple and complex
- We desire a "just" society, and we value a "sustainable" society. However, what does that mean and what does that entail?
    - At a basic level, the environment is a necessity because society needs breathable air, clean water, and consumable food (the conditions of life). If we don't make an ecological right, we are disrupting ourselves in the end.
- It is neither just nor fair that we live at the expense of future generations and the integrity of the natural world. The unsustainable future that was once conjecture is now occurring (climate change). How does society account for this present reality?
- Unfair treatment of people is rarely palatable, but unfair treatment of the environment is fair because the effects won't be felt until much later. The distance in space and time prevent us from acting with urgency, though these distances are constantly shrinking.
- The rich living at the expense of the poor is not fair, so why do we permit it?
- 5 factors contributing to the collapse of society
    1. Climate Change
    2. Hostile Neighbours
    3. Trade Partners
    4. Environmental Problems
    5. Society's response to environmental problems.
        a. Only the fifth is the crucial one, as it is the only in our control
- We need a different way to look at sustainability, from a legal perspective. Maybe sustainability itself is more of an organizing principle.
- Sustainability is not this artificial balancing act, it is at the core of long-term economic prosperity.
- If you want economic prosperity, look after the environment first. Reprioritization is key
    - So how can law do this? We can state all the science we want, we need policy
    - Set standards based on scientific data

Sources of sustainable environmental law

- International Law
    - Sustainability/Sustainable Development has proliferated within international law instruments over the last 30 years (>100 multilateral treaties)
    - However, most sustainability is limited to the preamble, but they still are included in legally binding treaty provisions.
    - Most international lawyers agree that sustainability at international law lacks consistency and coherence which has limited its effectiveness as a legally binding norm
- Domestic Canadian Law
    - Judicial consideration of sustainability is uncommon
    - That said, the Supreme Court confirmed that 'ecological integrity' and it is the core of sustainability in *British Columbia v Canadian Forest Products*
    - Sustainability is incorporated as an objective or legal principle in 85 statutes in Canada.
    - Preamble of *CEPA*:
        - "It is hereby declared that the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention."

As an example, while the Government Cabinet approves pipelines, the National Energy Board advises it. The decision is made on if the project is in "public interest".

- NEB has a lot to do before advising Cabinet, including an environmental assessment to determine if the economic benefits (feasibility studies, how much will X increase in export profit) and what environmental concerns (what impacts are created by the statute) and address social issues (First Nations consultation). From this, they make a recommendation to Cabinet.
- For Transmountain, they made 138 recommendations to make it in the public interest. There was significant environmental impacts on whale populations, but the NEB did not include this (there was a Court challenge that found this finding was inappropriate).
    - NEB could not abate the issue, so just gave it to Cabinet. Cabinet approved it because of the economical benefits.
    - A law could be passed to say "if any project is likely to cause the extinction of ___, then it cannot be approved"
        - This would thus require a re-working of public purpose.
- Flip the question: what contribution does this project make to sustainability?
    - This is a fundamentally different way to see it, because the only questions are usually ones of economic benefit.

Environmental issues are often based on the fact that laws on the matter are long term planning, much longer than a 4-year timeline governments are on. Legal limits are needed, which would have to transform to long term decision making.

- These are shifts, but they are hard to do, particularly when we value a society that is stable.
- There is not a strong case law for sustainability. Most revolves around statutes, like CEPA, which is used to ensure the goods we are using aren't unnecessarily burdensome on the environment, or the people that use it
- Sustainability is the ecological outcome, Sustainable Development is the process to get there

Sustainability Development Goals (SDGs) put human health at the center of sustainability – the legal system we are in is the embodiment of our broader societal values.

- SDGs are universal calls to action to protect the planet and improve our Earth. Each goal has associated timelines.

- Law often hinders or promotes sustainability across social issues. Environmental and natural resources are pieces in the puzzle, but not the solution. These laws have over 40 years of data to prove this. Environmental law is constrained to the legal framework of the society we create (including property laws, tax laws, laws involving government structure)

What legal tools do we have?

(a) Strategic Planning
    (a) *Federal Sustainability Development Act*
        1. Government produces a plan, Cabinet receives it.
        2. Development and reporting of federal sustainability strategy for accountability.
        3. They are audited and reviewed at the Cabinet level.
        4. But is not binding and thus cannot be enforced. Limited success so far
(b) Direct Regulation
    (a) Superficially appealing to rely on command-and-control techniques to direct particular outcomes
    (b) Set better limits, find better ways to stay within them
    (c) EU has tried this with mixed results. France has criminalized obsolescence (purposefully manufacturing products to eventually expire to force continued buying)
(c) Information-based Instruments
    (a) Regulation by disclosure through mandating transparency and publication of information to third parties. This is to provide consumers with information that is required to make informed and environmentally responsible decisions.
        1. Like a sticker that certifies that the product is fair trade
    (b) This is basically environmental blacklisting. Hard because not all people will understand data or statements to understand their environmental impacts; no company would blatantly admit to wrongdoings and would try to convey the message in a more positive light that can mislead lay people

As much as environmental law focuses on what the state is doing, non-state actors are of huge relevance. While sustainability requires the government to act as a long-term strategist to have set the conditions for sustainability, moving in that direction requires contribution from civil society, organizations, private corporations and individuals. Law can be used to encourage, monitor and enforce corporate social responsibility, but at the end of the day, it is up to the corporations to do it.

- Corporate social responsibility has also been refined as Creating Shared Value which looks for points of mutual value for social objectives and corporate gain
- *Canada Business Corporation Act* has a broad fiduciary obligation that all director shall act honestly and in good faith with a view to the best interests of the corporation

PART 2: SOURCES OF ENVIRONMENTAL LAW

<u>International Environmental Law</u>

International law has shaped domestic environmental law in Canada for 2 reasons:

1. Climate change is a global issue that doesn't follow borders
2. Public international law and Canadian environmental law are both newer, so have developed together and created International Environmental Law (IEL)

Environmental issues used to be considered a national concern, but now have bilateral, subregional, regional or global levels. This means the only way to appropriately deal with it is through international cooperation, which implicitly requires law and regulation. Ecological interdependence is important – issues in one part of the world have longstanding impacts in ecosystems elsewhere.

International law, though it sounds all powerful, is nothing more than a functioning inter-state legal system, populated by binding and non-binding *principles, targets and guidelines*. This is key, since they are not *laws*. That which it lacks forms the foundation of Western legal institutions:

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

The UN doesn't pass laws, it may pass resolutions that can heavily influence countries, but this is not hard law. The only body that can pass laws in the UN is the Security Council, so those regulations have the force of law. International Environmental Law is consent based.

- There is the International Court of Justice (judicial arm of UN)
    - It exists through Treaty, and states have to agree to be bound by it. Canada is effectively bound to the dispute resolution, but all was from a decision that Canada made to be bound by it.

Historically, Canada addressed environmental matters domestically. International law was viewed as a separate legal system (if a legal system at all) with little utility until Canada decided to pursue IEL and implement the result.

- This has all changed; the domestic-international law distinction is being diminished. It is a direct and indirect source of domestic environmental law and if international cooperation was once the exception, it is now the norm. IEL now has enhanced recognition and Courts recognize it.
- IEL is needed to address environmental issues that transcend national boundaries. Climate change tries to manage things that don't stay local ("the commons")
    - It has developed concurrently with Canadian Environmental Law (CEL) and has left an indelible mark
- Canada is a middle power and relied on international law to further its interest and values. The need to reconcile independence of each state with environmental interdependence has put us where we are today
- Fundamental principles of International law include the full sovereignty of resources in your boundaries. No other country can tell another what to do and what not to do with resources within their boundaries. How do you reconcile that with cooperation on sustainable development of limited resources?

Pre-1972 and pre-UN action on the environment, IEL was a reactionary response by groups of nations responding to regional threats.

- *Trail Smelter Arbitration United States v Canada (1931-1941)*, 3 RIAA 1905
    - Trail, BC had a huge smelter place that had large environmental impacts. It was built on a high piece of ground with tall smokestacks. This was made purposely so the smoke would mix with the air and blow away
    - This sent smoke into Washington state. Crops, forestry and rain all impacted.
    - They could not just sue Canada, so what happened?
    - The Federal government espoused their claim, meaning they consented to arbitration over the matter, which brought domestic law to an international level.
    - The arbitration found that Canada was responsible, since you cannot sue an individual (other than War Crime tribunals). Canada itself was found liable because it approved the plant (government action and government approval). The involvement grounded liability.
    - From this, Canada had to pay and underwent regulation of industry to prevent similar.
        - Ratio: at international law, there is a general prohibition on transboundary pollution

        - You cannot use your resources in a way that pollutes the land of another, and if you do, you will be responsible and liable at international law.
            - This was "soft law", though not binding, it effectively gets picked up as accepted law in the Canadian context

Post 1972:

- 1972-1992: United Nations Stockholm Conference on the Human Environment and its declaration of principles. United Nations Environment Programme established to study and develop law.
- 1992: United Nations Conference on Environment and Development ("Rio Conference") and the Rio Declaration created 27 principles that set the future of IEL and spawned numerous treaties
    - This spawned "hard law"
- 1992-present: modest and incremental development and implementation of international legal regimes.

Article 38 of the Statue of the *International Court of* Justice sets out sources of International Law:

- Treaty Law
    - Consent based
    - Predominate form of International Law
    - Can be between countries (migratory birds legislation between Canada, US, Mexico) or multilateral (the commons in question has an international level, like oceans)
    - Negotiation is usually through a conference called by the UN
        - If successful, they will enter a treaty for signature (each country head will sign, but it is not yet successful; mostly symbolic)
        - After signed, it only gains legal status when ratified
            - Most treaties will say that X amount of countries is needed to follow it
            - Each country will follow their own rules to ratify it, and then submit the ratification to the UN/Conference host city
        - Then the Treaty enters into force in that country and is binding.
    - Traditionally, these are more of a framework – it makes a base that lets participants to make individual decisions to get to the same end result.
    - To achieve their goal, there will be a conference every year to decide what the goal will be (framework with constant updates)
    - Often, the executive will appoint someone in government to do the negotiation
        - Usually, there will be a diplomatic mission to negotiate and sign, but they will likely be from a specialist person. Ie, it isn't always the Prime Minister, unless it is something like the Paris Agreement with largescale attention
    - So, for the Paris Agreement, Trudeau signed it in Paris, but he needed to bring it back to Ottawa to incorporate it into our legal system.
        - Canada is dualist, so ratifying it nationally does not automatically incorporate it into our legal system. Some countries are monist, so it automatically becomes law.
            - In Canada, there needs provincial involvement.
            - In The Great Lakes Water Quality Agreement, the federal government had to get provincial buy in because waters are provincial. So, Canada invited provinces to the Convention, and will not ratify anything unless it is sure that the provinces are good with it
    - While there is express full or partial incorporation, there is also passive incorporation and positive action or policy initiatives
        - Migratory Birds Convention: express reference
        - UN Convention on the Law of the Sea: partial incorporation in *Oceans Act*

        - 1973 International convention for the prevention of pollution from ships: partial incorporation through the *Canada Shipping Act*
        - Ramsar Convention on Wetlands of International Importance: by passive incorporation through various pieces of legislation
        - Stockholm Convention on Persistent Organic Pollutants: by Toxic Substances Policy in *CEPA* and the *Pest Control Products Act*
        - CBD: limited reference to a treaty and by policy in *SARA*
    - Examples: Paris Agreement, CBD (Convention on Biological Diversity, led Canada to make *Species At Risk Act (SARA)*), CITES, CMS, UNCLOS, Great Lakes Water Quality Agreement, Migratory Birds Convention.
    - Generally, judges don't give a ton of weight to international treaties but can still use them to justify their findings. It is also a statutory interpretation principle that it is implied that states presumed to comply with international law when enacting legislation.
- Customary Law
    - Rules that develop over time
    - Opt-out based
    - General accretion over time through state practice and *opinio juris* (the legal nature of the norm; parties start behaving in a way because they feel obligated to)
    - Canada is monist for customary law, since customary international law is automatically implemented in Canada. Can circumscribe action at the domestic level
        - This is relatively infrequent
    - *R v Hape* found that customary international law is automatically accepted into common law, provided it is compatible with the Constitution and federal/provincial legislation
        - A judge can hold Canada accountable because it presents a 'prohibitive rule'
    - Various principles:
        - National Sovereignty over Natural Resources
        - Good Neighbour Rule (from *Trail Smelter*)
        - Duty of Equitable Utilization of Transboundary resources
        - Duty to Notify and Consult in the event of an environmental disaster
        - Procedural requirement to conduct an environmental impact assessment
- General Principles of Law
    - Mostly procedural in nature
- Subsidiary Sources
    - Not binding, but persuasive, and include judicial judgements and the writings of the most eminent scholars. They need to be like, *the* expert
- Soft Law
    - Doesn't have direct legal effect, but can still have impact
    - Exists somewhere between policy and law. They become "binding" through convention
    - Declarations (Stockholm, Rio, UNDRIP)
    - Precautionary Principle and the Polluter Pays Principle

<u>Precautionary Principle</u>

Principle 15 of the *Rio Declaration* states "where there are serious 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"

- We often don't know what a high concentration of whatever substance would do to the environment, so we should get it under control first

Examples of the precautionary principle:

Impact Assessment Act, SC 2019, c 28, s 1

Section 6

(1) The purposes of this Act are

(d) to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid adverse effects within federal jurisdiction and adverse direct or incidental effects

(l) to ensure that projects, as defined in section 81, that are to be carried out on federal lands, or those that are outside Canada and that are to be carried out or financially supported by a federal authority, are considered in a careful and precautionary manner to avoid significant adverse environmental effects

(2) The Government of Canada, the Minister, the Agency and federal authorities, in the administration of this Act, must exercise their powers in a manner that fosters sustainability, respects the Government's commitments with respect to the rights of the Indigenous peoples of Canada and applies the precautionary principle.

Canadian Environmental Protection Act, 1999, SC 1999 c 33

Section 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

Section 6

(1) For the purpose of enabling national action to be carried out and taking cooperative action in matters affecting the environment and for the purpose of avoiding duplication in regulatory activity among governments, the Minister shall establish a National Advisory Committee

(1.1) In giving its advice and recommendations, the Committee shall use the precautionary principle.

Section 76.1

When the Ministers are conducting and interpreting the results of

(a) a screening assessment under section 74,

(b) a review of a decision of another jurisdiction under subsection 75(3) that, in their opinion, is based on scientific considerations and is relevant to Canada, or

(c) an assessment whether a substance specified on the Priority Substances List is toxic or capable of becoming toxic,

the Ministers shall apply a weight of evidence approach and the precautionary principle.

Morton v Canada (Fisheries and Oceans), 2019 FC 143

Facts:

The *Fishery (General) Regulations* were made pursuant to the *Fisheries Act* and included requirements that the Minister of Fisheries issues a license before a fishery can transfer live fish from a fish habitat into a rearing facility. This can be done only if s56 is satisfied.

- The requirement permitted the operators to determine themselves if there were any diseases in the fish, and thus government testing was not required.

Morton and the 'Namgis First Nations argued this put salmon at risk and claimed that they are to take the precautionary principle when considering licenses.

- A similar argument was taken to court in *Morton v Canada* 2015 FC 575 where the Court found that s56(b) embodied the precautionary principle.

Issue:

Did the Minister derogate from the precautionary principle in their issuing of licenses?

Rule:

Section 56 of the *Fisheries Act*

The Minister may issue a license if

(a) The release or transfer of the fish would be in keeping with the proper management and control of fisheries

(b) The fish do not have any disease or disease agent that may be harmful to the protection and conservation of fish; and

(c) The release or transfer of the fish will not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks

Analysis:

Section 56(b) stating *may be harmful* embodies the precautionary principle and means that the Ministers interpretation of the section is also subject to the same principle. However, the precautionary principle does not confer substantive rights to the claimant or 'Namgis people. As such, it does not require the Minister to test before a transfer.

- The Court in the 2015 case found that 'may be harmful' does not require scientific certainty, but that does not mean there is no certainty
- The Ministry maintain the flexibility to assess risk reports and the context of the fisheries to give a certain level of certainty.
- So long as that decision is made in accordance with the *Fisheries Act* and is reasonable in light of the evidence before the decision, the Court is bound to defer to the Minister's decision.

The precautionary principle doesn't require action when there is a risk of any level of harm, it must be serious or irreversible.

- The disease presents a very significant threat that is still uncertain
- Given the scientific uncertainty around the PRV disease and the decline of salmon numbers, the Minister's failure to address wild salmon status fails to embody the precautionary principle.

The Minister's interpretation is thus a narrow construction of "harm" and an attempt to circumvent the precautionary principle. It is unreasonable as it does not respect the precautionary principle and fails to consider the health of wild salmon.

Conclusion:

Minister derogated

Hold, Order:

Minister decision quashed

Ratio:

Where statutory provisions embody the precautionary principle, decisions made to the contrary, given the scientific evidence available, will not be permitted.

- The precautionary principle does not afford substantive rights

This was the landmark case that shows the precautionary principle has weight and is interpreted in policies. In this case, the salmon were at a vulnerable level in their life to disease. The precautionary principle did not require the salmon to go extinct to work as an argument, but can be used to save the population of salmon before it happens.

- Morton, in the 2015 action of this case argued that 56(b) required the precautionary principle when transferring the license. The government was not going any long term testing to see if there were harmful diseases. But by not involving the precautionary approach, section 56 was void and of no effect
- So, the federal government amended 56(b) and argued they could transfer as long as it does not pose an existential threat to fish populations. Morton again argued this was still too narrow and did not align with the precautionary principle. And the Federal Court agreed.

Morton, who was a fish biologist, had standing since she had public interest standing, and thus a suitable litigant in front of the courts, without being directly involved. She was worried about the fish disease that was getting release into oceans when smolts were transferred.

Polluter Pays Principle

Principle 16 of the *Rio Declaration* says that "national authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting trade and investment"

Canadian Environmental Protection Act, 1999, SC 1999 c 33

Section 287

The fundamental purpose of sentencing for offences under this Act is to contribute, in light of the significant and many threats to the environment and to human health and to the importance of a healthy environment to the well-being of Canadians, to respect for the law protecting the environment and human health through the imposition of just sanctions that have as their objectives

(c) to reinforce the "polluter pays" principle by ensuring that offenders are held responsible for effective clean-up and environmental restoration.

Canadian Energy Regulator Act, SC 2019, c 28, s 10

Section 136

The purpose of sections 137 to 142 is to reinforce the "polluter pays" principle by, among other things, imposing financial requirements on any company that is authorized under this Act to construct or operate a pipeline.

Section 137

(1) If an unintended or uncontrolled release from a pipeline of oil, gas or any other commodity occurs, all persons to whose fault or negligence the release is attributable or who are by law responsible for others to whose fault or negligence the release is attributable are jointly and severally, or solidarily, liable for

(a) all actual loss or damage incurred by any person as a result of the release or as a result of any action or measure taken in relation to the release;

(b) the costs and expenses reasonably incurred by Her Majesty in right of Canada or a province, any Indigenous governing body or any other person in taking any action or measure in relation to the release; and

(c) all loss of non-use value relating to a public resource that is affected by the release or by any action or measure taken in relation to the release.

Imperial Oil Ltd v Quebec (Minister of the Environment) 2003 SCC 58

Facts:
The Government of Quebec approved a license for a residential building project on lands that previously contained oil tanks owned by Imperial Oil.
- Oil leaked into the ground and contaminated the soil and properties

The Government of Quebec issued Imperial a clean up order to decontaminate the soil.
- Imperial brought action to quash the order, on the argument that the GoQ only did it to avoid civil liability

Procedural History:
The Administrative Tribunal of Quebec (ATQ) rejected the order
- The Quebec Superior Court ruled in favour of Imperial Oil
    - The Quebec Court of Appeal overturned the QCSC decision

Issue:
Does the polluter pay principle apply such that Imperial is responsible for the cleanup?

Rule:
Section 31.42 of the *Environmental Quality Act*
Where the Minister believes on reasonable grounds that a contaminant is present in the environment in a greater quantity or concentration than that established by regulation under paragraph a of section 31.52, he may order whoever had emitted, deposited, released or discharged, even before 22 June 1990, all or some of the contaminant to furnish him with a characterization study, a programme of decontamination or restoration of the environment describing the work proposed for the decontamination or restoration of the environment and a timetable for the execution of the work.

Analysis:
Section 31.42 applies the Polluter Pays Principle and is now incorporated into Quebec's environmental legislation, in most Canadian legislation and in the *Rio Declaration*.
- This requires the polluters to clean the mess they caused and ask them to keep better watch on their affairs to better protect the environment.

The Act authorizes the Minister to issue an order where he believes, on reasonable grounds, that a contaminant is present in a place and may cause harm to the environment or humans. Even if the party responsible for the contamination is no longer the owner of the property, they are liable for the clean up. Avoiding this would be manifestly unfair to the new owners and contrary to the accepted polluter pays principle. This order can validly be against *anyone* who caused the contamination

Conclusion:
Polluter Pays Principle sufficient to ground liability

Hold, Order:
Imperial responsible

Ratio:
Polluter Pays Principle is accepted in Quebec (Canada?) and can require remediation of the responsible party even after they have left the premise.

This was the first Supreme Court evidence of enforcing the polluter pays principle, even to a party that has since moved from the premise, so long as they are the party responsible for the pollution. A government ordering this is not a way to avoid civil liability. This case firmly entrenched the polluter pays principle into Canadian environmental law.

- Canada faces an extra burden with federalism, since both Canada and the provinces have areas of jurisdiction that touch on climate change. Most of the activity are in the provinces jurisdiction.
    - Coordinating the response between Provinces and Parliament is a large challenge, but it is also equally important in the solution.

International Environmental Law Regimes

- Convention on Biological Diversity
    - Opened for signature in 1992 at the end of the *Rio Conference*
    - Biodiversity: the "variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species, and of ecosystems
    - Biodiversity was framed as remaining under national sovereignty
        - A lot of the worlds diversity are in developing countries
    - We need Indigenous knowledge to access resources. If a tribe in the Amazon know of a medicinal value of plants, they should get compensation for it.
    - Other principles: technology transfer, intellectual property rights…
    - Objectives:
        1. Conservation of biological diversity;
        2. Sustainable use of its components; and
        3. Fair and equitable sharing of the benefits coming of its use
    - Operationalization
        - *In situ* conservation: primary, protected areas and regulatory measures to protect a species at risk
        - *Ex situ* conservation: supplemental, like gene banks, zoos.
- United Nations Approach to Climate Change
    - Scientific inquiries and investigations triggered the negotiation of the *United Nations Framework Convention on Climate Change* (UNFCCC) and the creation of the Intergovernmental Panel on Climate Change (IPCC)
- UNFCCC
    - Opened for signature in 1992 and came into force 1994
    - "stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system"
    - Equity for present and future generations, cooperation, precautionary principle
    - Also, to ensure the rate of change allows nature to adapt, and not threaten food production and to allow sustainable development.
        - Mitigation: fix so it doesn't happen
        - Adaptation: adapt to it if it does
    - Common but Differentiated Responsibility (CBDR)
        - Measures that are possible based on socio-economic conditions; developed countries to take the lead also to assist developing countries in taking appropriate action.
        - The developed nations have to start since they are the countries that emit the most and benefited from industrialization. When they start, developing countries can industrialize in a more sustainable way
            - This, in and of itself, won't necessarily solve it but it is a building block
- *Kyoto Protocol*
    - Treaty – stands on its own international obligation
    - Framework endorsed in 1997, rules of operationalization did not before effective until 2005 as there was a lot of foot dragging before hand

    - Was the first binding GHG reduction target. Trying to set UNFCCC goals but had weight
        - This was *only* for developed nations.
    - Flexible mechanisms of operationalism was touted, like clean development, joint implementation and emissions trading. New methods were not mandated but allowed.
    - Canada can basically just try and reduce and see what happens, or implement the new methods in Kyoto Protocol
    - Clean Development: Developed nations invest in developing nations, and if the developing nations industrializes in a way that reduces emissions, the developed nation has effectively reduced.
        - If Canada invests in Indonesia by supplying solar panels rather than them continuing to use natural gas, Canada can claim those reductions as their own.
        - Allows Canada to get low hanging fruit, which is easier than changes at home
        - Canada withdrew in 2013
    - Joint Implementation: one helps the other deviate (additional reductions) between two industrialized nations. If Alberta perfected CCS and incentivized it elsewhere, Canada could claim those reductions for their goals
    - Emissions Trading: Regulate emissions through a trade approach. All the players have a cap that can be emitted. Then, tradable credits are allocated (usually need governmental intervention).
        - If you emit more, you have to pay a fine or get less credits
        - If you emit more, you can sell credits to those who go over
        - Gradually, the cap gets lowered for smooth adjusting.
            - Can be done anywhere in the world (Quebec – California)
- 2015 Paris Agreement
    - CBDR isn't enough – we need universality. Every country that emits, which is all of them, need to reduce. CBDR is not erased, but it is qualified.
    - Each state party shall prepare, submit and maintain successive nationally determined contributions (NDCs)
        - Ideally, Canada would do cooperative federalism because neither the provinces nor the federal government can do this alone. Unfortunately, this has not been smooth and more combative than cooperative
        - Enter the *Greenhouse Gas Pollution Pricing Act*.

<u>Environmental and Toxic Torts</u>

The basic goals of Tort Law are compensation (to the extent that money can fix issues) and justice (avoid retaliatory outcomes) as well as, to a much more minor extent, deterrence, punishment. The remedies are mostly damages (compensatory, punitive, aggravated, nominal), but there is also injunctive relief (permanent, interim, anticipatorily).

- Contribution: backstop to larger regulatory action (where regulations don't go far enough, rots can do the rest) or to hold tortfeasors/government actors accountable (allows the person to get a little creative with their argument).
- Concerns: are the courts the proper arbiters of environmental dilemmas and complex factual matrices
- Limitations: litigation is costly, reactive, adversarial, limitations in existing causes of action (largely, factual causation and the but for test)
    - Tort law is to compensate people, not the environment
        - Damages can't improve the environment per se
    - By nature, tort law is reflective, but environmental practice could be anticipatory
    - Public authority liability is also very hard to establish

        - The big decisions that the government makes in relation to the environment are usually key policy decisions, and thus likely immune from liability.
    - Plaintiffs in environmental cases are likely people of low socioeconomic status, so it is unlikely they would go to the courts with sufficient funds.
- In sum, in the sphere of environmental law, tort importance has gone down as administrative and regulatory importance goes up.
    - But, for centuries, the common law was the primary form of environmental and land use regulation.

Toxic Tort: a tort arising from environmental contamination or a toxic product. Available causes of action include:

1. Negligence – targets unintentional but unreasonable conduct
2. Public Authority Liability – negligence of public officials
3. Trespass – direct and intentional 'invasion of property'
4. Assault/Battery – unconsented harm/trespass of the body
5. Private Nuisance – unreasonable interference with use and enjoyment of property
6. Public Nuisance – impact to a public right or community at large
7. Strict Liability – *Rylands v Fletcher* and no-fault liability

Negligence

Currently, this is the most prevalent and important tort claim. It provides a remedy for unintentional, but unreasonable consequences. The defendant fails to meet a standard of care, through act or omission to which the plaintiff is entitled. This causes the damage for which compensation is sought. Identification of, and remedy for, unintentional but unreasonable conduct

- This is common for storage of pollutants or product liability
- Hurdles include the proof of damages required, the factual causation, personal/property damage compensable whereas financial loss may or may not be compensable.

Though not in the scope of this course, the tort of negligence requires multiple steps:

1. Duty of Care
2. Standard of Care
3. Causation
4. Proximity
5. Damages

Smith Brothers Excavating Windsor Ltd v Camion Equipment & Leasing Inc (trustee of) [1994] OJ 1380

Facts:

Storage tanks stored methanol on the Camion (defendant) property. These tanks were vandalized, such that the valves opened and 1,300,000L of methanol leaked and was absorbed into the soil.

- The methanol then spread to the Smith Brothers (plaintiff) property, causing damage to their property and seeping into their underground water system.
- Smith Brothers brought an action in negligence, arguing that Camion was negligent in falling short to secure the methanol from interference.

Issue:

Were the defendants negligent for permitting the methanol to contaminate their neighbours property?

Rule:

To satisfy the tort of negligence, 5 elements are necessary:

1. legal duty
2. standard of care
3. cause in fact

4. proximate cause, and
5. damage to the plaintiff.

Analysis:

Legal Duty

The neighbour principle is common place – it is negligent to permit foreseeable dangers on your property from damaging the property of your neighbours

Standard of Care

Hindsight can be useful, but in sum, the test is whether what was done is below the standard of care imposed in the industry practices.

- Camion did have an employee working. While not to guard the tank, they were still there, and had 3 German Shepherds in the vicinity as guards, as well as a security company who came on weekends/holidays to inspect for vandalization.
- No special security is required for tank farms, as per the Fire Officer
- While additional security measures could be implemented, this was not obligatory, and the standard of care for tank farms (though minimal) was followed. The failure to provide more is thus not negligent.

Conclusion:

Negligence not made out

Hold, Order:

Action dismissed

Ratio:

If standard of care is met, failure to provide extra security measures doesn't constitute negligence.

Standard of care is a reasonability analysis for looking at the standard practice of the industry. Smith Brothers were unable to argue that they should have done more than what they were doing.

- They tried to argue they were negligent in security and remediation.
  - The court found their security was up to industry practice, so did not violate standard of care. They also found that the remediation was done without delay
- While the court found the defendant not negligent, the government technically can issue an administrative order demanding they clean up (according to the polluter pays principle, but not in negligence).
- In a case like this (ie, contaminated lands), it is common to plead broadly.
  - Trespass, negligence, Ryland Fletcher, nuisance…

Public Authority Liability

Negligence can accrue to government agencies in the form of 'public authority liability'. This cause of action should be more prevalent than it is, but has become more relevant in recent years owing to the erosion of Crown immunity, which has historically protected government officials from civil liability.

- The general issue is if public officials owe a duty of care. According to *Kamloops v Nielsen*, the duty of care exists if:
  1. There is a sufficiently close relationship between the parties such that, with reasonable contemplation of the authority, carelessness might harm the individual, or
  2. Do existing considerations negate or limit the scope of the duty, the class of people whom the duty is owed to, or compensable damages
- Is the impugned act or omission characterized as falling within the policy or operational sphere of decision making?

Tottrup v Lund, 2000 ABCA 121

Facts:

The plaintiff accused the Albertan Minister of the Environmental Protection, and the two former premiers of the Environment that their negligence let to the flooding of his property and contaminated it to the point that it was unfit for agricultural or recreational use.

Procedural History:
The Ministers had the claim struck for no chance of success, so the plaintiff appealed

Issue:
Are the Ministers, though Public Authorities, liable in negligence for the contamination of the plaintiff's property?

Rule:
To satisfy the tort of negligence, 5 elements are necessary:

1. duty of care
    a. sufficiently close relationship to the parties, such that carelessness may damage the person
    b. any considerations that should limit a) the scope of the duty, b) the class of persons to whom it is owed, or c) the damages to the breach?
2. standard of care
3. cause in fact
4. proximate cause, and
5. damage to the plaintiff.

Analysis:
<u>Legal Duty of Care</u>
Though there is no tort for breach of statute, the statute can delineate circumstances that would give rise to a duty of care. The plaintiff argues that 1) the Ministers knew of the contamination and did nothing which violated environmental regulations and 2) the Ministers are vicariously liable for the acts of their employees.

- There is no argument that the Ministers acted irresponsibly or carelessly, and there is no evidence to point that they acted in a way that would create a duty between them and Tottrup, nor that they were careless as supervisors.
    - There is not even an allegation that they were involved in the enforcement of the regulations that Tottrup is involved in.
    - No foundation for the execution of any policy or discretionary action.

Conclusion:
No legal duty – no negligence.

Hold, Order:
Appeal dismissed.

Ratio:
Absent a common law or statutory duty to prevent [flooding], there is no duty owed and a negligence claim cannot be founded.

The claim was a rather weak one, kind of a hail Mary, stating that government decisions had to do with the flooding and/or that the Government of Alberta didn't do enough to prevent the damages. The court found no carelessness or even any operational decisions taken that could have caused these issues.

- Without this, there was no duty of care and no possibility of negligence.
- Under statutory law, there is an obligation of the Government to manage land in water. However, there is no tort of statutory breach in Canada.
- The message is that, just because the Government has something they should do, does not mean they are liable.

The *Nelson v Marchi* (2021 SCC 41) case found a four-factor approach to determine whether the nature of a government's decision is core policy or operational

1. The level and responsibilities of the decision-maker (proximity to elected officials)
2. The process by which the decision was made (process with balancing of competing considerations)
3. The nature and extent of budgetary considerations (allocation of public resources); and
4. The extent to which the decision was based on objective criteria

The *Paradis Honey Ltd v Canada* (2015 FCA 89) argued that public authority liability is probably not the best way to address these issues. It is a private law approach to a public problem. Administrative law is so involved in our life anyway, so maybe we should see this as a public area of law

Nuisance (Private)

There are two types of nuisance: private and public.

- Private: landowners/occupiers protected from unreasonable interference caused by another
- Public: protecting the public from harm/damage

Private Nuisance: an activity that results in an unreasonable *and* substantial interference with the use and enjoyment of land

- Classic circumstances: noises, odours, fumes, vibrations…

The goal of private nuisance is to strike a balance between competing land uses since people "do not live in splendid isolation from one another." There are two branches of private nuisance, either will satisfy the requirements of the tort

1. Loss of Amenity
    a. Was it actually so bad that the enjoyment of the property is stalled, or can the property still be enjoyed
    b. Engages a balancing act because you are balancing competing aspects of land
    c. Factors to consider include:
        i. Duration and Gravity that is engaged
            1. Odours, smoke, noise/sound, vibration
            2. Short or long term
        ii. Nature of the neighbourhood
            1. Industrial and residential areas have different expectations
        iii. Utility of the defendants conduct
            1. What is the social benefit or purpose of what the defendant is doing
            2. Is it for significant economic purpose, or social objective
        iv. Plaintiff sensitivity
            1. Is there a precondition/sensitivity that the reasonable person does not
2. Actual Physical Harm
    a. Need proof of damages

Reasonableness may be considered in all situations, but this is especially true in loss of amenity situations. When there is actual physical harm (with proof of damage), the applicability of reasonableness is less certain

- Courts commonly look to a number of features when assessing reasonableness, including the gravity of the harm, severity of the interference, character of the neighbourhood, and sensitivity of the plaintiff.
- For example, salt applied to roads next to an orchard, or use of pesticides could be normal practice, but if sufficiently close to the orchard and the harm is large, nuisance may be founded

The most common asserted defence of nuisance is that it is an inevitable consequence of actions expressly authorized by statute/regulation, which attracts legislative protection. This turns on an assessment of whether there were alternative methods of conducting the activity.

- If salting of the roads was authorized, it may be immunized from liability

- But what if the trucks didn't have the proper flaps to prevent the spread? That would have been an alternative way that would avoid the nuisance
    - No immunity from liability

Ryan v Victoria: public authority immunized from liability if they can demonstrate that there is no practical probability of carrying out its mandate without causing a nuisance.

Groat v Edmonton was the first articulation of nuisance in the context of pollution. In that case, the city expanded and had to create a municipal dump and sewer system (which was a valid action per the *City Charter*) but this impacted the riparian rights of Groat and constituted a private nuisance.

- The Court found that "pollution is always unlawful and, it itself, constitutes a nuisance"
- Unfortunately, today pollution is considered an evil of society, and only at high levels will it be considered a nuisance.

Smith v Inco Ltd, 2011 ONCA 628

Facts:
Inco operated a nickel refinery in Port Colborne, Ontario for 66 years before closed in 1985. Smith (and other plaintiffs) resided adjacent to the plant and their properties were contaminated with nickel, lead and arsenic from Inco's emissions.

- Their claim argued that their properties did not appreciate the same as other, non contaminated properties, would have.

Procedural History:
The plaintiffs were successful at trial, Inco appealed to the Ontario Court of Appeal.

Issue:
Is Inco liable in private nuisance for the contamination of neighbouring property?

Rule:
Section X of the *Whatever Act*
Private nuisance requires the actions of the defendant to produce a 1) unreasonable and 2) substantial interference with the use and enjoyment of the plaintiff's property

Analysis:
<u>Reasonableness</u>
Unlike negligence, nuisance does not concern itself with the actions of the defendant. If the defendant acted reasonably, but the effect/interference was unreasonable, they will still be liable in nuisance. On the flip side, if the defendant acted unreasonably, but the interference was reasonable, they will not be liable. Unreasonableness can be characterized by loss of amenity or proof of physical damage.

- Branch 1: Loss of Amenity
    - Loss of amenity is not applicable since there is no proof that the plaintiffs were unable to use enjoy their property.
- Brank 2: Physical Damage
    - Damage can be ascertainable even if not visible to the naked eye.
    - A change in the chemical composition of the soil, measurable through scientific equipment constitutes a readily ascertainable change in the soil.
    - But the damage needs to be actual, substantial, physical damage to land or levels of contamination that pose risks to health and well-being.
    - The damage here was the nickel that posed some risk to health but does not amount to substantial harm to the property.
    - Property value went down because buyers didn't want nickel on their land; this is a market reaction, not nuisance

Without physical harm, the nuisance claim cannot succeed

Conclusion:
Not liable
Hold, Order:
Appeal allowed; trial judgement set aside.

Ratio:
If the plaintiff can prove either substantial damage to property or health impacts, the action is unreasonable. The damage itself must "actual, substantial, physical damage to the land"

This is the textbook case on environmental law. Unfortunately, it also severely constrained how much this tort will be available for private action. The need to balance the activities was examined, and which would get priority. What do we expect people to bare as a result of societal functioning?

- This case clarified that the defendant's conduct is irrelevant. So long as the result is unreasonable, the action can succeed.
- Unreasonableness is only for loss of amenity (which was not argued), because proof of damage is prima facie unreasonable

So, the issue boiled down to whether the increased chemical deposition of Nickel was considered damage. While the court agreed that damage can be invisible (like chemical deposition), they did not find there were health risks or otherwise any damage, even though the elevated Nickel levels were established. The Court of Appeal really constrained the way material damage is approached. The damage needs to be proven as more than trivial, of which chemical alteration without health impacts is not.

- That is not to say it had no impact: people didn't want to buy the contaminated land.
- But this is a market reaction, not a legal one. There needs to be more proof than that for nuisance to work.

Class action suits are very attractive for environmental contamination, since they often affect many people or properties. However, this brings other hurdles:

- It will be governed by class action legislation
    - Procedural elements: need class certification (judge has to agree it should proceed as class action; almost pre-trial)
        - A lot of cases will fail at this point
        - Only a certain number of individuals experience the actionable forms of harm

But there are also benefits:

- Improve access to justice
    - Costs can exceed expected recovery, so marginalized communities are affected
- Behavioural modification
    - Larger damages will discourage large companies from doing the harm, especially harms that are widespread, but have minimal individual harm
    - Can also entice legislative action or reform
- Service judicial economy
    - Common issues resolved at a single hearing
- Tend to exclude personal health claims
    - A judge would need to approve on the basis that all plaintiffs experienced the same injury, which is incredibly unlikely

The limits from the *Smith v Inco* case almost beg the question whether a new nuisance category should be created. Not all chemical alterations are visible but could have harmful impacts. *Smith* wouldn't have been decided any differently since we know that Nickel doesn't cause many health problems, but we are unsure when it comes to pesticides and herbicides.

Nuisance: Public

Public Nuisance: an activity that unreasonably interferes with the public's interest in freedom from harm or damage in questions of "health, safety, morality, comfort or convenience"

- Question of fact that examines the extent of the inconvenience, the character of the neighbourhood, and any difficulty associated with reducing the risk
- Quasi-penal tort
    - It started as criminal law, and some nuisances are still criminal
    - Widespread harm such that we wouldn't expect one person to act to stop it (impacts to transportation and navigation are most common), but the community at large is still impacted
    - Must be brought by the Attorney General (still from the criminal component). It can be brought by a private part with the consent of the attorney general, if they can demonstrate a peculiar or special damage in the form of an impact to your private rights
        - Essentially, a public nuisance also impacted their private rights
- If a highway is disrupted by an individual, it still impacts everyone.
    - But to prove special damages, you would have to live adjacent to the road or something that impacts them/their business (economic or personal interest)
- *Tate & Lyle Industries Ltd v Greater London Council* was a case where the company needed to dredge the Thames River in London to do their sugar refinery/shipping operation and ferry terminal. The City influenced with the dredging, so it was a public nuisance, but Tate & Lyle were especially affected – it permitted a public cause of action
    - This is also common for owners of shores or beaches. Your property has special damage if someone using the water impacts all the shoreline

Hickey v Electric Reduction Co of Canada Ltd [1970] 21 DLR (NFSC)

Facts:
The defendant discharged poisonous material from its phosphorous plant into Placentia Bay. The bay was polluted and the fish unmarketable to local fishers.

Issue:
Is the defendant liable in public nuisance?

Rule:
Public nuisances are criminal offences. It must materially affect the reasonable comfort or convenience of life of a class of Her Majesty's subjects

Analysis:
The plaintiff and all fisherman using the bay suffered economically. If the person suffers a peculiar damage, they have a right of action. But this cannot be maintained if the damage is common to all persons of the same class.

- The damage would be to all of Her Majesty's subject in the area. This right of action can only be commenced by the attorney general, in the common interest of the public.

Conclusion:
Public nuisance is inapplicable.

Hold, Order:
Action dismissed.

Ratio:
If the person suffers a peculiar damage, they have a right of action. But this cannot be maintained if the damage is common to all persons of the same class.

This case really showed the limitations to public nuisance. If all people suffered a similar harm due to the public nuisance, none suffered special damages, and thus none can claim for it. However, recent case law has found that interference with economic interests (*Gagnier v Electric Reduction Company of Canada*) or treaty/Aboriginal rights (*Saik'uz First Nation v Rio Tinto Alcan*) may be enough to constitute special damages.

- The Ontario *Environmental Bill of Rights* also includes a provision for public nuisance causing environmental harm

Main hurdles to public nuisance:

- Attorney General's discretion to deny consent
- Restrictive special damage test (*Hickey*)

Strict Liability

No fault liability. It does not have to be intentional or negligent. It is simply because it happened. It could even be a pure accident and the defendant would still be liable. This has even been applied to animals like livestock. It has *Rylands & Fletcher* elements. This is found when the defendant collects things on his land that are likely to cause mischief if they escape. If they escape, the defendant will be liable for their damages, even if the defendant was not careless or at fault for their escape. This is the Rylands Fletcher rule.

1. The defendant is in lawful occupation of property
2. The property stored a dangerous agent or not natural use of land
3. An agent or thing escapes and
4. It caused damage to the plaintiff

The natural use of land is the tricky part – what is a natural use of the land. Technically, anytime there is a unique use of the land going on, strict liability should apply.

- Courts will often resist this though, often saying that the legislature can make those delineations if they want, but we aren't going there.

In *Cambridge Water Co v Eastern Counties Leather*, Eastern was using degreasers in their leather manufacturer. These leaked into the soil and percolated elsewhere. Cambridge was impacted and their water wasn't potable and they suffered economic harm. The sought action against Eastern

- Lord Goff focused on 'foreseeability' in his analysis to reject the claim
    - Foreseeability of damages is always an element of nuisance, and this damage was not foreseeable, so no liability. England still uses foreseeability, but Canada does not.

Takeaways about this tort

- Strict liability as emanating from, but now existing separate and distinct from private nuisance
- Court seems to defer to legislative bodies to intervene in situations that might by 'high risk' as opposed to strict liability doing the work
- The *Cambridge* case limited the availability of these actions to instances of historical pollution, even though the toxin continues to migrate (but is beyond present control)
- Rylands & Fletcher is somewhat vexing and has been abolished in some places
    - Narrow application of the rule. *Smith v Inco* tried to argue this but the Court focused on the escape requirement and the unintended aspect of the risk that has been created
    - Rejects automatic application of the rule to 'ultra hazardous' activities and concludes that the refining activity in question would not qualify in any event
    - Non natural requirement: operation of a refinery in an industrial use would not qualify as non natural, and an intended consequence of a reasonably conducted activity

Trespass to Property

The law of trespass is all about protecting land. Trespass is a metaphorical fence that can protect against invasion by others. Needs a (1) direct and intentional invasion (2) of property (3) by another person (4) in the absence of legal authorization. It is actionable per se (you don't need to prove actual damage to maintain a successful action). Remedies are damages (nominal or general) and injunctive relief. The biggest hurdle is often the 'directness' requirement.

- Did the contaminant or pollution arrive directly as a result of the defendant's action or was it deposited consequentially/indirectly
- Drift (air/water/wind) scenarios raise concerns – do they sever the directness requirements?
- Should we favour a liberalized directness requirement that accepts 'natural and inevitable forces' that deposit substances?
    - This was not followed in a case where a farmer used GMO's on his land, and genetic drift lead to GMOs on organic farms, invalidating their organic status. Directness was not met. The act of marketing improved product when it isn't requires a lot of intervening forces.
- Difficult to find a principled justification to maintain the directness requirement moving forward in the context of the environmental pollution given what we now know
    - Another limitation is that it requires a physical substance.
        - Do microscopic particles count as physical substance?

This was traditionally used as a law to help people combat the diverse environmental problems of an agrarian society from straying livestock to seeping privies.

- *Friesen* case was about the application of aerial pesticides. They may not have meant for the pesticides to travel to an organic farm, but they still meant to apply the pesticides. This is sufficiently intentional to satisfy the tort
    - Other situations: ash from a sawmill, deposition of rocks and waste and waste water disposal

Trespass to the Person

Battery: Deliberate application of force to another person resulting in harm or offensive contact to that person. Must prove intentionality (or minimally, negligence) – a desired outcome or substantially certain consequence. Assault is not sufficient

- If interpreted broadly, any pollution can be trespass to the person.
- *Macdonald v Sebastian*: landlord knew of arsenic in water. The landlord knew of the potential health affects and did not warn tenants. She was liable for battery for the exposure to the dangerous chemicals. The only way it was successful was because they knew it was dangerous and chose to let it occur. If they didn't know, it likely wouldn't have worked.

Riparian Rights

Those landowners 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"

- Seems to offer strict protection to property rights in water

This is a common law duty, but it has been mostly usurped by the *Water Act*, so the principle is limited but not totally gone.

- *McKie*: Cottage owners along a river were unhappy with KVP who was a sawmill and discharged effluent so the river was not usable for anything (highly polluted)
    - The Court agreed it was a breach of riparian rights and enjoined their operation

- Ontario knew that sawmills were very lucrative, so they enacted the KVP Act to permit the nuisance and riparian right violation to act, and avoided all tort liability
    - Regulatory capture – the regulatory agency has undue power over the regulator.
    - Large lobby groups have a large seat at the table when dealing with energy projects

Challenges in the Common Law

The biggest issue with common law torts are the role of scientific security and trying to get preventative relief (prevent something before it happens)

Palmer v Nova Scotia Forest Industries [1983] 2 DLR 397

Facts:
The plaintiff wished to prevent the defendant company from spraying certain areas with phenoxy herbicides. These herbicides were under particular political scrutiny

- The plaintiff argued that the herbicides, if entered onto their land, would create serious health risks
- This action occurred before any spraying occurred, so they were seeking anticipatory injunctive relief

Issue:
Is the action of nuisance justified to order a *quia timet* injunction?

Rule:
Plaintiff must establish that 1) irreparable harm and 2) inadequacy of damages

Analysis:
Judges are not scientists. They do not conduct scientific analyses, and cannot conclude on it. There are legal quantities, and uncertainties are answered by scientist or law makers.
If the health risks are true, it is certain that damages would not be the proper recourse for health risks. The case thus turns on the certainty of the Health Risks

- Certain diseases, like cancer, have long incubation periods and caution should be taken to this. Many carcinogens are everywhere, so the dosage is the issue.
- There is little evidence that the pesticides are carcinogenic and safe to humans at lower levels.

Conclusion:
Injunction not made out

Hold, Order:
Application denied

Ratio:
The health risks in order to satisfy irreparable harm depend on best scientific data.

This case really showed that courts are not scientists. This case was before the precautionary principle, so it may be answered differently today. But they admit there are legal quantities, and uncertainties that are answered by scientists by law makers, not judges.

- Courts will answer questions of fact, but don't make scientific standards of proof, but they will still need to answer on them. They still must be willing to interact with science. Science can't be shied away for lack of certainty.
- Don't need pure scientific certainty, but you can take judicial notice of it.
    - The Court in the *GGPPA Reference* doesn't say "this is the concentration of CO_2 in the atmosphere", they just say that "data shows that climate change is an existential problem"
- Judges can even say, that is a complex question of social policy, so we will let legislatures hash that one out.

    - In this case, the evidence was limited, but it was enough to turf the application.
- One suggestion since this case is to reverse the onus of proof (the company would have to prove they get the relief they are looking for)
    - The forestry corporation would have to prove it was safe, not the citizens proving it isn't
- There is a general limit on the ability of the common law to offer preventative & precautionary relief. There is a necessary interaction between the common law and government regulatory action
    - Courts engagement with scientific evidence as seemingly determinate in dismissing the causes of action

Another issue is proving the causation of an injury.

- Scientific nature of toxic torts: long latency periods & multiple potential causes
- Traditional "but-for" factual causation test: employs probabilistic analysis that does not lend itself well to difficult causation questions
    - But, *Ferrell v Snell* was the SCC case that told us not to be concerned about scientific precision in the causation analysis but rather that courts should introduce flexibility by employing common sense to the fact finding exercise.

Possible solutions to the causation problem:

1. Shift the burden of proof: (i) Legal burden of disproving causation on a balance of probabilities imposed on the defendant; or (ii) evidentiary burden imposed on defendant, who has to adduce some evidence to disprove causation; the ultimate legal burden remains with the plaintiff
2. Risk-based liability: "risk as injury" approach whereby proof of risk is sufficient to ground liability

Last issue is the Indeterminate defendant

- Who is the defendant? When an environmental injury occurs, from something like pollution, who is to blame as the cause in fact?
- Can do a market share liability (*Sindell v Abbott Laboratories*)
    - If you produce 30% of the bad drug, you pay 30% of the damages
    - This is better for the plaintiff since they do not have to prove who gave the drug that caused the injury, just that it was made, it was released, it was exposed, and it damaged
    - Canadian courts have not yet used this approach, but provincial legislation has done this to big tobacco companies.

All to say, the common law tort system is probably not the place to start with environmental law. Often, it starts at the regulatory level or the international level, that will percolate to torts. As such, it is likely that torts will become a reasonable avenue in the future.

<u>Constitutional Jurisdiction</u>

Almost all issues regarding constitutional environmental law is who can do what. Who is responsible for environmental regulation and stewardship? *Ontario v Canadian Pacific* summed it up:

> "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."

This calls for intergovernmental cooperation when it comes to environmental policy. Instead, provinces and Canada are often fighting with each other over what can and can't be done.

- Laboratories of Democracy: the state may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country
    - Basically, let provinces try something out first. If it works, great Canada can do it too. If not, well at least it wasn't the whole country
- This means the Canadian government can't just consider provinces as agents for implementing national policies, but rather as veritable laboratories for the development of solutions adapted to local realities.

Federalism imports several conundrums:

- Fragmentation: political reality vs nature and the environment
- Constitutional division of authority is a historical relic whereas environmental problems need innovative and holistic legislated responses
- Lowest common denominator is the common result of political compromises contrasted with the successful laboratories experimentation
    - Race to the bottom: the province with the weakest environmental law is where companies will settle
- Exclusive jurisdiction vs concurrent jurisdiction vs cooperative jurisdiction

The "environment" was not a ground enumerated in either s91 and s92 of the *Constitution Act, 1867* – largely because environmental issues were not yet (perceptible) issues at the time of Confederation. So, who has jurisdiction?

- Federal Parliament?
    - Yes, in statutes and regulations of related s91 spheres
- Provincial Legislature?
    - Yes, in statutes and regulations of related s92 spheres
- Municipal Councils?
    - Yes, in by-laws and resolutions

All governments can touch on the area, it just depends how they do it.

For example, federal governments have transferred control over freshwater fish to the provinces, though they have fisheries as an enumerated ground in s91. This is probably the broadest area of power that Parliament has, and if it wanted to, it could exert more power over this. Since the 1980's resource related issues (which are often provincial jurisdiction in essence) have been a flashpoint for controversy between Ottawa and the provinces, and Alberta in particular.

Federal Jurisdiction (Section 91)	Provincial Jurisdiction (Section 92)
Functional Powers: (12): sea coast and inland fisheries (10) navigation and shipping (29) certain works and undertakings - interprovincial communication and transportation Conceptual Powers (27) Criminal law - enabling command and control (3) taxation - tax undesirable activity (2) trade and commerce - generally limited to interprovince/national Residual powers	(8) municipal institutions (10) local works and undertakings, except those under federal control (13) property and civil rights - (land use and planning) (16) all matters of a merely local or private nature - (companies within the province) (A) non-renewable natural resources, forestry and electrical energy S109: mines and minerals - Provincial Crown Lands

- Emergency - National concern	

For federal jurisdiction, territorial reach extends to all of Canada, including territorial waters, but still depends on enumerated powers. Generally, anything interprovincial or international is a solidly federal ground. Federal jurisdiction is certainly broader in the sense that it has two roots of jurisdiction.

1. Functional Powers: resource control or certain activities related to pollution that might affect the resource
2. Conceptual powers: broad ranging and general control techniques, which engages environmental quality
    a. Criminal law
        i. Enabling command and control regulation (most environmental law is now regulatory)
    b. Spending power
        i. Ancillary powers, support environmental action by directing or influencing activities
    c. Taxation
        i. Ancillary supplement command and control by supporting spending or by altering activity through taxing undesirable activity
    d. Trade and commerce
        i. Limited applicability but restricted to transborder trade
    e. Peace, Order and Good Government
        i. Emergency
        ii. National Concern
    f. These grant a lot of authority to try different techniques. If they notice an environmental problem, can use tax responses, spending responses or command/control responses

Other areas:

- Exclusive vs concurrent jurisdiction
    - Exclusive: If exclusive jurisdiction over an aspect of an activity, only one level can legislature.
    - Concurrent: If both can legislature, the federal legislative prevails if there are inconsistencies
- Limited Power to delegate
    - Legislative delegation to the other level of government is impermissible
- Interjurisdictional Immunity
    - Limited ability for provincial environmental law to bind the federal government. But, duly constructed federal laws are likely to bind provinces
- Territory and Ownership
    - Provinces unable to legislate in pith and substance beyond the boundaries of their respective province, but it can have incidental effects
    - Federal ownership of land within a province affords additional powers to the federal government that would normally be held by the provinces
- Treaty Implementation
    - Federal government can clearly negotiate and implement environmental issues within the scope of federal jurisdiction; however, if they negotiate on issues within provincial jurisdiction (i.e., non-renewable resources), this can create significant obstacles
- Cooperative federalism
    - Judiciary branch encourages all levels of government to take action to protect the environment

- Double Aspect
    - Allows subject matter regulation by both levels of government
    - Represents a modern articulation of cooperative federalism
    - Addresses inevitable overlaps and considers the provincial and federal features of the overlap to be of equal importance – asks if each aspect of the same problem/issue has both a provincial and federal dimension
        - If both laws are valid, they can both stand

Courts will presume that laws are constitutional, and the onus of unconstitutionality will rest with the party challenging the legislation. They will chose an interpretation that favours validity

First step will always be determining the pith and substance of the law:
- Characterize the dominant purpose and true nature of the challenged legislation
- If the pith and substance of the impugned legislation can be related to a matter within the jurisdiction of the legislature that enacted it, the courts will declare it *intra vires*. If not, then the law is *ultra vires*
- Look at the purpose, the intrinsic and extrinsic evidence, the legal and practical effects

Fowler v The Queen, [1980] 2 SCR 213

Facts:
Fowler (appellant) operated a logging business on the coast of BC. The logs had to be dragged in a stream, which deposited debris in them. The stream was a spawning grounds for Pacific salmon.
- Fowler was charged with s33(3) of the *Fisheries Act*.
- There was no evidence that the debris affected fish fry

Issue:
Is s33(3) of the *Fisheries Act* in the legislative competence of the Parliament of Canada?

Rule:
Section 33 of the *Fisheries Act*
(3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

Analysis:
The respondent argues that (3) is *intra vires* by virtue of 'sea cost and inland fisheries' under s91(12) of the *Constitution Act, 1867*. The appellant submits that (3) falls within provincial legislative power under ss92(5)(10)(13)(16).
- Section 33(3) does not deal directly with fisheries, but tries to control certain kinds of operations on the basis that they may have deleterious effects to fish
    - This is *prima facie* a regulation of property and civil rights.
        - To be valid, it must be proven to be necessarily incidental to effective legislation on fisheries.
- The legislation covers water that flows into other water frequented by fish and any place which debris is likely to be carried to such water.
- It is a blanket prohibition on certain types of activity in provincial jurisdiction. It is too broad to be incidental to the federal power.

Conclusion:
Ultra vires federal Parliament.

Hold, Order:
Appeal allowed

Ratio:
Provisions that are *prima facie* regulations of provincial power need to be necessarily incidental to the legislation to be valid federal law.

Fisheries are unique since they stand as their own head of power. Most federal environmental law are not standalone, but vestigial in nature on other heads of power. In this case, the impugned legislation was an attempt to regulate local industry (which is a property and civil right in s92). This was because there was an offence without requiring any proof of harm to fish, fisheries or fish habitat. The pith and substance was *not* about regulating fish. As such, it was beyond the capabilities of Parliament.

- After this case, the Government of Canada amended the legislation, but this was also taken to court:

Northwest Falling Contractors Ltd v The Queen, [1980] 2 SCR 292

Facts:
Northwest (appellant) stored diesel fuel on their property. 3,000L of the fuel spilled and contaminated the tidal waters of British Columbia.

- The appellant was charged with violating s33(2) of the *Fisheries Act*

Issue:
Is s33(2) of the *Fisheries Act* within the legislative competence of Parliament?

Rule:
Section 33 of the *Fisheries Act*
(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.

Analysis:
The appellant argued that the legislation is an attempt by Parliament to legislate pollution and invade provincial jurisdiction of property and civil rights. To decide this, it is necessary to decide whether s33(2) is aimed at the protection and preservation of fisheries.

- It is concerned with the deposition of deleterious substances in water with fish (or that flows into such waters). This is a proper concern of legislation under the 'fisheries' power of Parliament.
- This is valid (while s33(3)) is not because s33(2) is specific to deleterious substances, not activities.
  - It is a specific prohibition of deposits that threaten fish, their habitat or their use for man.

Conclusion:
Intra vires Parliament.

Hold, Order:
Appeal dismissed.

Ratio:
Legislation aimed at fish, fisheries, or fish habitat are close enough to fall under federal jurisdiction

In this case, the new law was sufficiently close to 'fish, fish habitat and fisheries' to fall into federal power. The Court distinguishes it from *Fowler* on the basis that the section presents a clear nexus between the prohibited action and fish habitat, whereas that nexus was too weak in *Fowler.*

- They didn't actually have to prove a fish was killed, only had to prove that the substance dumped *could* harm fish.
  - That is enough to establish the nexus and make it federal

After pith and substance, it is usually needed to characterize the area to a doctrine. Most heads of power aren't as standalone as 'fisheries'. There are three groundbreaking cases in Canadian jurisprudence about environmental law and the doctrines. They laid the groundwork for broad federal jurisdiction on the environment.

POGG - National Concern

R v Crown Zellerbach Canada Ltd, [1988] 1 SCR 401

Facts:
Crown Zellerbach (respondent) was charged under s4(1) of the *Ocean Dumping Control Act* (part of the current *CEPA*).
- Section 4(1) prohibited the dumping of substances into the sun without a permit
- The respondent had a permit, but the permit did not cover Beaver Cove, which was in BC but was connected to the Pacific Ocean
    - There was no evidence that the dumping influenced navigation or marine life

Procedural History:
At trial, the Court found s4(1) *ultra vires* of the Federal Parliament
- The British Columbia Court of Appeal dismissed the appeal

Issue:
Is section 4(1) of the *Ocean Dumping Control Act ultra vires* of the Federal Parliament national concern under the Peace, Order and Good Government power?

Rule:
Section 4 of the *Ocean Dumping Control Act*
(1) No person shall dump except in accordance with the terms and conditions of a permit

Section 2
(1) In this Act,
"dumping" means any deliberate disposal from ships, aircraft, platforms or other man-made structures at sea of any substance but does not include
(2) For the purposes of this Act, "the sea" means
(a) the territorial sea of Canada;
(b) the internal waters of Canada other than inland waters

Analysis:
The respondent concedes that Parliament can legislate on dumping in the waters outside the territorial limits of a province. It also concedes that it may regulate provincial waters that flow out of province. The Crown argued that the provision can be justified under the POGG power of the federal government.

<u>Characterization</u>
The pith and substance was argued by the appellant to be about the regulation of marine pollution, whereas the respondent argues it is directed at dumping which need not necessarily have a pollutant effect.
- The regulatory model prohibits the dumping of any substance without a permit
- The purpose is to require a permit so that the authority may determine before the dumping has occurred, having regard to the concerns in ss9 and 10.
- It can be properly characterized as the regulation of marine pollution, in so far as that may be relevant to the question of legislative jurisdiction.

<u>Classification</u>
The federal jurisdiction over coast and inland fisheries is not sufficient to validate s4(1) as the impacts on fisheries is not the only impact the Act is concerned with.

1. National Concern
    a. National concern applies to elements which did not exist at Confederation.
    b. It must be single, distinct, and indivisible.
    c. Need to consider the extra provincial effects of a provincial failure to deal with the matter
    d. 'Provincial inability'

Marine dumping, because of its extra-provincial nature, is clearly a matter of concern of the whole country. But is dumping in provincial marine waters single, distinct and indivisible?

- The act distinguishes ocean dumping from freshwater dumping.
- It is difficult to ascertain a visual dividing line between territorial sea and internal marine waters, which creates an unacceptable degree of uncertainty for the application of regulatory penalties.
    - This makes it very indivisible, particularly in combination with the inevitability of pollutants crossing the boundary once in the water
- Additionally, the distinction between salt water and freshwater limits the application of the Act so to not intrude too far into provincial domain.

Conclusion:
Section 4(1) of the *Act* is valid as enacted.

Hold, Order:
Appeal dismissed

Ratio:
All matters related to ocean pollution are federal jurisdiction under POGG national concern.

This was the first landmark case because it delineated the National Concern branch of POGG from the Emergency Branch (which requires temporary measures, only in times of emergency). Ocean dumping is seen as a unique form of pollution and international since oceans are communal – it is wholly different than dumping in local waters.

- Crown Zellerbach argued that since they were dumping in the narrow ribbon of ocean around the province's shoreline, it is provincial. Beyond that ribbon is federal.
    - The area of dumping was a narrow strip of provincial water that lead to federal waters.
- But the SCC upheld the law because ocean waters mix. Pollution that was in the provincial waters will mix with ocean waters and could transport all over the world, which undoubtedly becomes an issue of national concern.
- This case, beyond environmental, actually was the leading authority for National Concern of POGG until the GGPPA (more to come)

POGG branch has three branches:

- Residual Gap: federal can pass laws where this is an area of no law, a gap at confederation
- National Concern: test developed in this case (slightly evolved in GGPPA)
    - Can be applicable to issues that existed at Confederation (not gap) and those that have arisen in the meantime – including those of local or private nature
- Emergency: requires temporary measures for a declared emergency

Three parts to the test:

1. Single, distinct and indivisible
    a. Can draw a line where it starts and ends. This is only ocean dumping, not freshwater
    b. Pollution does not stay put when dumping in an ocean
    c. Based on currents and tides (which don't exist in inland water), the pollution would mix and get carried far distances, well beyond the provincial ribbon

2. Scale of impact on provincial jurisdiction that is reconcilable with provincial authority/jurisdiction
    a. Federal authority is already pretty predominant in oceans, where provincial authority is limited, so it wouldn't be a large change of things
    b. All this is a requirement for permits.
        i. Minimal intrusion into provincial domain
3. Extra-Provincial Consequences
    a. Does it have something that cannot be addressed provincially?
    b. Is it a national concern because there is a provincial inability to respond to the issue?
    c. Yes, British Columbia could not solely address ocean dumping. BC can't regulate Nova Scotia's oceans
        i. It has an extra provincial effect

In the end, the *Ocean Dumping Act* (now part of CEPA) fulfilled all these and was thus valid under National Concern POGG. This doctrine wasn't really touched for over 30 years after this case.

- La Forest had a pretty aggressive dissent, not seeing it as minimally intrusive and protruding quite far into provincial jurisdiction.
- He thought it was wholly occurring in an area of provincial jurisdiction, akin to *Fowler*
- He thinks that POGG use can only be in an emergency, rather than this really nebulous, infrequently used doctrine.
    - If it is emergency, there are limited powers for the federal government to address it.
        - He also doesn't see this as something with significant impacts on environmental issues. He didn't want the floodgates to more federal regulation in provincial property.
        - Could justify broad interference of federal law upon provincial areas of private property, civil rights and local undertakings in the name of environmental management.
    - To La Forest's credit, the logic in this case could easily apply to GHG. The only difference is that GHG is much more ubiquitous than marine dumping is.

Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3

Facts:
The province of Alberta applied to construct a dam on the Oldman River, and the federal government approved it pursuant to the *Navigable Waters Protection Act*.

- The Minister of Transportation attached appropriate conditions to the approval, though he did not perform an environmental assessment in the *Environmental Assessment and Review Process Guidelines Order*.

The Friends of the Oldman River Society applied to quash the order.

Issue:
Is section 3 of the *Guidelines Order* a valid federal law? Or is it too broad to offend ss92 and 92A of the *Constitution Act, 1867*?

Rule:
Section 5 of the *Navigable Waters Protection Act*

(1) No work shall be built or placed in, on, over, under, through or across any navigable water unless
    (a) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction

Section 3 of the *Environmental Assessment and Review Process Guidelines Order*
The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision-making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.
Analysis:
Characterization
Environmental impact assessment is a planning tool that is now an integral planning tool of sound decision making. It grands decision makers the objective basis for granting or denying approval for developments.
- It is, in pith and substance, an instrument that regulates the manner of how federal institutions must administer its duties and functions.

Classification
The pith and substance being inherently federal, it fits neatly into the Parliament's power. It is also a purely residuary aspect of POGG.
Conclusion:
Intra vires of the Parliament.

Hold, Order:
Appeal dismissed

Ratio:
Intentions of a government order are legally binding and meant to be of force.

This case was more procedural than anything. Governments often did a lot of feet dragging when it came to environmental assessments. This was not a regulation or statute, just a guideline order.

- But this did not stop it from being legally binding.
- This was a project in full provincial boundaries (local works and undertakings?), it was authorized and commissioned provincially.
    - But, it was a navigable waterway and a permit is required from the Federal government, and that is sufficient to trigger environmental assessment.
    - The Court agreed that the environmental assessment was needed because of the order
    - With federal permitting requirements, the federal government can assess issues that have federal aspects
        - So, fisheries, migratory birds, navigability… trigger the availability of a federal assessment. Once triggered, it extends to all of the federal aspects of the project
            - This can be extremely broad in scope
- This recognition of federal permitting gave a very large, broad authority for the areas of federally recognized licensing and permitting
- The pith and substance: instrument and regulation the ways that institutions must administer their multifarious duties and functions. This is nothing more than an adjunct of the federal legislative powers affected.
    - This is no different than the federal government exercising authority over navigable waters
    - What *is* different is that this is a procedural element, not a specific legal outcome
        - And that is protected not
- How far will this logic go? Can something like the *Impact Assessment Act* be validly upheld for all corporations emitting GHG which is a transboundary harm? Is it too far removed from the permitting regime of the federal domain?

Criminal Law Power

After *Hydro Quebec,* Criminal law is potentially the biggest source of environmental law at Parliament's fingertips. They now know exactly how to enact valid regulatory environmental legislation.

R v Hydro Quebec, [1997] 3 SCR 213

Facts:

The Government of Canada made an interim order under ss 34 and 35 of the *Canadian Environmental Protection Act* that restricted the emissions of PCBs.

- Hydro Quebec violated these emissions orders and was charged with breaching it
- Hydro Quebec applied to have ss34-35 and the orders deemed *ultra vires*

Procedural History:

The Court of Quebec found the law *ultra vires* of the criminal law power

- The Quebec Superior Court dismissed the appeal
    - The Quebec Court of Appeal dismissed the appeal

Issue:

Are the orders or the provisions *ultra vires* of the federal criminal law power?

Rule:

Section 34 of the *Canadian Environmental Protection Act*

Subject to subsection (3), the Governor in Council may, on the recommendation of the Ministers and after the federal-provincial advisory committee is given an opportunity to provide its advice under section 6, make regulations with respect to a substance specified on the List of Toxic Substances in Schedule I, including regulations providing for, or imposing requirements respecting

Section 6 of the *Chlorophenyls Interim Order*

The quantity of chlorobiphenyls that may be released into the environment shall not exceed 1 gram per day in respect of any item of equipment or any receptacle or material containing equipment in the course of the operation, servicing, maintenance, decommissioning, transporting or storage

Analysis:

Because 'environment' is not enumerated in ss91 or 92, it is diffuse and cuts across various areas in those sections, and both governments can enact legislation so long as it does not protrude too much into the jurisdiction of the other.

<u>Characterization</u>

The environment is the largest issue of our time, and it requires action by governments at all levels as an international issue.

- The preamble of the Act states that Canada must fulfill international obligations
- Section 35 can only be brought into play when the Minister believes a substance is not listed in Schedule I and not subject to any control.
    - The interim order is allowed because they are concerned that immediate action is needed to deal with dangers to environment/health.
- Pith and substance of the Act lies in the regulation by federal agents of any and all substances which may harm any aspect of the environment or pose a danger to human health.

<u>Classification – Criminal Law Power?</u>

In order for legislation to be valid criminal law power, it must satisfy three P's

1. Prohibition
    a. Prohibiting emissions as per the guidelines
2. Penalty
    a. Penalty for emissions as per the Act

3. Public Purpose
    a. It is entirely up to Parliament to decide which evil it wishes to address.
    b. Criminal law is meant to underline and protect our fundamental values
    c. The only limit to Criminal law power (outside the Charter) is it cannot be colourable.
    d. Environmental issues can be criminally sanctioned for the protection of human life or health, but that is not the limit of these provisions. Certain forms of environmental pollution can, directly or indirectly, sooner or later, cause significant harm to humans.
    e. Environmental protection is a fundamental value in society that Parliament may use its criminal law power to underline that value.
        i. Criminal law must keep pace with emerging values

Conclusion:
Valid Federal criminal law.

Hold, Order:
Appeal allowed.

Ratio:
Environment is a valid criminal law public purpose
- Public purpose can change over time with emerging values

While much more specific, the nature of the dispute was asking how far ranging will the federal power to establish a broad and general regulatory scheme to control the emission of substances that are harmful to the environment or human health?

- Hydro Quebec obviously argued this was industry regulation of one province
- Canada argued it was National Concern or Criminal Law

The Supreme Court upheld it as criminal law, and upheld the entire parent statute rather than just the impugned sections. So, all of CEPA is confirmed as valid federal law.

- CEPA is very broad in scope. Every exposure to substances we have is all from CEPA
- It has significant human health and environmental health concerns

SCC pith and substance: regulation of substances that can have negative health or environmental effects to humans or the environment.

- Precautionary framework for identifying and regulating the release of toxic substances.
- While they caution against criminal law being employed colourably and invading into areas of exclusively provincial legislative competence, they allow multifaceted public purposes for the criminal law power (prohibition, penalty and public purpose)
- The traditional 3P's have more wiggle room than we previously saw it. It can have something more regulatory in nature and still be criminal since criminal is far ranging.
    - Anything with 'thou shall not' could be criminal
- Prohibition: limitations on what can be emitted
    - SCC: Criminal law does not have to be black and white – it doesn't have to be you can or cannot do something
        - It can have conditions
        - Toxins were allowed to be emitted, just not exceeding certain amounts or concentrations
        - You can sell paint, so long as it does not exceed 50ppm [mercury]
        - Conditions like this do not invalidate criminal law
- Penalty: most CEPA penalties are a fine, but that does not invalidate criminal law
- Public Purpose: environment is a valid public purpose
    - What is a public purpose can evolve in Canadian society
    - What is outlawed reflects Canada's moral values

    - To include something that is not 'traditionally criminal' (like murder), reflects the view that certain bad activities are also to be outlawed
        - The environment is a fundamental value in Canadian society

La Forest wrote the majority in this case, but was dissent in *Crown Zellerbach*. He justifies it since criminal law is a clearer enumerated head of power that is much more broadly used than national concern (he didn't want something so nebulous to have such expansive encroachment on provincial authority). But, by allowing this as criminal law, the federal Parliament has almost no restrictions on what environmental regulations are justified, so long as it is implemented like this. Basically, they could outlaw GHG. But this would not be politically palatable

- Environmental law is almost always command and control; go over that limit and get prosecuted
    - *GGPPA* kind of changed it to an economic approach

These three decisions hint at some practical realities:

1. Compromises surrounding provincial ownership of natural resources
2. Provincial jurisdiction over Crown land, property and civil rights, municipalities and matters of local or private nature
3. Federal hooks of fisheries, navigation, criminal law, national concern
4. Informal or formalized cooperative provincial federal action

They also gradually increased jurisdiction over environmental matters:

- POGG (*Crown Zellerbach*)
- Criminal law power (*Hydro Quebec*)
- Environmental Assessment (*Oldman River*)
    - But, their expansion was met with a fairly limited federal response. Parliament could do a lot more if it wanted to. There must be something more at work to explain their federal timidness
    - There is an informal cooperative provincial federal action as a staple in Canadian environmental law
        - Federal government delegates, through agreements, to the provinces in areas that would normally be of federal jurisdiction (equivalency agreement)

Federal Timidness: consideration as to why the federal government has been unwilling to further extend its reach in light of SCC decisions. There is a political constitution where Parliament has deferred to provinces who are reluctant to cede any jurisdiction over the regulation of natural resources.

- This results in a politically easier collaborative approach
- There needs to be more external pressure from voters to change this: environmental protection has diffuse benefits and concentrated costs, so it attracts few political benefits but significant political costs to do anything about it (not to mention counter economic concerns)
    - Voters vote against their own self interest because they are voting for economy but making things worse down the road
    - Most Canadians agree that climate action is needed, but when it comes to cost, support dwindles. The support is thus nominal
- A lot of this comes down to ownership of natural resources
    - The reality is somewhere in the middle – resources can't be federal, nor exclusive jurisdiction of the provinces
        - Try to come to a collaborative, non confrontational approach

Competitive Model: presumed federal unilateralism; cooperation only favoured when unilateralism produces costs or withering benefits

Collaborative Model: favours cooperation over federal unilateralism; often expressed as "equivalency agreements" in federal legislation

The Canadian collaborative model, if done incorrectly, creates a race to the bottom and eliminates federal unilateralism/intervention absent provincial consent. A competitive approach might even promote provincial-federal mindset to win votes.

- Our collaborative approach lacks legal enforceable federal standards (water quality guidelines)
    - But if done correctly, it can have some very creative outcomes.

Ongoing environmental federalism discussion is underscored by the need for coordinated action on environmental issues juxtaposed with the lack of effective intergovernmental coordination and federal leadership.

Example: Pesticides

- Federal: authorization of what pesticides can be important, sold or used in Canada by (Health Canada). There are also limits to the concentrations of pesticides that can be applied (*Pest Control Products Act* + Regulations)
    - Based on health and environmental considerations
    - Federal government assesses on a broad level what pesticides can exist in Canada
- Provincial: Pesticide regulation through *EPEA* to regulate the sale, use, storage, transportation and disposal and licensing. So long as this does not conflict with federal law
    - These are common civil and property rights
- Municipal: by-laws that restrict cosmetic application of pesticides on municipal lands and private lands, so long as they are not less stringent that provincial/federal laws
    - No cosmetic pesticides

Federal was broad level what pesticides can exist

- Province has role in the storage and sale of the ones that can exist
    - Municipal has role on how the ones that can exist and the ones that are sold are applied

This was a success story for cooperative federalism. It has been a different story for GHG regulations

<u>Domestic Climate Change</u>

Syncrude Canada Ltd v. Canada (Attorney General) 2016 FCA 160

Facts:
Section 139 of the *CEPA* prohibits the production, importation and sale in Canada of fuels that does not meet the limits: they must contain 2% renewable fuel.

- Syncrude produces diesel for Oil Sands operations in Alberta, and so submitted an application to declare the law invalid on constitutional grounds.

Procedural History:
Federal Court dismissed the application.

Issue:
Is s5(2) of the *Regulation* aimed at economic regulation rather than air pollution, thereby being a matter of s92(13) and therefore *ultra vires*?

Rule:
Section 139 of the *Canadian Environmental Protection Act*

(1) No person shall produce, import or sell a fuel that does not meet the prescribed requirements.

Section 140

(2) The Governor in Council may make a regulation under any of paragraphs (1)(a) to (d) if the Governor in Council is of the opinion that the regulation could make a significant contribution to the prevention of, or reduction in, air pollution resulting from
    (a) directly or indirectly, the fuel or any of its components; or
    (b) the fuel's effect on the operation, performance or introduction of combustion or other engine technology or emission control equipment.

Section 5 of the *Renewable Fuels Regulation*

(2) For the purpose of section 139 of the Act, the quantity of renewable fuel, expressed as a volume in litres, calculated in accordance with subsection 8(2), must be at least 2% of the volume, expressed in litres, of a primary supplier's distillate pool for each distillate compliance period.

Analysis:

Step 1: Characterization

Legislation heavily indicates it is aimed at pollution rather than economy.

- Section 140(2) allows toxic substances to be added if they significantly contribute to pollution
- Air pollution is defined as anything that endangers human life – GHGs are all listed as toxic from the immediate or long-term effects on humans
- 140(1) has a lot of components for regulations of fuels.
- Order in Council made statement that the 2% regulation would significantly decrease air pollution.

The pith and substance, given these facts, of s5(2) is aimed at maintaining the health and safety of Canadians, as well as the natural environment upon which life depends.

Step 2: Classification

Criminal law requires (a) prohibition, (b) penalty and (c) public purpose.

- (a): The *Regulation* prohibits sale/import of non 2% renewable fuel
- (b): The *Act*, s272(1) makes it an offence to disobey the 2% renewable fuel aspect
- (c): For valid criminal purpose, the evil addressed must be substantially aimed at peace, order, security, morality or health. *R v Hydro Quebec* found that protection of the environment is absolutely a valid criminal law purpose.
    - Syncrude argues the section is ineffective. However, whether a regulation is worthwhile is not germane to criminal law – the purpose is the same
    - Syncrude also argues the regulation is to promote the renewable industry. A global market of renewables would help the purpose: decrease GHG emissions. Criminal law is not defeated because Parliament hoped it would spur renewable investment.
    - Syncrude also argues that the ban on GHG is not outright, and thus not criminal. *RJR* showed that prohibitions don't have to be total. There is not a constitutional threshold of % fuel that would make it criminal.

Any market responses to the *Regulations* do not detract from the dominant purpose of reducing GHG and air pollution. Section 5(2) is thus not colourable, and valid criminal law.

Conclusion:

Intra vires Parliament criminal law power.

Hold, Order:

Appeal dismissed

Ratio:

Criminal law can be broad but if a prohibition is complete economic regulation, it is not criminal

Syncrude argued many different things, all of which were dismissed

- Section 5(2) was economic regulation?
    - Pith and substance: the purpose and effect of the impugned legislation is to maintain the health and safety of Canadians and the natural environmental through the reduction of GHG emissions
    - Classification: the criminal law power requires a prohibition, backed by a penalty, for a criminal purpose
        - A criminal purpose is broadly construed, but must not stop short of pure economic regulation
        - Not colourable
    - Economic consequences of a regulatory measure does not negate its criminal purpose
- The regulation was not a complete prohibition?
    - Criminal law doesn't know how to be a complete prohibition. It can be a scale of what is allowed
        - It doesn't have to say 'no GHG', but it can say 'no importing GHG emitting devices'
        - It is a pretty low bar. Doesn't have to be at a certain level. It is using the market to get to 2%
        - No 'threshold of harm' exists to trigger criminal law power
- Regulation would not reduce air pollution?
    - The effectiveness is not relevant. If the federal government has jurisdiction to do so, and they think it will, they are allowed to do this

However, in *obiter* they say that the federal government can use criminal law to ban the combustion of fossil fuels. If we banned fossil fuels, society would collapse.

- But the Federal Court of Appeal says it is possible.
- *RJR* was another case where the court says the federal government could have gone farther, but didn't for practical reasons

Mutual modification: would the total ban modify or obliterate any area of provincial jurisdiction. That has huge issues on natural resources, to the effect that the industry would have to close

- But it is possible. Criminal law could go quite far so long as polluter pays principle is met. This is likely a common avenue going forward to adapt and spending money to transition

<u>Greenhouse Gases</u>

The *Pan-Canadian Framework on Clean Growth* was a policy released in 2016

- Central to this framework policy is the *Greenhouse Gas Pollution Pricing Act*
- Pillars
    (i) Pricing carbon pollution
    (ii) Complementary measures to reduce GHG emissions across the economy
    (iii) Measures to adapt to climate change and foster resilience
    (iv) Inactions to accelerate clean technology and innovation

Carbon Pricing

- Regarded as an efficient and effective way to reduce carbon emissions, some indicia of command and control, but driven by efficiency
- People see it as embedded, that there is no single action to limit it, like there are for other pollutants (CFCs)
- Can take many forms: carbon tax/regulatory charge or levy, performance based standard, or cap and trade system
    - The most common is the regulatory charge

- The *GGPPA* established a benchmark price for carbon emissions, starting in 2018, which would gradually increase in stringency (increasing price or decreasing cap)
    - Under the *GGPPA*, provinces can opt for an explicit pricing system or a cap and trade system

Existing approaches
- British Columbia: revenue-neutral carbon tax, since 2008, that imposes a direct price on each tonne of CO_2 equivalent that results from combusting fossil fuel
- Alberta: carbon levy (similar to BC's tax) and an emissions intensity reduction strategy for large emitters (>100,000 tCO_2 pursuant to the *Carbon Competitiveness Incentive Regulation*)
- Quebec/Ontario: cap on total allowable tradable carbon allowances (1t CO_2) per year, distributed freely and through auction; market sets the price; emitters must account for annual emissions through allowances
    - Cap and trade motivates them to become more efficient so you can profit
    - The prices are set by the interactions in a free market
    - There needs to be a backstop to ensure the price is adequate and certain enough (this is often where the government comes in, to ensure allocation is proper and the economy can keep going)

Canada *GGPPA*
- Benchmark seeks to ensure that carbon pricing applies to a broad set of emission sources throughout Canada with increasing stringency over time to reduce GHG emissions, with the lowest impact on consumers and to support innovation and clean tech
- Common scope: fossils purchased or used within the province, subject to certain exemptions
- Is two-track like Alberta's approach: 1) a fuel charge and 2) an output based pricing system (for large emitters)

Reference Re: Greenhouse Gas Pollution Pricing Act, 2021 SCC 11

Facts:
In 2018, Parliament enacted the *Greenhouse Gas Pollution Pricing Act* to regulate carbon emissions. It Involved a fuel charge that applies to those who produce, distribute and import carbon-based fuel
- Pricing mechanism set out for large emitting companies
    - Does not apply to all provinces, only to those whose GHG pricing programs are insufficient or lacking altogether
        - Means the mechanisms are constantly assessed

Procedural History:
- Three provinces challenged this act in Court: Saskatchewan and Ontario Court of Appeals ruled the GGPPA constitutional whereas the Alberta Court of Appeal ruled it unconstitutional

Issue:
What is the 'pith and substance' of the GGPPA (characterization)?

Rule:
Must describe the pith and substance as precisely as possible; should capture the essential character in terms as precise as the law will allow. This must be kept separate from the classification.

Analysis:
Intrinsic Evidence:
- The title of the act alludes to the fact that it is more than regulation of GHG but pricing them.

- The preamble states that failure to reduce GHG will have significant harm and must be approached broadly in Canada
- Mischief: Profound nationwide park with a purely interprovincial approach and biodiversity/health/economic weakening. Mischief is not the GHG but the effects of the failure of Parliaments to act on our environment

Extrinsic Evidence:

- Suggests main thrust is establishing minimum national standards of GHG price stringency to reduce GHG emissions
- After the *Paris Agreement*, premiers endorsed the *Vancouver Declaration* that recognized international carbon pricing mechanisms and committed to similar
- Goal was to make a minimum benchmark without displacing provincial authority to make their own. Other generals said it was a backstop system, so a carbon price applies broadly through Canada

Legal Effects:

- Legal effects confirm the GHG is essentially backstop nature federally
- First effect is to create a pricing scheme consistent with the Canadian economy; it does not tell people they cannot perform GHG emitting activities. All it does is force them to pay for them proportionately with how much they emit
  - Lets consumers chose how to respond
- Will not be in effect in provinces with sufficiently stringent measures already in place

Practical Effects

- Unwise to attempt to predict economic consequences of GGPPA
- The only practical effect is not allowing a province/territory to implement the mechanism or implement one of their own
  - Alberta is not currently in the backstop because they had a pricing scheme 'tailored to Alberta's industries and priorities'

Conclusion:

The true pith and substance of the GGPPA is to establish a minimum national standard of GHG price stringency to reduce GHG emissions

Issue:

Which head of power has the authority to accomplish this?

Rule:

Findings this a matter of national concern is permanent so finding this a federal power has concerns over the division of powers in Canada. National concern is only in appropriate, exceptional cases and for adequately constraining federal power in accordance with federalism.

Establishing National Concern:

Threshold Question:

- Ensures National Concern doctrine cannot be invoked too lightly

Singleness, Distinctiveness, Indivisibility

- Distinct enough to distinguish from provincial concern and provincial inability test (what would happen if province failed to deal with the regulation?)
  - Also helps determining if the matter is of provincial concern or extra provincial/international even if provincially originating
- 1. Legislation must be so provinces separately incapable of enacting legislation
- 2. Failure to include some would jeopardize the operation for other parts of Canada
- 3. Failure to deal with the matter has grave extra-provincial consequences

Scale of Impact

- The matter has an impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power

Analysis:

Establishing minimum national standards of GHG price stringency:

Threshold Question:

- The matter is not regulation of GHG but the minimum national standards
- All provinces committed to the Vancouver Declaration and large consensus internationally that carbon pricing is a critical measure in reducing GHGs
- This is clearly a national concern; critical to life in Canada and the world

Singleness, Distinctiveness, Indivisibility

- 1. GHG are extra-provincial in their nature
- Paris Agreement illustrates the international nature of GHG emissions
- National basis that is not an aggregate of provincial matters not duplicates provincial GHG pricing systems
- Evaluating provincial mechanisms to decide if the GGPPA applies is inherently federal
- 2. Provinces are not capable of establishing a pricing floor to the whole country and not including one province jeopardizes the program in the rest of Canada because of carbon leakage (companies would move to a different province because it is not expensive to emit)
    - Provincial cooperation may not result in national emissions reductions
- 3. Grave Consequences
- Not a question GHG have horrible effects on climate change, especially in the Artic
- This is an inherently global problem
    - A provinces failure to act threatens Canada's commitments which hinders Canada's persuasive power to push for lower emissions worldwide

Scale of Impact

Given that provinces can invoke their own policies to displace this policy. Minimal impact

Conclusion:

The GGPPA is valid federal legislation under the National Concern branch of POGG

Hold:

Greenhouse Gas Pollution Pricing Act is constitutional

Order:

Attorney General of Saskatchewan/Ontario appeal dismissed; Attorney General of British Columbia appeal allowed

General National Concern framework:

1. Pith and Substance of GGPPA
    a. establish a minimum national standard of GHG price stringency to reduce GHG emissions
    b. Federal jurisdiction is located on the basis of national concern branch of POGG; double aspect applies here since both Canada and provinces can legislate
        i. But the federal rule, owing to national concern, is paramount
2. National Concern (POGG)
    a. Sufficient concern to Canada as a whole
        i. a price on carbon to address climate change is important part of the response to it
    b. Provincial inability to address the issue
        i. Provinces alone cannot set a minimum national standard
        ii. If each province did their own, it would be a race to the bottom
    c. Impact on provincial jurisdiction is qualified and limited
        i. It serves as a benchmark and pricing deficiency
        ii. It grants discretion to the provinces on how they an achieve it
            1. Both federal and provincial can set similar legislation in their sphere.
            2. This was the first time double aspect was incorporated into national concern analysis

Chief Justice described climate change as 'an existential threat to human life in Canada and around the world'

Canadian Net Zero Emissions Accountability Act, SC 2021, c 22

Section 4
The purpose of this Act is to require the setting of national targets for the reduction of greenhouse gas emissions based on the best scientific information available and to promote transparency, accountability and immediate and ambitious action in relation to achieving those targets, in support of achieving net-zero emissions in Canada by 2050 and Canada's international commitments in respect of mitigating climate change.

Section 6
The national greenhouse gas emissions target for 2050 is net-zero emissions

- *net-zero emissions* means that anthropogenic emissions of greenhouse gases into the atmosphere are balanced by anthropogenic removals of greenhouse gases from the atmosphere over a specified period.

Section 7

(1) The Minister must set a national greenhouse gas emissions target for each milestone year with a view to achieving the target set out in section 6.

(1.1) Each greenhouse gas emissions target must represent a progression beyond the previous one.

(2) The national greenhouse gas emissions target for 2030 is Canada's nationally determined contribution for that year, communicated under the Paris Agreement, as amended from time to time.

(3) Each greenhouse gas emissions target must be as ambitious as Canada's most recent nationally determined contribution communicated under the Paris Agreement.

(4) The Minister must set the national greenhouse gas emissions target
  (a) for the 2035 milestone year, no later than December 1, 2024;
  (b) for the 2040 milestone year, no later than December 1, 2029; and
  (c) for the 2045 milestone year, no later than December 1, 2034.

Climate Law & Human Rights Litigation
Litigation has been attempted for climate change, but it hasn't really worked out. But there is different precedence in other places and more tolerance for these new arguments.

Benefits of climate litigation:

- Raises the profile of environmental/climate issues
- Serves to inform the development and implementation of stronger climate mitigation laws
- Acts as a safety net whereby the judiciary can fill gaps in existing legal regimes
- Improves access to justice for impacted complainants
- Improves accountability and enforcement, which are recognized gaps in environmental/climate law
- Helps to overcome some of the barriers in traditional human rights litigation in its application to environmental/climate harm
- It isn't ever the perfect response (it is reactive rather than precautionary), but it is still important

State of the Netherlands v Urgenda Foundation [2015] HAZA

Facts:
Urgenda sought a court order directing the state to reduce GHG by 40%, or at least 25% compared to 1990.

Procedural History:
The District Court allowed Urgenda's claim, requiring the Netherlands to reduce emissions
- The Court of Appeal confirmed this decision

Issue:
Is the Dutch state obliged to reduce, by the end of 2020, the emissions of GHG from Dutch soil by at least 25% compared to 1990?

Rule:
Article 13 of the ECHR states that national law must offer an effective legal remedy to avoid imminent violation of human rights

Analysis:
Article 13 of the ECHR states that national law must offer an effective legal remedy to avoid imminent violation of human rights. Given that environmental hazards threaten large groups of the population, this may be reason enough. The argument that the Netherlands is doing more than other countries is ineffective since each country is responsible for its own share.
- The targets (20% by 2020, 49% by 2030 and 95% by 2050) are laid down in the Dutch *Climate Act*.
- The Dutch state offered no explanation why its reduction in targets would keep within the 2C target. Thus, the Court of Appeal was permitted to reach its conclusion, that the state is bound to the 25% reduction.

The State argued the Court is being political. The Parliament is required to make decisions and is given large discretion. The Courts decide whether, in taking their decisions, the government remained in the limits of the law they bound themselves to.
- The Court finding that the government is not doing enough to meet ECHR standards

Conclusion:
Court was entitled to the decision and bind them

Hold, Order:
The order to reduce emissions stands as a final order

Urgenda was really a pendulum swing for climate change litigation, which otherwise, in and of itself won't get us where we want to be. Mobilization of large elements is nonetheless important.
- The argument was that Netherlands, as a developed issue should do more to address climate change
- The Supreme Court agreed that higher targets were needed. Liability was under 2 heads
    a. Netherlands was not adequately precautionary
        i. We need precautionary steps, and the current ones were not sufficient
    b. Human rights
        i. Section 2 and 8 (includes right to participate in essential activities)
        ii. Climate change impacts the ability to do the activities and impacts community safety
- General findings:
    - Dutch government has a positive obligation to protect its citizens from both public and non-public activities that could endanger these rights
    - Climate change constitutes an imminent threat that has triggered the Dutch governments obligation to take precautionary action
    - Remedy based on Netherlands fair share of its global responsibility
        - Argument that Netherlands share of GHG is negligible is dismissed

- All states hold an independent responsibility to reduce GHG proportionate to its share of responsibility (regardless of other emitters)
    - Can't wash liability because they are a relatively small emitter
    - Climate change requires a global response
- Proportionate share determined to be a 25% reduction by 2020 as determined with reference to other developed states

In the Canadian context, most litigation is based on section 7 and section 15 of the Charter:

Charter of Rights and Freedoms
Section 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Section 15 Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 7 is applicable to all matters within the authority of parliament/provincial legislatures

- Traditionally applied to criminal law proceedings but has been tried in health care context and MAID. Litigation today is focused on negative rights (right to be free from) but the courts have not closed the door on its possible application in a positive rights context (requiring action, in *Gosselin v Canada*)
- Two part test:
    - Law or government action that interferes with or deprives the complainant's right of life, liberty or security of the person. The must be a causal connection between the state action and alleged impact.
    - The depravation is not in accordance with the principles of fundamental justice, meaning it is arbitrary, overbroad, or disproportionate to its objective
        - Even if both of these are met, the state action can be saved by virtue of s1
- However, this still is attractive to litigants because under s24(1), there are a broad range of remedies available to the court (damages, declarations, injunctions and other mandatory remedies)

The *Mathur et al v Her Majesty the Queen* case was the first case arguing section 7 breach that actually made it to Court

- 7 youth challenged the Government of Ontario's decision to rollback climate targets by Minister discretion (of which, no targets or plans were made)
    - Youth are good advocates because they have a 'lost future' argument
- Seek a declaration that the new scheme violates ss7 and 15 and s7 needs a stable climate system. Applicants also request the government must set a science-based reduction target that accords with proportionate share of climate change within the 1.5C target range for food security, increased severity of weather events, health conditions
    - Ontario argued that it had no change of success but he Court disagreed
- The court said that they are not to make political determinations, but when there is a potential for violation of rights, that is the courts area and they should debate. If constitutional rights are at issue, this is assuredly the courts issue

- Did not determine whether the claims themselves are determinable, but found that Ontario's decision to translate policy decisions into law and state action meant that a trier of fact should determine whether these decisions infringe constitutionally guaranteed rights
- Headed the applicant's argument that they are not looking to impose a positive obligation on the government to redress future harm, but rather to hold them to account for weakening their climate targets and increasing climate-related harms

The provincial argument argued:

- There is no constitutional requirement on a particular stringency of environmental climate action and admits the current provincial law is more of a 'glossy brochure' than a legal response
    - Shouldn't every place have some mitigation efforts?
- The federal government has legislative authority over climate
    - Funny, they said the opposite in the *GGPPA*
- No evidence that additional or more stringent action by Ontario would avoid climate harm

<u>Indigenous Peoples' and Environmental Jurisdiction</u>

Indigenous nations have long had a connection between their communities and the land and environmental systems. This has led to a recent push for greater autonomy of Indigenous nations over land ownership and land use

- Diversity of perspectives but unique worldviews and close relationship to the land
- Cultural connection to traditional lands manifests in different ways
- Evidence located in customary practices and community knowledge and stories
- Property regimes often differ from European practices and can embrace communal rights over lands and their natural resources
- Protection of rights often requires protection of traditional territory

Indigenous legal systems long predated colonial jurisdiction. Work continues to be needed to recognize inherent rights to Indigenous government and pre-contact sovereignty

- European colonizers asserted sovereignty is based on doctrine of discovery
- Colonizers asserted sovereignty over lands through treaties or occupation/seizure

Aboriginal law:

- *Royal Proclamation of 1763* – paternalistic approach to establishing systems of English governance and requiring nation-to-nation agreements to surrender sovereignty
- *Constitution Act, 1867 – s. 91(24)* – federal jurisdiction over "Indians, and Lands reserved for Indians"
- *Indian Act, 1876* – framework for exercising federal jurisdiction over "Indians" and "Indian lands"; band membership, taxation, resources and lands management, etc.

Result: "the destruction of traditional lands and the development of environmental governance processes that often do not allow for the meaningful participation of the Indigenous peoples who are often most affected by natural resource development projects"

Then came the *Constitution Act, 1982*:

Constitution Act, 1982
Section 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada

This did not revive anything, it merely recognized that things were protected on a going forward basis

- Aboriginal rights
    - Treaty Rights
    - Free standing traditional/cultural practices
    - *Sui generis*
    - Aboriginal Title

Section 35 has been used for:

- a defense to regulatory prosecution under fisheries laws
- basis for judicial review of resource licensing and permitting decisions given the constitutional duty to consult and accommodate when an Aboriginal right is impacted
- Division of Powers actions taken by First Nations to oust provincial regulation
- basis for legal action seeking to prove Aboriginal Title
- Enforcement of Indigenous laws and customs

<u>Aboriginal Rights</u>

R v Sparrow made the first framework. *R v Van der Peet* elaborated how to determine if the right exists

1. Is there an existing Aboriginal right in question?
    a. What is the precise nature of the Aboriginal right being claimed
        i. Very narrowed and tailored
    b. Was it integral to the society prior to European arrival?
    c. Is there reasonable continuity between the activity's traditional practice and modern form
2. Is there an engaged regulatory action interfering with the right?
3. Is it justified?
    a. Compelling and substantial reasons
    b. A valid legislative objective (conservation is the biggest one)
    c. Honour of the Crown

Both tests allow different forms of evidence. Oral evidence (as is traditional in Indigenous cultures) can be used and are given equal weight

<u>Aboriginal Title</u>

Developed in *Delgamuukw v British Columbia*. Found that Aboriginal title is a *sui generis* interest in land

- Affords right to exclusive use and occupation and the right to choose the use that land is put to .
- It is inalienable, except to the Crown
- There are some inherent limits to the land.
    - It cannot be used in a way that would prevent future generations from accessing the same benefits of the land
    - So, cannot put a parking lot on the land and completely deprive it of its spiritual use
- Compensation is payable if Title is infringed – based on the *Sparrow* test for justification
- Where it exists, or if it *might* exist, the duty of consultation is engaged prior to action or decisions taking place

Test for Aboriginal title:

1. Occupier the land in question prior to the assertion of Crown sovereignty
2. Exclusive Occupation

3. Continuous Occupation (oral history afforded equal evidentiary value, and nomadic lifestyle won't prevent this test from being satisfied)

Unfortunately, this is a difficult test and has rarely worked

- It did succeed in *Tsilhquot'in Nation v BC*
    - The sought a breach of duty to consult from a timber license approval on the land by the government
    - It was the first successful title claim
        - The Supreme Court took a 'culturally sensitive' approach and confirmed that it extends to nomadic people
    - Confirmed that title claim incorporates self government and land management
        - But, the land management is made by the collective, for the collective
    - Additionally, the court confirmed that there is no interjurisdictional immunity granted to Federal crown for 'core Indianness' under s91(24)
- But it did present problems. Because no development was allowed that would deprive future generations (since the title is collective), couldn't virtually every commercial project violate this?

To justify violating title, on the basis of broader public good, the government needs:

1. Consent of the Nation, OR
2. Constitutional requirements (written and unwritten) fulfilled
    a. Procedural duty to consult and accommodate discharged
    b. Actions supported by a compelling and substantial objective – which must advance recognition
    c. Government action is consistent with the Crown's fiduciary obligation – which must respect that Title, as a group interest, inheres to present and future generations

Haida Nation v BC

- Sets down what is required to uphold the honour of the Crown when it comes to the duty to consult and accommodate in line with the Crown's fiduciary obligation
- Constitutional duty to consult and accommodate even before rights are proven. It is triggered if there is real or constructive knowledge of potential rights. Agreement not necessary, but commitments to a meaningful process undertaken in good faith is required
    - Result of consultation dictates whether accommodation is needed
    - It is a spectrum
- Say there is a proposed pipeline through traditional hunting lands
    - If consultation discovered that the uses of the land are shifting based on shifting wildlife, to accommodate the government should alter the map of the pipeline to least interfere with wildlife, but still approve it in the end
        - There is a dialogue created. There is consultation, and there is an accommodation, but it is still approved

Mikisew Cree First Nation v Canada

- A winter road proposal through reserve land (on the edge) did not consult with the Mikisew despite their protest on the impact with guaranteed treaty rights
- Even if the project could have been allowed from Treaty 8 taking up provisions, there was consultation needed.
    - Minister's approval of the winter road project was quashed

Gitxaala Nation v Canada (Northern Gateway Pipeline)

- The pipeline crossed a lot of traditional land.

- The Environmental Impact Assessment conducted by the government can be utilized to discharge the duty to consult
- Standard of consultation is not a perfection standard (government isn't expected to have perfect standards) but reasonable ones
- Took a detailed look at the consultation process for the approval of the Pipeline.
    - At key steps in the process, there was only a one sided discussion. They attended and took notes, but they did not have a dialogue with the Nation and there was no accommodation whatsoever.
        - Boxes being checked off does not suffice for adequate consultation.

Clyde River v Petroleum Geo-Services
- PGS wanted to conduct off shore seismic testing, which marine animals avoid and often will not return to the area of the testing
- This was detrimental to the lives of Clyde River Inuit
- The Supreme Court found that not enough consultation was made with the affected Nations as they did not have an adequate opportunity to participate
- Court determined that the consultation involved fell short of the requisite standard and failed deep consultation standards

In the *Tsleil-Waututh v Canada* case, the TMX pipeline under Justin Trudeau was argued in court.
- Trudeau government had notes on consultation needed from *Gitxaala*. They had a very good consultation process in the first two phases of the project
- But, the third phase consultation had no meaningful dialogue (government took the role of note taker, and didn't do anything with the legitimate worries of the Nation)
- The pipeline was quashed. After further consultation, the project was revived

UNDRIP required free and informed consent of Indigenous nations. But, Canada just requires a duty to consult, not to consent. When UNDRIP came out, Canada accepted everything, but the free and informed consent part. Consent is only needed if a project affects Aboriginal Title.
- But, it has been found that the duty to consult is not in the legislation making process.

What is required in consultation? Very context dependant
- Depth of Consultation differs according to strength and nature of Aboriginal claim
- Extent of consultation can vary from mere notice of proposal to long term, in-depth consultation
- Consent is not required, with almost certain exception of infringements of Aboriginal Title
- Good faith is required on both sides
- Resulting accommodation is dictated by the outcome of the consultation
- No unreasonable timelines imposed
- Government positions and decisions properly explained
- Aboriginal concerns considered and addressed
- Crowns deals reasonably and takes Aboriginal rights seriously (no 'sharp dealing')
- Can take place as part of the Environmental Assessment process

When is the duty to consult triggered?
- Aboriginal title to land
- Aboriginal rights or interest in land, short of ownership
- Rights established by treaty, including land based rights to hunt, fish, trap, harvest

In *Yahey v British Columbia*, the Blueberry First Nation in Northern BC Treaty 8 territory had been telling the Crown for a decade that there was too much oil and gas development and it was impacting their lifestyle.

- Government tried to keep going, so they brought a Treaty claim for a sizeable claim of their land. There was a ton of evidence
- Government argued they had the Treaty 8 right to take up the land
- The community wasn't contesting one specific instance, it was ten years worth of development of forestry and oil and gas.
    - In their cumulative nature, it infringes their rights
- Environmental law struggles with cumulative effects. They are decision by decision basis, and it struggles with this articulation
- The BS Supreme Court:
    - By causing the cumulative effects, the Province breaches its Treaty 8 obligations
    - Taking up of land has produced that there is no land left to enforce their treaty rights
        - As such, this was an infringement of their rights
        - No more authorization of development can continue
        - Not only that, but British Columbia has to address the issue

This was a big win for Indigenous and Environmental law

- First time cumulative effects have been recognized to justify liability on the government in infringing aboriginal or treaty rights

There is a growing area of "Indigenous Protected and Conserved Area in Canada". These are areas in traditional lands that were designated to be National Parks. National Parks mean Crown governance though, so these are Indigenous run areas that also elevate Indigenous law and traditions.

- They are often structured through agreements between the federal government and the Indigenous community in question, but with Indigenous law woven into the agreements.
    - A management board would then feed into it.
    - Respects Indigenous way of the land.

PART 3: ENVIRONMENTAL REGULATORY LEGISLATION

Canadian Regulatory Frameworks

This is the biggest area of environmental law, the nuts and bolts of environmental law in Canada. Pretty much every activity in Canada has to comply with environmental legislation.

Regulation is a spectrum

- On one end, is permissive regulation (dominant form of environmental law in Canada)
    - In this case, discharge into environment is permitted so long as it is within a prescribed limit, and these limits are within regulation and statute
    - These are a mixture of federal and provincial authorities that deal with this.
        - Federal is more overarching
        - Provincial usually authorizing of polluting activity (mining, resource extraction)
    - Canadian regulatory environmental law usually choses to regulate rather than prohibit
    - Three main features of permissive regulation:
        - Need some standard setting exercise. Like under *CEPA,* what concentration of a substance is allowed, or what kind of activity would be approved. What are the limits of scrutiny?
        - Need some approval process. What we allow to be emitted is actually being emitted. Before ground breaks on a project, all ducks need to be in a row.

Ensure you are following provincial authorization and in accordance with statutory requirements.
        - Need some compliance/monitoring/enforcing system. Are polluters following their license conditions? If no, they are in a state of non-compliance. How do we bring them back? What are the consequences?
- On the other end is preventative design. This is often seen as so restrictive and burdensome it is not done.
    - System to find what we want to prevent and design then entire system to avoid it.

How do we move forward? Can we move from permissive regulation to preventative design? This can be done for substances, activities or authorization. The general way forward is:

1. Initial presumption of novel pollutants/substances as "safe"
2. Uncertainty and circumstantial evidence of harm
3. Acrimonious debate
4. Permitted releases (subject to a threshold)
    a. This is an iterative proves
    b. We tend to proceed until there is certainty that something is bad and then decide how to fix it.

The process we use relies on multiple assumptions:

1. Regulation of pollution for its *known* effects rather than its *uncertain* consequences
2. Assimilative Capacity: environment's enduring capacity to absorb certain levels of pollution without harm
3. Scientific Knowledge: decisions around things like assimilative capacity are based on sound science. This is an issue for problems of scale, types of toxicity, acute/chronic and cumulative effects)
4. Effective/efficient regulation: the transaction costs/externalities associated with development and enforcement of environmental law is stacked against effective or efficient regulation

Regulation can often take on media-based responses (legislation that addresses air quality, water quality and land use). This is the US Approach (they have the *Clean Air Act, Clean Water Act*).

- Canada uses a more sector-based approaches (regulations taking on specific acts of the economy
- But we also use Approval Based regime (activity is prohibited in the absence of approval, applicable to general pollution releases)

<u>Step 1: Setting Standards</u>

How do we set a limit for a pollutant that we deem acceptable? This is all about permissiveness. What are we trying to get to? What are we trying to achieve? What are we trying to balance?

- One objective is to strike a balance
    - Keeping diversity, human health, species survival, long term use of the land
- How to translate objectives to criteria?
    - Biodiversity index, concentration of contaminants that are safe for humans
- How to translate criteria into standards?
    - Regulate to industry how much/what concentration they can release
    - Standard are just the end product and a reflection of what level we find appropriate and how it is articulated into a legal effect
    - Standard setting thus becomes a critical part of the exercise
- Performance Based: prescribe a pollution limit (general or specific) and allow flexibility in how to achieve it.

    - "can't be more than this concentration of mercury in water"
    - These are nice because the Act does not tell industry how to achieve this target, so emitters can pick that themselves
- Technology Based: Mandate the use of approved government pollution control technologies.
    - "in your operation, you can only use government approved technology"
    - This was common in coal phase out, had to use certain scrubbers or combustion
        - "Best quality": government determines the best technology and orders its use
- Management Based: not regulation outcomes or means, but the management planning activities
    - Environment Management Plan (EMP) that organizes and structures environmental protection; Not overly effective
    - Evert industry in an area has to complete and operate an EMP that details how the environment is taken care of
        - Hands off approach from the government. Environment is something companies will have to consider, but it is in the corporation's hands to do something with it
        - These are usually for less noxious activities.

Franson, Franson & Lucas Model for Environmental Standard Setting ("FFLM")

Gives us a framework to work through a process on the way pollutants are managed and regulated. The Model is not how all governments do it (or necessarily should), but they are likely to do some sort of variation of this approach

1. Determine Objective(s)
    a. Political choice: goal could be to have as much economic output as possible
        i. Could be to maintain water that is safe in the environment to drink
        ii. Or to protect environmental diversity to continually harvest
2. Develop Criteria
    b. Scientific undertaking to assess if we are achieving objectives
        i. How much [pollutant] can there be in the water for it to be safe to drink?
        ii. What habitat does a migratory species need to sustain population sizes
    c. This is usually about objective criteria so we have certainty going forwards
3. Establish an Ambient Quality Standard
    d. Technical and Political
    e. How to set standard that reflect the criteria we identified?
        i. Overall, what are the limits on the [pollutants] we want in the area
        ii. How much can populations decrease to maintain the population
4. Define individualized operational/effluent standards
    f. Define permissible and impermissible actions
    g. Then translate the ambient standard into an operational one; where the rubber hits the road
5. Monitor, gather information, and report
    h. Resource intensive
    i. As time goes on, need an iterative approach
    j. What happens and what needs to be adjusted over time

Example: Microplastics. Microplastics break down into particulate matter and accumulate in water ways following waste disposal by humans. It accumulates in tissues and can be detrimental to the functiongin of organ systems.

1. Determine Objective
    a. What to protect biodiversity of waters that are subject to microplastics
2. Develop Criteria
    a. How much [microplastics] are going to be problematic for various species?

    b. What size of microplastic causes problems in different species?
        i. Mistaken for food, inhaled?
3. Establish an Ambient Quality Standard
    a. Develop a standard overall that is permissible for microplastic
    b. No more microplastics smaller than 300 µm diameter
4. Operational Standards
    a. Prevent spillage, improve transportation
    b. What if our standard indicates the objective has already been breached?
        i. Well then that would require clean up and remediation
        ii. How to regulate/limit it: littering, garbage disposal
5. Monitor, Gather information and report

Approaches to setting specific standards and criteria:

1. Environmental Quality-Based Standards
    a. Want a certain level of environmental health for animals and plants that live there
    b. Generally preferred
2. Health Risk Assessment Standards
    a. Want a certain level of human health guarantees
    b. Precautionary, kind of?
3. Best Available Technology
    a. Focused on innovations in technology that can fix issues
4. Point of Impingement vs Source control
    a. Are we regulating the place where it is emitted (the factory?)
    b. Are we regulating the process that causes it (marine dumping?)
5. Informational Standards
    a. What do we know about the industries?
    b. People should have a way to figure out what they are being exposed to
    c. National Pollutant Release Inventory

If we can't invent an environmental or health standard, but we have the best technology, we can short circuit the 5 steps because you have a solution that is your best possible remedy

Where does standard setting sit in the legislative framework?

- This is an area of cooperative federalism. Both powers have authority to regulate these things.
- In 1993, Canadian Council of Ministers of the Environment identified harmonization as a core priority and subsequently developed the *Canada-Wide Accord on Environmental Harmonization*
    - This provides a framework for developing sub-agreements to harmonize approaches to environmental management across jurisdictions.
- One sub-agreement was made which led to ambient standards designed to benefit all Canadians
- Has led to a number of pollutant specific Canada-wide standards that, while not legally binding in their own right, have been adopted by provinces and translated into an approval process
    - This process has also been used to identify guidelines for healthy air quality across Canada
    - Made mainly for healthy ambient air for kids regarding triggers like asthma

Canadian Environmental Protection Act, 1999, SC 1999 c 33
Section 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.

This national inventory response in *CEPA* requires the Minister to keep an inventory of all pollutants that could cause issues. The registry is made public for all Canadians to see what substances are regulated

While Canada does practice more permissive regulation, there are a few examples of practical elimination for specific initiatives. One example of the "Pollution Prevention Approach" (eliminate rather than regulate certain pollutants) is the elimination of Ozone from ongoing amendments to the *Montreal Protocol*.

- Ozone is a UV shield in the atmosphere, but CFCs produced in aerosols break ozone down and make holes in the atmosphere that leads to more humans exposed to UV radiation.
- The global community agreed to reduce the release of CFCs and the Montreal Protocol anchored a cooperative elimination of CFCs. This was translated into domestic regulatory law in *CEPA* where we are not at a near 0 release of CFCs today
- This was easier than cutting out GHGs because CFCs were more discrete, only in refrigerants and there were technological advances that replaced CFC emitting

<u>Governance based Environmental Regulation</u>

This is a policy instrument for environmental management, similar to the Management based approach. Asks if it is more effective for the government to encourage companies to monitor their processes to amount to change or is it more effective to enforce a more top-down control.

- Top down is logically the preferred approach, since there isn't a lot of motivation to get companies to change things
- But, implemented right, this can be an effective method. But in reality, it is hard. Not many oil companies would chose to move towards net zero. Would a tobacco company chose to ban deleterious impacts to human health?

Policy instruments for environmental management:

- Self-regulation (government inaction)
- Exhortation (targeted and concentrated action)
    - Educate industry on the processes that are better for the environment/human health
    - If you are an industry that does have infractions ever, maybe you should be held to a different standard than ones with frequent infractions (like car insurance)
- Expenditure (grants, subsidies)
- Public ownership or government enterprise (Crown corporations)
- Regulation (legal limits accompanied by taxes, fines or jail)

There are also cooperative approaches to environmental protection. This involves bringing in all people because neither government nor industry can do the work on their own.

- Involves looking at the industry as the agent of change rather than culprit
- Cooperation: working together for the same end
    - Partnerships and common objectives
    - Most common in regulation, exhortation and self-regulation

Forms of cooperation:

- Compliance Support: regulation still exists and compliance is mandatory but the government assists the target or regulation in achieving compliance

- Flexible Compliance: Cooperative enforcement that doesn't treat regulated actors as "bad apples". Reduced compliance monitoring for firms that have certified management systems; penalty waiver for voluntary disclosure and self-correction and negotiated compliance agreements
- Cooperative development of regulatory standards: multi stakeholder negotiations
- Encourage voluntary action: industry government codes of conduct with threat of regulation waiting in the wings
- Government inaction: let civil society pressure environmental action (Forest Stewardship Council)

Interpretation of Environmental Statutes

The development and implementation of statutory and regulatory environmental law raises issues of statutory interpretation. The modern approach to statutory interpretation is applicable to environmental law, ie, Driedger's Principle:

- Reading the relevant words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act and the intention of Parliament

Purpose clauses are often quite important because courts will be reviewing the scope and effect of discretionary decision making. These are clauses that say "the purpose of this Part/section is to…"

- The contextual approach to environmental statutes will often require recourse to values and principles of international law, expressed in both their customary and conventional sense

Castonguay Blasting Ltd v Ontario (Environment), 2013 SCC 52

Facts:
Castonguay Blasting (accused) was charged by failing to report an incident where their highway construction crew was blasting rock and flying rocks caused property damage. This was contrary to s15(1) of the Ontario *Environmental Protection Act*.

Issue:
Is section 15(1) and the reporting requirements engaged by the incident with the rock fly? What is the meaning of "adverse effect" in the Act?

Rule:
Section 15 of the *Environmental Protection Act*

(1) Every person who discharges a contaminant or causes or permits the discharge of a contaminant into the natural environment shall forthwith notify the Ministry if the discharge is out of the normal course of events, the discharge causes or is likely to cause an adverse effect and the person is not otherwise required to notify the Ministry under section 92.

Section 1

(1) "natural environment" means the air, land and water, or any combination or part thereof, of the Province of Ontario;
"adverse effect" means one or more of,
  (a) impairment of the quality of the natural environment for any use that can be made of it,
  (b) injury or damage to property or to plant or animal life,
  (c) harm or material discomfort to any person,
  (d) an adverse effect on the health of any person,
  (e) impairment of the safety of any person,
  (f) rendering any property or plant or animal life unfit for human use,
  (g) loss of enjoyment of normal use of property, and
  (h) interference with the normal conduct of business;

Analysis:
Castonguay conceded that the blasting caused property damage but argued the damage was insufficient to engage the reporting requirement. This requires that, while s1(1) has 8 components, (a) is an umbrella clause, so there must be impairment of the quality of the natural environment to engage the reporting requirement.

Castonguay argued that the (a) definition of "adverse impact" was a catch all term that did not apply to the circumstances since the discharge did not "impair the natural environment" and is thus not responsible for reporting.

- Restrictive reading reads out the plain and obvious meaning, narrows the scope of the reporting requirements and limits the Minister's ability to exercise her remedial function.
- "adverse effects" appear in a dozen other provisions, with a wide range of environmental concerns. Limiting this definition thus limits the protection of the entire legislation and the Ministry's ability to respond
- The many components in the definition indicate that the impacts on animals, people or property do not require any impairment of the land/air/water. The Act protects the environment and *those who use it* which is consistent with the Act as a whole
- Protecting the environment recognizes that strategies maximize how the Ministry can investigate and remedy
- An "adverse effect" occurred here on the reading of subsections (b) and (g) and of € of the "likely to cause" qualified in the prohibition itself.

Conclusion:
Section 15(1) clearly engaged

Hold, Order:
Charge maintained

Ratio:
A modern approach to statutory interpretation is used for environmental legislation. Broad, purposive interpretation is often given when it has its goal to cure human health or environmental health.

This case really helps illustrate how it is very important to not "read down" the provisions of an environmental statute to limit the purpose of what the Act set out. If the court accepted Castonguay's interpretation, the whole of the Act would have been limited and weakened such that the overall goal of the statute couldn't have been achieved.

<u>Canadian Regulatory Models</u>

Fisheries Act

The *Fisheries Act* is an old piece of legislation, going back over 100 years, but it's last comprehensive amendment was in the 1970's. The large tensions in Canadian environmental law are on display with this Act. There are tensions around it's efficacy (enforcement, compliance and coverage) and its efficiency (unnecessarily impedes responsible resource development through the imposition of unnecessary and costly business burdens).

- Does it actually protect fish, fisheries or fish habitat? If so, is it doing so efficiently?
- Is it unnecessarily impeding private sector businesses?

It was tweaked in 2012 under the Harper government through Bill C-38 (omnibus legislation). This government saw it as overly burdensome. It was too much work for too little gain.

- The Trudeau government then modernized it in 2018/2019

There are two key provisions of the *Fisheries Act*: Habitat Protection (section 35(1)) and Pollution Prevention (section 36)

Section 35(1); the "HADD" Provision

Pre-2012:

(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction ["HADD"] of fish habitat

(2) No person contravenes section (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act

35(1) was a performance standard: tells you what businesses cannot do, but not telling them how they have to avoid it. This was also qualitative. 35(2) was permissive regulation; if authorized, 35(1) does not apply but if not authorized, doing HADD is an offence and there will be environmental prosecution.

- This required companies to seek approval for activities before they did them. Whenever they did them, they could engage a federal environmental assessment.
- This obviously had a lot of industry critique as overly burdensome as it captures even minor alterations of fish habitat and engages federal assessment too easily
    - The Department of Fisheries and Oceans ("DFO") also applied it very inconsistently

The 2012 Amendments were aimed at having narrower protections and had two major changes:

1. HADDs didn't trigger environmental assessments
2. Narrowed protections.

It removed the definition of "fish habitat" and added a new term:

- "Serious Harm": 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
    - No longer just altering fish habitat, it needed the death of fish or permanent alteration
    - But a lot of things can have a lot of harm without these happening
        - Constructing a bridge would need temporary culverts, but still wouldn't satisfy this

Section 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.

a. Only fish that gets protections are now those that are part of fisheries, which cut the amount of fish stocks down that apply by 70%

(2) A person may carry on a work, undertaking or activity without contravening subsection (1) if

(a) the work, undertaking or activity is a prescribed work, undertaking or activity, or is carried on in or around prescribed Canadian fisheries waters, and the work, undertaking or activity is carried on in accordance with the prescribed conditions

(b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;

(c) the carrying on of the work, undertaking or activity is authorized by a prescribed person or entity and the work, undertaking or activity is carried on in accordance with the prescribed conditions;

(d) the serious harm is produced as a result of doing anything that is authorized, otherwise permitted or required under this Act; or

(e) the work, undertaking or activity is carried on in accordance with the regulations.

- So s35(2) is still permissive since a variety of things are approved (way more than before)

(3) The Minister may, for the purposes of paragraph (2)(a), make regulations prescribing anything that is authorized to be prescribed.

The corresponding changes were termination of various fisheries and oceans habitat officers (130 layoffs) and the closure of fisheries and oceans habitat offices (from 63 to 15). Less environmental assessments, less approvals and thus less need for the DFO. This was aimed at efficiency.

Then the 2018 modernization was away from efficiency, and more about efficacy. There was rededication of funds to fisheries and habitat protection in Canada

- "Fish habitat" was re-added and "serious harm" was removed

An Act to amend the Fisheries Act and other Acts in Consequence:

(5) The definition *fish habitat* in subsection 2(1) of the Act is replaced by the following:
fish habitat means water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas; (habitat)

- This includes waters where fish live, but also where fishes food lives

Fisheries Act, RSC 1985 c F-14
Section 34 (1) The following definitions apply in this section and sections 34.1 to 42.5. 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 Section 34.4 (1) No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish. Section 35 (1) No person shall carry on any work, undertaking or activity that results in the harmful alteration, disruption or destruction of fish habitat. Section 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.

Section 35 restored the pre-2012 HADD language. It was still permissive from s35(2) as authorization was available. But it also added a new provision, s34.4 which prohibited activities that results in the death of fish. This is still permissive since it can be exempted by authorization.

Again, there was industry from industry who wanted more certainty about projects. So, the government still mandated an efficiency approach through "designated projects".

- There are "designated projects: which will always require a ministerial permit. These are larger scale projects that will be subject to federal impact or environmental assessment. They will be identified in regulations based on their potential impacts on fish and fish habitat.
- Under the regulations of the *Fisheries Act*, proponents (those who wish to develop a project) know which projects require a permit, and have greater certainty around the process and associated timelines.
    - Since this is automatic, it is clear what the process and timeline is
    - The practice of issuing letters of advice and ministerial authorizations will continue for projects that are not listed as designated projects.
    - This was a way to balance regulatory outcomes (protecting fish) with efficacy of business management (to not prevent effective operation of the industry)

Section 36(3) is the Pollution Prevention System. It prohibits the dumping of deleterious substances in water frequented by fish

- It is a performance-based standard, can be avoided by compliance with regulations that authorize discharges. In essence, it prohibits marine dumping
- This was the second section with broader environmental regulation implications. It has been criticized as being overbroad for establishing a "zero tolerance" regime for marine pollution, but s36(4) would allow some deposition with a permit

Section 34 including the definition of deleterious substance is broad, saying essentially something that is not good for fish in general

	Pre 2012	Post 2012 Harper	Post 2018 Trudeau
HADD Provision	No HADD (35(1)) allowed	35(1) removed "fish habitat"	35(1) re-added "fish habitat" and removed "serious harm"
Death of Fish	None	Replaced "fish habitat" w/ serious harm (harm to fish, not habitat)	Section 34.4 prohibition to kill fish
Approval	HADD w permit fine (35(2))	Still fine with permit, but broader	Section 35, 34.4 allowed permits
Environmental Assessment	Authorization triggered EA	Authorization does not trigger assessment	No assessment
Theme		Move towards efficiency rather than efficacy; layoffs	Move towards efficacy rather than efficiency

R v MacMillan Bloedel (Alberni) Ltd, [1979] BCCA

Facts:
MacMillan Bloedel was in working on a large forestry project in Alberni BC. As part of their operations, they would leave logs in the bay so boats could come in and get them. The company spilled 170 gallons of bunker C oil in the bay. This oil is particularly unrefined and very environmentally damaging.

- They were subsequently charged with breaching section 36 of the *Fisheries Act*
- MacMillan Bloedel argued that the section was not meant to capture times where there was no proof of actual harm to fish (no fish washed up)

Issue:

What is meant by "deleterious substance" in the *Fisheries Act*?

Rule:

Section 36 of the *Fisheries Act*

(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.

Analysis:

The trial judge found that "deleterious substance" was meant to prohibit a deleterious substance being dumped. This is opposed to the accused argument, who states it means looking to prohibit material that would *cause* the water to be deleterious.

- This appears to be the intention. The provisions make it seem like the Act is wanting to prohibit the process rather than the end result.
- It is interested in the deleterious substance, not that the final product of the water was deleterious

It is clear that bunker fuel is a deleterious substance. Any dumping of it would therefore be an infraction of s36 without a permit. The analysis does not need to go any further than proving it was dumped, the result is irrelevant as there are undoubtedly consequences that we may not see, particularly if there are cumulative effects.

- It is difficult for enforcement to find a real time activity of dumping. They usually find it afterwards. This is why it is the substance being dumped rather than the water's being deadly that is analysed.

Conclusion:

Charge justified

Hold, Order:

Appeal dismissed

Ratio:

Deleterious substance refers to the substance being dumped, not the end product of the water being deleterious

This case kind of seems obvious but it is a huge arrow in the quiver of environmental prosecution. The end result does not have to be deleterious for the company to be guilty, it just has to be dumping of any deleterious substance.

- Put another way, could this substance, in any water, have a deleterious effect
- MacMillan argued the "teaspoon of oil" argument. Would it be an offence to dump a teaspoon of oil?
  - Technically yes, but there is also prosecutorial discretion (most people who have environmental infractions wouldn't get charged anyway)
  - Also, the realities of environmental systems would likely prevent it from going to court
  - A teaspoon would be impossible to detect, so it likely would never be identified

Fletcher v Kingston (City), (2004) 187 OAC

Facts:

The city of Kingston had a golf course built along a river. It was built on a former municipal dump. Since dumps produce leachate, it seeped into the soil and leached into the river. The leachate was deleterious, detected and the city was charged.

Issue:

What is meant by "any water" within s36 of the *Fisheries Act*?

Rule:

Section 36 of the *Fisheries Act*

(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.

Analysis:

The City's argument was that "any water" within the *Act* was not satisfied since the leachate added to the water of the river did not produce a deleterious result.

- This would read down the purposes of the Fisheries Act. It is not the water in question, and whether it became deleterious, but it was if the deleterious substance was dumped at all. An addition of a deleterious substance to any water would be a contravention of s 36
- The dumping does not have to be in a specific course, any water that has deleterious substances added to it are detrimental

Conclusion:

Charge maintained

Hold, Order:

Appeal dismissed

Ratio:

"Any waters" means a deleterious substance added to any water in Canada; it is not the result of the deleterious substance in the water in question.

This case was actually commenced by a civil lawsuit. The Attorney General noticed it and took it up to elevate it to a regulatory suit. This is a re-enforcement of the *MacMillan* thinking and very positive for environmental litigation. You don't have to have a dead fish in hand, or the [pollutant] in the water to make it deleterious. All that is needed is proof that a substance is deleterious and that it was added to waters.

- Allows for very broad prosecution.

In any case, Canada prefers to give out warnings rather than charges. There is a wide agreement by environmentalists that this is insufficient to adequately protect waters and fish in Canada.

Canadian Environmental Protection Act ("CEPA")

CEPA is Canada's main environmental legislation. It was enacted in 1988 as the 'cornerstone' of federal environmental law. It was then amended in 1999. It caused the review of over 23,000 substances in Canada. Two agencies administer it: Health Canada and Environment and Climate Change Canada

- The preamble reinforces ideas of precaution, sustainability, Polluter Pays approach, equity, the public good
- Focus is on classification, identification, and regulation of thousands of toxic substances that are either in use or of proposed use.
- Key tool is a toxicity test, which is a risk assessment tool, which puts substances on regulatory review. Afterwards, it is given a designation and put on a list. There is then maintenance of 'lists' and the promulgation of regulatory measures that follow from key listing decisions.
    - Major action happens under the regulations
- Has emerged as a legislative tool which Canada's international legal commitments can be implemented (Montreal Protocol, London Convention, greenhouse gas)

Framework of *CEPA*

Parts 2 and 3 of CEPA allow for public participation to keep citizens informed about administrative decisions and to facilitate public commentary. Concerned citizens are allowed to trigger an investigation into *CEPA* violations and in coms circumstances, to commence limited enforcement action.

- There are mechanisms for information, access to different forms of information and statutory mechanisms
- Creates statutory cause of actions for loss recovery resulting from *CEPA* violations

CEPA covers a lot of ground, it is a very start to finish piece of legislation:

- Investigation: Section 17 allows Canadians to apply for an investigation, and if they do not think it is adequate, they can bring an environmental protection action under s22
    - This is a statutory judicial review
    - It is usually NGOs that know this information to investigations and reviews, not every citizens, but it is open to everyone
- Actions: Section 39 allows a Canadian to apply for an injunction to get a polluter to stop or not proceed with pollution.
    - This is an extension of common law, because in an alleged CEPA breach, you can statutorily seek injunctive relief or damages, but does not replace the common law tort actions, as allowed in s40. It just means that there is another took in your toolkit

Canadian Environmental Protection Act, 1999, SC 1999 c 33
Section 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. Section 22 (1) An individual who has applied for an investigation 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. Section 39 Any person who suffers, or is about to suffer, loss or damage as a result of conduct that contravenes any provision of this Act or the regulations may seek an injunction from a court of competent jurisdiction ordering the person engaging in the conduct (a) to refrain from doing anything that it appears to the court causes or will cause the loss or damage; or (b) to do anything that it appears to the court prevents or will prevent the loss or damage. Section 40 Any person who has suffered loss or damage as a result of conduct that contravenes any provision of this Act or the regulations may, in any court of competent jurisdiction, bring an action to recover from the person who engaged in the conduct (a) an amount equal to the loss or damage proved to have been suffered by the person; and (b) an amount to compensate for the costs that the person incurs in connection with the matter and proceedings under this section.

- Informational:

- Section 48: The Minister has to made an inventory of pollutants for information gathering purposes. This registry is mandatory and helps researchers, planners, public knowledge.
- Section 50: The inventory must be public. It must be maintained though there is discretion on what is to be publicly reported and in what cases, but it still has to exist.
    - NGOs often take the Crown to court over this, asking why certain pollutants are not registered
    - There is an internet portal, where you can report what substance was dumped and where it was
    - For public participation and transparency

Canadian Environmental Protection Act, 1999, SC 1999 c 33
Section 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. Section 50 Subject to subsection 53(4), the Minister shall publish the national inventory of releases of pollutants in any manner that the Minister considers appropriate and may publish or give notice of the availability of any other inventory of information established under section 48, in any manner that the Minister considers appropriate.

- Pollution Prevention in Part 4 mandates the production of pollution prevention plans for substances regulated under *CEPA*. These are separate from Regulations. This is a chance for the government to require industry to plan and to work to minimize release of toxic substances
    - Generate action that will effectively and efficiently manage *CEPA*-toxic substances and reduce overall risk to the environment and human health
    - Provide an opportunity for early action (relative to regulatory measures)
        - Attempt to be preventative and precautionary
    - Provide opportunities to develop and implement situation-specific and industry-specific solutions.
        - If one industry produces a certain toxic substance, a pollution prevention plan can require it to make and use protocols to deal with that substance
        - Needs documentation on how it is being dealt with from receiving to disposing of toxic substances.
        - Transparent: can go look at what was done to make sure releases were how they should be
    - Encourages pollution prevention
- Toxic Substances Control
    - This is where the vast majority of CEPA's work is done
    - There is a two step regulatory process:
        - Risk Assessment conducted on the substance in question (used or proposed to be used)
            - Can it be used at all? Heavy regulation or virtual elimination?
        - Proceed to assess the means through which the substance can be managed, limited, or eliminated by regulation or its alternatives
            - This is where the substance is put on a specific list

- Once on a list, Environment and Health Canada must monitor it

Initially, the substances were put on one of 2 lists before proceedings to review:
- Domestic Substances List (used in Canada)
- Non-Domestic Substances List (proposed for use in Canada)

Review:
1. Screening: assessed for appropriateness of inclusion on the *Priority Substances List*, which will lead to an expedited review on a scientific basis
    a. These need to be dealt with quickly because of the harmful impacts they will have according to the Minster's discretion and s 76

2. Substances proceeded through further assessment to determine if they should be listed on:
    a. *Domestic Substances List*: remain unregulated
    b. *Toxic Substances List:* controlled regulation to limit its release
    c. *Virtual Elimination List*: moving towards complete elimination

    The critical decision being the "toxic" or "virtual elimination" designation, there is then a 2 year period for the Minsters of Health and Environment to pass regulation. This can be a long processed with a lot of work involved and potentially large industry implications.
    - Section 64 delineates what constitutes "toxic" substances:
        - Immediate or long term harmful impacts on environmental or biodiversity
        - Constitute danger to environment on which life depends
        - Constitute a danger to human health
            - Precaution is built in to this definition; since it is "causes *or may cause*"
            - It is also not just humans, since (a) and (b) are about environmental health
    - Section 65 regulates "virtual elimination" substances
        - Virtual elimination is extremely rare in Canada, with only a handful of substances on this list

Canadian Environmental Protection Act, 1999, SC 1999 c 33
Section 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. Section 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 release below the level of quantification specified by the Ministers in the List referred to in subsection (2). (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. (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, and, in doing so, shall take into account any factor or information provided for in section 91, including environmental or health risks and any other relevant social, economic or technical matters.

Section 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.

- Framework:
    - Part 7: Controlling Pollution and Managing Wastes (nutrient limits, prohibiting depositions at sea/marine dumping)
        - This is where *Crown Zellerbach* was
        - Also regulated nutrient dumping. Nutrient dumping is actually very dangerous since they change the productivity of an ecosystem to somewhere it shouldn't be. Nutrients dumping of the limiting factor of the ecosystem can cause explosions of algae and kill off all subsurface animals
    - Part 8: Emergency Orders and Measures
        - Breaches or problems with administration of the act
        - Health or Environment minister can require the impugned company act or comply in a certain way
    - Part 10: Enforcement
        - There are certain prohibitions within CEPA, but a lot of prohibitions are also in the regulations and can be prosecuted
        - Either generic in CEPA, or more targeted in regulations.

CEPA was last amended in 1999. Given the rapid evolution of environmental problems, our recognition of them and technology, it is in need of more modifications. It is on the House floor right now to be amended, as Bill S-5: *Strengthening Environmental Protection for a Healthier Canada Act*. The main additions that the current government want are:

- Preambular recognition of a right to a health environment and 2-year administration framework
    - Administrative framework would require the principles of the preamble (ie, a right to a healthy environment) to be operationalised.
        - This means it is more than a "we want a healthy environment" but instead a system to get there.
- Risk Assessment
    - Plan of Chemical Management Priorities (2 year timeline)
        - Would be a legislative requirement for government to make a chemical regulation plan for list designation
    - Duty to mitigate the impact of cumulative effects of pollution on vulnerable populations
        - Monitoring, reporting, and geographically targeted hot-spot responses
    - Creation of a "list of substances of potential concern"
        - New criteria that support the creation and maintenance of this watchlist
        - List of substances of potential concerns, and also a Priority Substances List, Regular Substances and one of Potential Concern

Environmental Protection and Enhancement Act ("EPEA")

EPEA is only an Albertan statute, but it is very pervasive. At the provincial level, the focus is on the development of industry, so EPEA is very helpful for industrial regulation

- EPEA runs on an approval-based approach to pollution reduction and control
    - It is an approval process with associated compliance procedures
    - This is more administrative as well as enforcement focused than CEPA

When looking at industry, pollution and other results from activity, the purpose of the Act (as per s2) is to support and promote the protection, enhancement and wise use of the environment.

- Some energy activities will be regulated under specific Regulations
- Approvals under EPEA are usually under the Alberta Energy Regulator (AER)
    - Other approvals are from Alberta Environment and Parks
- It also mandates an approval requirement for a variety of activities, including:
    - Waste management facilities
    - Substance release (refineries, factories, metal-related industrial processes)
    - Power plants
    - Pulp and paper mills
    - Food production facilities
    - Oil refineries, processors, upgraders, etc
    - Conservation and reclamation projects
    - Miscellaneous pollution activities (pesticides, designated materials, water wells)
    - Interference with potable water and wastewater treatment facilities.
- Air, water and land pollution come from all sorts of areas (cement production, plastic production, textile facilities). If any industry pollutes, they shall require an approval

Environmental Protection and Enhancement Act, RSA 2000, c E-12
Section 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society; (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning; (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations; (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions; (e) the need for Government leadership in areas of environmental research, technology and protection standards; (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions; (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts; (i) the responsibility of polluters to pay for the costs of their actions; (j) the important role of comprehensive and responsive action in administering this Act.

CEPA and EPEA interact a decent amount. A site can have multiple layers of regulation attached to it

- If you produce a substance like lead, it needs to comply with CEPA
- If you produce things that harm fish, it needs to comply with the Fisheries Act
- If you pollute, it needs to comply with EPEA
    - There is foreseeably a lot of overlap with these three objectives. EPEA and CEPA actually have very similar frameworks, so the overlap is not very cumbersome
    - Though it is open for the province to set stricter standards since it will have to be followed regardless

EPEA approval process utilizes both the carrot and the stick

- Carrot: satisfy the regulator that your approach to pollution management is sufficient and you are approved/licensed to operate (pollute)
    - Fill out an application and work towards approval
    - If the Province agrees it is good enough, it will approve and license you to operate
    - Process by which industry papers its application and gets approval to proceed
- Stick: approvals/licenses will have penalties and conditions attached. Violating approvals constitutes an offence. Monitoring/reporting is required as part of the approval/license with consequences for failure to adhere.
    - Once the license is in place, penalties are attached to them for non compliance
    - Reporting is required to keep the license valid
        - This license to pollute has corresponding responsibilities, and the legislation itself has different safeguards as well.

EPEA has three different requirements for different projects. Each activity will need one of three options before being able to operate. The *Activities Designation Regulation* in the schedules tell you which projects need which registration. If you do the wrong one, there could be prosecution. Each different requirement has different penalties and conditions.

1. Environmental Approvals
    a. Most intense monitoring that will be done by the regulator
    b. This is also the avenue that is under the most scrutiny. If people don't like an environmentally dangerous project, they get mad at it being approved.
        i. Mostly for the large emitters

Environmental Protection and Enhancement Act, RSA 2000, c E-12
Prohibition Section 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. Prohibition Section 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 Approval or Registration of Minister's Order Section 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.

Section 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.

2. Environmental Registration
    a. Level of activity below that which requires approval
        i. Two projects could be the same type of facility in the same facility, but only one would need environmental approvals
        ii. The less footprint there is, the less work, less paperwork, less monitoring
    b. Sections 60 and 61 are related to both Approvals and Registration. They are almost the exact same provision
        i. The only difference is the word "knowingly", in s 60
        ii. Both make it a prohibition to do an activity that the regulations designate as needing an approval/registration without having the approval/registration
            1. Section 61 says it is a prohibition to do this, section 60 says it is a prohibition to do this *knowingly*
            2. Stricter fines exist if s 60 is breached than if s 61 is breached, since s 60 would be intentional breach, but s 61 could be negligent.
    c. Section 64 states that the Minister can deny authorization or registration based on a public decision-making framework (ie, if it is not in the public interest to do so)
        i. This is obviously open to some discretion with what we want to proceed
            1. What do we want to pollute
            2. It isn't just fill in the necessary paperwork, and you can pollute
            3. There needs to be a government worker thinking about it and deciding if it is in the public interest
            4. Social interest: balancing economic and environment
    d. Section 68: the regulator can issue or refuse an approval or a registration
        i. But 68(2) states that the regulator can add whatever conditions or terms it wants when issuing approval or registration
        ii. Government can amend their plan to respond to any concerns they feel have come to light through the proposed project

3. Environmental Notice
    a. Don't need to get approval or license, but you will need to give notice to the government
    b. Unilateral action by the proponent is enough, the government does not have to send back anything for the project to continue.
    c. The requirements of what to submit are in the s7 of the *Activities Designation Regulation*

i. Name and address of person doing activity, location and description of it, proposed dates of work and any other pertinent information

d. Similar to sections 60, 61 for Approvals and Registrations, sections 87 and 88 are the same provisions for operating without giving Notice
    i. Again, section 87 includes knowingly (and brings stiffer penalties) than s 88 which does not require "knowingly" to be included.

Environmental Protection and Enhancement Act, RSA 2000, c E-12
Prohibition Section 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 Section 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
Section 5 (1) The activities listed in Schedule 1 are designated as activities in respect of which an approval is required. (2) The activities listed in Schedule 2 are designated as activities in respect of which a registration is required. (3) The activities listed in Schedule 3 are designated as activities in respect of which notice to the Director under Part 3 of the Act must be given. (4) Notwithstanding subsections (1) to (3), an activity undertaken at an oilfield waste management facility as defined in section 2(1)(l) does not require an approval, a registration or the provision of notice under Part 3 of the Act. Section 7 A notice for the purposes of Part 3 of the Act must be in a form acceptable to the Director and must contain the following information: (a) name and address of the person responsible for the activity; (b) location and description of the activity; (c) proposed dates for construction commencement, construction completion and commencement of operation of the activity; (d) any other information required by the Director in respect of the activity.

Under the *Regulation*, Schedule 1 are Approval Activities, Schedule 2 are Registration Activities and Schedule 3 are Notice Activities.

- Schedule 1 has basically every production plant imaginable
- If you operate a production plant, you need to fill out all the paperwork and all government information to work it through

- Lawyers do all this. They have the conditions or amendments that lawyers need to do.
    - Once it is approved, there is a huge stack of information that you need to ensure your client is doing
    - Then the lawyer would help with monitoring and submitting for them to ensure they are submitting properly

This may seem like a lot of work, but once pollution is out there, it is hard to know where it came from. That is why it is so important to have these regulatory structures to get ahead of the problem

The Administrative Side of EPEA is laid out in ss90-102

- EPEA is a little different than CEPA since it creates its own Appeal Board: The Environmental Appeals Board (EAB)
- EAB is involved in a lot of processes. EPEA creates and empowers the EAB
    - The EAB is above the director, but below the Courts
    - EAB board members are the people with relevant technical expertise: lawyers, scientists, engineers and other experts
- Important in decision making of Alberta projects but does not have to go all the way to the Courts. This is better ease of access.
    - The rules of process are a lot more relaxed than the Rules of Court
    - Very important for self represented people, can pursue justice easier than through the court system
    - Wait times and costs are less, so outcomes are seen as more tailored
- Section 90 establishes the EAB
- Section 91 enumerates its powers as a quasi-judicial body (not dealing with setting limits, but complaints and appeals)
    - Right to notice: who has the right to appeal a decision to the EAB
        - A company who gets its application refused, can appeal it to the EAB
        - Landowners also get the chance to appeal if they could be impacted by industry, but only if they are *directly* impacted
    - EAB needs a statement of concern to be filed to hear the case. This is lodging or preserving on the record the parties' opposition to the project and that they are directly affected by it (need standing)
        - There is an obligation on the director to give notice around the project proposal that landowners are required to be given notice of the project
        - The process is set out in Regulations
            - Sets a geographical sphere around the project proposal where landowners are required to be given notice of the project
            - Can be mail, doorknocker, newspaper, online
            - These are usually accompanied by a town hall to host the community to have information sessions about the proposal
                - At that stage, if you qualify as one of the people in the sphere, you can submit a statement of concern
                - Need to be directly affected (not just public concern)
                - 3 P's: potential impact to person, property, pecuniary interest
- Sections 72 and 91 go through the details about the complaints process.
- There are limited circumstances where the EAB will hold a public hearing under s 94
    - Usually an approval, if contested will have a public hearing
    - 3 EAB members in a board room and give individuals the opportunity to speak
        - A lot more flexible, casual and less rigid
        - These are a useful place to get people involved.

- Section 95 describes the powers of the EAB
    - Can overturn the directors decision, can improve on the decision, or impose it's own conditions.
    - Can also give awards that are broadly constructed
- Section 101 states there is minimal rights to reconsider the EABs decision
- Section 102 is a very broad privative clause, aimed at avoiding the EABs decision from ever being judicially review.
    - However, even the most broadly written privative clauses cannot fully insulate judicial review from s96 courts
    - But the provision will give weights to the courts on the amount they should weigh in

Environmental Protection and Enhancement Act, RSA 2000, c E-12
Section 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. Section 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 Section 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. (2) In conducting a hearing of an appeal under this Part, the Board is not bound to hold an oral hearing but may instead, and subject to the principles of natural justice, make its decision on the basis of written submissions. (3) The Board may, with the consent of the parties to an appeal, make its decision under section 98 or its report to the Minister without conducting a hearing of the appeal. Section 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. Section 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

<u>Administrative Orders</u>

Legally binding directives from government officials. EPEA uses these as an intermediate level of control that fall short of environmental prosecution. They try to ensure enforcement and compliance short of needing a full prosecution. If there was an unauthorized release of some pollutant, the Director may require that the person remediate it

- Can also be used to say, look you violated EPEA so we are temporarily revoking your right to continue

They are most often a demand of remediation, cleanup or some other specific action. Can also require that a facility be shut down temporarily or permanently if the breach is bad enough.

- These are important as they are more focused on fixing the problem rather than just paying damages. Often pursued contemporaneously with criminal prosecutions
- Gets the company to take responsibility to show them the guide on what they need to do to fix it

There are two administrative order types

1. Environmental Protection Order
    a. These are more about command
    b. EPEA, CEPA, Fisheries Act can all compel investigation of a site to monitor on part of the company. Based on the information, they will file a report, take back to the government and give a suggestion on what kind of order may be appropriate.
    c. Broad orders: because you did this, you have to do this
2. Enforcement Order (s 210)
    a. These are more about control
    b. Suspend, stop activity or other measures the Crown finds appropriate
    c. If they don't comply under s213, the court can register the non-compliance as contempt of court
        i. Elevate an enforcement order to a judicial declaration and then there are penal consequences

For example, section 113 of EPEA allows these to be made if the Director is of the opinion that pollution is occurring. But if there is approval/registration/notice, the Director may not make this order. The order can take any conditions necessary:

- Investigation order, prevention order, measurement/monitoring order, remedial order, restoration order, equipment repair/construction order

Environmental Protection and Enhancement Act, RSA 2000, c E-12
Environmental Protection Orders Section 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 substance. (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.

Enforcement Orders
Section 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.

Section 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 King'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.

In sum, EPEA is a very layered form of regulation:

- Works in tandem with CEPA and FA and largely geared to approving, registering or requiring notice of polluting activities
- List of courses of pollution are identifiable
    - Whether or not you need high or low level of authorization depends on the magnitude of what you are doing
    - Needs to be in advance

- Approval is done by Directors in the department of the government
- If approval is made and what the company does not like, can appeal to the EAB
    - EAB is admin tribunal that is primarily quasi judicial (intermediary between director and the courts)
    - Strong ability for company to seek approval, but more constrained ability for individuals to get involved.

Environmental Enforcement

Enforcement comes at the end of the regulatory cycle. Administrative orders are a step in the enforcement latter, but the first step. All legislation incorporates regulatory compliance tools, which means regulatory prosecution.

- What sort of actions can be brought and what is the goal of environmental enforcement?
- A lot of things can happen to compel compliance before prosecution (like administrative orders)
- There was a move away

This became prominent in the mid to late 20th century as pollution control shifted from the common law to government led regulatory controls (CEPA, EPEA)

- This was also helpful since a pure warning was not sufficient for severe polluting events
- Helps operationalize the Polluter Pays Principle
- Compliance: the state of conformity with the law
    - Communications, consultations, monitoring, inspection, data review, enforcement
- Enforcement: activities that compel offenders to comply with their legislative requirements or that punish for failed compliance
    - Investigations, imposition of corrective measures, administrative responses to compel compliance, and prosecution
    - Enforcement is only needed in significant non-compliance

Federal Enforcement: Under CEPA and the Fisheries Act, compliance is considered primarily in the context of regulatory compliance and enforcement uses statutory prohibitions or regulations and involves prosecutions analogous to criminal prosecution

Provincial Enforcement: compliance is measured primarily with respect to approvals, and enforcement is multifaceted with more enforcement options (administrative orders, directives, ticketing and monetary penalties, approval cancellation/alteration)

All legislation (Fisheries Act, CEPA, EPEA) empowers investigation so officers have warrant type powers and statutory authority to investigate and compel information and seize documents and records.

- Based on these records, evidentiary records are completed, and then a prosecutor can use this to decide if a prosecution is warranted
- At the end of the day, it is the Prosecution Office that will do this all (though the Crown can contract out private firms as well)
    - There aren't many prosecutors that do this (2 provincial and 2 federal probably)

There is limited data linking the relationship between compliance/enforcement with environmental protection. Roughly 10 infractions go by for every one that is prosecuted. The system is underfunded

- Everything that goes unpunished escapes the polluter pays principle, contributes to cumulative effects and reinforces the idea that breaching compliance measures is acceptable.
    - This is why it is necessary to properly catch and prosecute these things

100% compliance does not mean 100% environmental protection because the system is based on permissive regulation. Things prosecuted are only in excess of the limits that were approved. But that does not mean there are not damaging effects to polluting below these limits

Recognized Weaknesses of *Fisheries Act, CEPA*:

(1) Limited and Fragmented data on Compliance/Enforcement
(2) Chronic under enforcement
    a. Decreases in number of inspections, investigations, charges and convictions
(3) Warnings more common than prosecution
    a. Every year, there are 5000 investigations, 2000 warnings and 20 prosecutions
(4) Low fines
    a. Average monetary penalty under CEPA is $10,000, which is unlikely to serve as an effective deterrence
    b. If the breach is only $10,000 and the company can make $100,000s of dollars in profits from the breach, people will just see this as a transaction cost and adjust to it rather than change their behaviour.
(5) Canadians get little information; exact nature of violations and location of violations
(6) Findings the correct balance between adversarial enforcement and cooperative enforcement

A summary:

- Most won't get caught for environmental violations
    - If they get caught, it will probably be just a warning
        - If they don't get a warning, $10,000 is not that much
            - If a breach is only $10,000, but payout is millions, no incentive to change

What happens with fine money? Some of them need to be earmarked for environmental protection and projects that further the goals of the legislation. These are funds that allow people to apply for environmental protection projects

- If money is a proxy for damages, it should be meaningful
- Some creative sentencing is exercised and they can often cause reputational costs

<u>Criminal Law</u>

In theory, there would be criminal law available for environmental enforcement. There are no *Criminal Code* provisions for environmental offences.

- But pollution release or environmental disasters by corporations can have criminal exposure, especially if they have loss of life or significant injuries
- For example, the Lac-Megantic oil railway disaster
    - Had CEPA prosecutions as well as criminal charges against engineers and operators of the corporation
        - Under a regulatory proceeding, both the corporation and individuals can be criminally liable
- The typical *Criminal Code* provisions that would be used in an environmental capacity would be the criminal negligence provisions (s 219), criminal negligence causing bodily harm or death (ss 220, 221) or nuisance (s 180)
    - It is possible to have tort claims, regulatory prosecutions and criminal prosecutions simultaneously
    - A corporation cannot be put in jail, but they can pay larger fines, and then the directing minds can serve jail time

- This is an area of backlog. Environmental offences are usually not prioritized against certain other criminal provisions for public welfare

Criminal Code, RSC 1985, c C-46
Common Nuisance Section 180 (1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who commits a common nuisance and by doing so (a) endangers the lives, safety or health of the public, or (b) causes physical injury to any person. Criminal Negligence Section 219 (1) Everyone 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. Causing death by criminal negligence Section 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 Section 221 Every person who by criminal negligence causes bodily harm to another person is guilty of (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or (b) an offence punishable on summary conviction

Benefits of Criminal Environmental Prosecution	Drawbacks Criminal Environmental Prosecution
- Criminal stigma - Accompanied by the full force of the law and state resources - Can be brought against corporate actors; recent amendments to the Code make it easier to proceed against corporations for acts/omissions of management officers	- Onerous burden of proof - Prosecutorial discretion - Triage and Timelines

<u>Regulatory Offences</u>

This is the bread and butter of environmental enforcement. It is an area of law that is not 'mens rea', but because of the expanding role of government, it really took off.

- Not "true crimes" like murder, but still warrant punishment (*R v Wholesale Travel Group Inc*)
- Regulatory offences emerged to operate in regulated areas where punishment without specific intent made sense.

    - Mens rea can be proved, but it is not necessary
    - Just because the actus reus occurred, is sufficient to ground liability
- These offences trigger the defence of mistake of fact or reasonable care (due diligence)
- Likely only have to justify true, no fault liability (ie, absolute liability) for very minor infractions
- There is a presumption in any regulatory offence that, unless the statute is clear that they intend to be mens rea or absolute offence without defences, it will be a strict liability offence
- There is a two year limitation period for laying regulatory charges

The *R v Sault Ste Marie* case is the leading case for establishing the various types of offences:

1. True crimes actus and reus must be proven beyond a reasonable doubt
2. Strict liability where actus reus to be proved beyond a reasonable doubt with defence of reasonable care/mistake of fact on the standard of a balance of probabilities (commonly called regulatory offences, or public welfare offences)
3. Absolute liabilty where no fault or negligence if required. All that must be proved is the actus reus. These are rare and require clear legislative intent.

Classification in one of these three is a question of statutory interpretation.

- *Levis (Ville) v Tetreault* confirmed the presumption of interpretation for public welfare prosecutions to qualify as strict liabilty, with the availability of the due diligence defence
- Where the word "knowingly" is present, there is a mens rea requirement and will have a higher penalty attached to it (and the difference can be quite significant)

Recall that EPEA had ss 60, 61, 87, 88 offences to operate without approval/registration/notice. There are various other regulatory offences within EPEA as well:

- Section 108: cannot (knowingly or otherwise) release substance in environment that is in excess of approved rates
- Section 109: cannot (knowingly or not) release substance in environment that is in excess of amount that is likely cause a significant adverse effect
- Section 110: Anyone who releases or knows of release has to report it
- Section 112: the person who causes a release with adverse impact must remediate as soon as possible
- Section 148: no person can release a system into a "waterworks system"
    - This is a system that deals with potable water system
- Section 155: no person shall store substances that can contaminate animal, plants, food or drink
- Section 176: cannot dispose of waste unless at a disposal site or without authorization
- Section 192: cannot dispose of hazardous waste without proper approval/registration
    - A lot of substances are hazardous, and industry would either use or create hazards through by products so the disposal of these things need a lot of approval and work
- Section 226: limitation period of 2 years
- Section 227: offences
    - Note, the ones with the word "knowingly" are mens rea offences and have higher fines and potential of jail times
    - The rest are presumed strict liability offences
- Section 228: Penalties
    - The ones with "knowingly" will have the highest penalties
- Section 229: defence of due diligence is allowed for most offences
    - This is already given at common law, but it is now codified. Officers can also be pursued under s232, but with culpability will be related to the officers involvement in the offence

Section 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.

Section 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.

Section 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.

Section 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
- (b) restore the environment to a condition satisfactory to the Director.

Section 148

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

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

(3) 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.

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.

Section 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.

Section 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.

Section 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.

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
(j) contravenes section 60, 61, 67, 75, 76, 79, 87, 88, 108, 109, 110(1) or (2), 111, 112, 137, 148, 149, 155, 157, 163, 169, 170, 173, 176, 178, 179, 180, 181, 182, 188, 191, 192, 209 or 251

is guilty of an offence.

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.
(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.

(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

Section 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, 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.

Section 232
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, 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.

CEPA also has various offences in their regulations. It is generally an offence to use all the substances contrary to the act, but there are also section 5 and section 6 which are specific regulatory charges for specific substances

- Section 5 of the *PCB Regulations* is the regulation and standard setting exercise for PCBs
- Section 6 is the offence to using PCBs more than allowed
    - So, the section itself is both a regulation and the offence involved (a regulatory offence)

PCB Regulations, SOR/2008-273 (enabling statute: *Canadian Environmental Protection Act*)

Section 5
No person shall release PCBs into the environment, other than from the equipment referred to in subsection (2), in a concentration of

(a) 2 mg/kg or more for a liquid containing PCBs; or

(b) 50 mg/kg or more for a solid containing PCBs.

Section 6
Except as provided in these Regulations, no person shall

(a) manufacture, export or import PCBs or a product containing PCBs in a concentration of 2 mg/kg or more;

(b) offer for sale or sell PCBs or a product containing PCBs in a concentration of 50 mg/kg or more; or

(c) process or use PCBs or a product containing PCBs.

R v Syncrude Canada Ltd, 2010 ABPC 229

Facts:
Roughly 1,600 birds died in 2008 when they landed on a tailings pond on Syncrude's Aurora North oil sands near Fort McMurray. The mine fell under the pathway of migratory birds flying to grounds in Wood Buffalo.

- Syncrude was prosecuted for failing to prevent these deaths by detracting birds from the ponds and contravening s155 of *EPEA* and s5.1 of *MBA*

Issue:

Can Syncrude negate liability through the defence of due diligence to prevent the bird deaths?

Rule:

Section 155 of the *Environmental Protection and Enhancement Act*

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.

Section 5.1 of the *Migratory Birds Convention Act*

(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.

Analysis:

The Crown had proved the *actus reus* of s155 and s5.1 given that these were Syncrude's tailing ponds. The onus then shifts to Syncrude to provide a defence.

Due Diligence

Due Diligence will preclude liability if Syncrude can establish that they could not have reasonably foreseen the contravention of statutes.

- There is no evidence of mistake of fact here Syncrude would have known this was occurring – bitumen was deposited into the basin and Syncrude could not make certain that birds would not land in the pond. It was reasonably foreseeable that this would have occurred.

The defence could also apply that Syncrude took all reasonable steps to avoid the contraventions

- A standard of perfection is not required – proper systems or reasonable efforts will suffice.

Did they take all reasonable steps to ensure waterfowl would not be contaminated in the ponds? Whether or not this happened, they need to prove they took all reasonable steps to arrive there.

- Gravity of the Effect
  - Potential harm by Syncrude's conduct will influence efforts it would reasonable be expected to prevent the harm
  - Bitumen cannot be removed from current technology
  - The legislation is aimed to protect environment and bird populations – it is not directed at the immediate and direct effect of the conduct but also the potential harm if the conduct is widespread. So, even if those birds would die from hunting, that is not an excuse to prosecution.
- Complexity
  - The ponds are along the migratory pathway, there are lots of birds around. Deterring birds requires effort
  - When a company undertakes to make these tailing ponds, it is reasonable the company will craft proper systems to effectively manage risks to wildlife.
  - Syncrude itself had previously commissioned expert studies in Oil Sands Bird and Wildlife Protection. They had acquired bird deterrent devices
    - The sound cannons in place were not properly positioned
- Preventative System
  - Syncrude was obliged to have preventative measures to deter birds from landing on the ponds
  - Their system was inadequate and staff had been cutback
  - They had a team to do preventative work, but it was ¼ the usual size and was implemented late.

Alternative Solutions

- While no industry standard is accepted, there are numerous other alternatives
- Most obvious: sufficient equipment and staff to do this earlier than April.

- Other oil companies had comprehensive written procedures, training and advance planning.
  - Syncrude didn't have to do this per se, but they are evidence of reasonable alternatives

Foreseeability
- Foreseeability element is needed to determine if reasonable steps were taken; steps to take must be to avoid something they could reasonably foresee.
- Syncrude argues the blizzard in April prevented them from setting up the preventative measures.
  - Syncrude's team should have foreseen that their tailing ponds, given the weather and frozen ponds around, would attract the birds.
  - Heavy winter weather is not uncommon in April in Northern Alberta.
- Weather interfering with deployment of the measures was foreseeable.

In whole, their system did not take reasonable steps to ensure effective wildlife safety

Conclusion:

Due diligence not made out

Hold, Order:

Conviction established

Ratio:

Due diligence does not need to be perfect, merely that all reasonable steps were taken.

- Foreseeability needs to be considered to assess reasonable steps

This case was almost entirely on the defence of due diligence, since it was pretty easily established that Syncrude committed the actus reus. Tailings ponds are just an environmental liability since reclamation of the ponds is not possible. Birds can't tell the difference between them and a real pond and often land on them, especially in the case of inclement weather.

- Oil is lighter, so is on the top. So birds get stuck when they land.

Syncrude was late in implementing the bird deterrents, despite their records in their policy that the deterrence measures should be operational in April.

- Evidence showed they cut back on staff and maintenance on site was inadequate
- The measures they had didn't even meet their own standards

This case actually started as a private prosecution, not from the Crown.

- Everyone can privately prosecute if the state doesn't, but often the Attorney General will intervene and stay it, but also they can take it up
- Federal Department of Justice: The right of a private citizen to lay an information [a first step in a private prosecution], and the right and duty of the Attorney General to supervise criminal prosecutions are both fundamental parts of our criminal justice system
- Politician: "[It] has been the experience of private informants that regardless of the legal basis for their case or the strength of the evidence collection on their own accord, the Crown has intervened to stay the proceedings."

Syncrude tried to argue that their actions were authorized, which would absolve them of liability. Even in an approval situation, you have to comply with EPEAs other provisions, so their authorization, while existence, contravene other statutory provisions.

- They did have the availability of due diligence, but the authorization, in itself, is not enough to absolve liability

State has the burden BARD to prove Syncrude did the act (easily established since it was their pond) and then the onus switches to Syncrude for due diligence, on the BoP

- The defence was not made out
- The nature of the deterrence system they had may have been sufficient. But the policy wasn't up to par. It was late in implementation, and not even up to date with their own system
- They also tried to argue that the birds were early. But that was irrelevant since their own policy contemplates that birds may come early, and that is why the system needs to be in place by April 1
- This case also elaborated on things that are needed to establish due diligence:
    - Foreseeability, alternative solutions, industry standards, technology, legislative requirements, character of the neighbourhood, things beyond their control
- Syncrude tried many things:
    - Impossibility: it was impossible to prevent this from happening
        - This cannot be said however, since they didn't have operational system up
        - Not impossible because what the deterrent systems are up, this doesn't happen
    - Act of God: intervening factors, like a natural event (the snowstorm) was the reason for this, not their lack of deterrence
        - Court rejected this, part of the reason the system is up April 1 is because birds will land in the ponds during storms
        - A snowstorm in northern Alberta in April isn't even that freak
    - De Minimis: tried arguing that "only" 1600 birds died
        - The Court really did not like this; it was a mass event with significant casualties, and even if it won't impact waterfowl population, it is still a significant infringement on environmental protection

The sentencing was rather creative:

- Syncrude negotiated a sentencing arrangement with the prosecutors that the Court agreed to
    - Significant penalty, including some money to Conservation Projects
    - Creative sentencing is using the money charged to another purpose, rather than going to the government.

Environmental sentencing should be different since we are under very different circumstances.

- Should be cautious with fines that don't have a designated purpose if they don't go far enough

Podolsky v Cadillac Fairview Corp, 2013 ONCJ 65

Facts:
Cadillac Fairview Corp (defendants) owned and managed the Yonge Corporate Centre in Toronto. They were subject to a private prosecution by Ecojustice on the merit that their highly reflective glass windows caused the harm and death to migratory birds, contradicting federal and provincial legislation.

Issue:
Did Cadillac take reasonable steps to avoid the birds deaths to satisfy the defence of due diligence?

Rule:
Section 14 of the *Environmental Protection Act*

(1) Subject to subsection (2) but despite any other provision of this Act or the regulations, a person shall not discharge a contaminant or cause or permit the discharge of a

contaminant into the natural environment, if the discharge causes or may cause an adverse effect.

Section 32 of the *Species at Risk Act*

(1) No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.

Analysis:

Actus Reus

The *actus reus* was made out for both s14 and s32 charges

Due Diligence Defence

If due diligence is maid out, the standard is objective as to whether the conduct of the accused is assessed against that of a reasonable person in similar circumstances.

- The defendant did not retain external consultants to address bird collisions. Even if they did, a corporate defendant cannot relieve itself of liability by effectively delegating/outsourcing its responsibility.
- The defendant did rely on Mr. Mesure and Dr. Klem, who were the leading sources of information on avian collisions with buildings.
- Cadillac also invested heavily in deterrent applications once they found out about the prosecution; they committed themselves to fixing the problem.
- YYC complied with municipal and industry standards, and few building addressed bird collisions more.
    - They previously donated to bird retrieval and rescue
    - They attempted window treatments that were either costly, ineffective, unacceptable to tenants or many of these.

The issues were complex and the site-specific solutions were constantly evolving.

- The standard being of a reasonable person, Cadillac exercised due diligence

Conclusion:

Due diligence maid out

Hold, Order:

Acquittal entered.

Ratio:

Perfection is not required in Due Diligence. Even if the defendant could have done more, if they took all reasonable care that is sufficient to ground the defence

This is a bit of a weird case because it is weird to consider using reflective glass as "discharging" a substance, but that is the violation of the Ontario EPEA that occurred. Unlike Syncrude, due diligence was successfully raised in this case.

- Importantly, the court finds that due diligence does not require perfection
- While there is more that the accused could have done to prevent the birds from dying, it either wouldn't have worked or it would have been too costly.
- They also complied with all building codes and regional standards.
- Since the standard is reasonableness, not perfection, the company was not expected to have done more.
- On an ongoing basis, they considered options and while they didn't do everything, anything more wouldn't have been expected.
- The company also took it seriously, as they initiated additional efforts to potentially address the harm going forward.

Should more have been done?

- The tailings ponds were allowed, but the results were not permitted
- This kind of raises the alarm on SARA.
    - What value do we put on that long term stewardship of these species?

- Goals of regulatory enforcement are to punish and to deter.
    - Maybe the regulator should come and make different business codes.
        - If nothing happens like this until it is done, the legislature wouldn't have any incentive to include them
    - So, this case, while not successful, may help move the standard
        - Enforcement action is to put pressure to change things that are not working (probably why it was justified in bringing it in the first place)

R v Terroco Industries Limited, 2005 ABCA 141

Facts:
Terroco Industries was a transportation company of dangerous goods. They incorrectly mixed two products in their truck and this created chlorine gas that escaped, causing serious injury to a worker's respiratory system. The mixture leaked into the ground

- The corporation was charged under *EPEA* ($50,000) and the *Dangerous Goods Transportation and Handling Act* ("DGTHA") ($5,000).

Conviction was established; sentencing was the issue

Issue:
What is the appropriate sentence given the statutory infractions?

Rule:
Section 98 of the *Environmental Protection and Enhancement Act*
(2) No person shall environment of a substance at a rate of release that causes or may cause a significant adverse effect.

Section 19 of the *Dangerous Goods Transportation and Handling Act*
A person shall not handle, offer for transportation or transport any dangerous goods unless
(a) the person complies with all applicable safety requirements

Analysis:
Five factors should be considered when ascertaining the proper sentence; environmental offences often require a "special approach".

1. Culpability
    a. This is the dominant factor; *EPEA* doubles the fine if the act was intentional.
    b. One end is deliberate act, the other is acts that harm despite due diligence, with a myriad in between (i.e., a sliding scale)
        i. More intentional acts will require stiffer penalty ranges
        ii. More carless acts will also require stiffer penalty ranges
        iii. The more diligent, the less the penalty range should be
2. Prior Record and Past Involvement
    a. Prior record indicates officer is more concerned with profit than compliance
    b. If they have been warned but keep persisting, that is an aggravating factor
3. Acceptance of Responsibility/Remorse
    a. Early guilty plea is mitigating factor. Someone who sees no error is more prone to re-offend than someone who takes responsibility.
    b. Failure to take remedial steps is an aggravating factor
    c. Early reporting, cooperation, exercise of remedial actions are mitigating factors
4. Damage/Harm
    a. If actual harm is established, that is aggravating (especially if foreseeable)
    b. Trifling damages are not as aggravating as long lasting health or environmental impacts
        i. Harm can be hard to prove for environmental issues (ie, cumulative effects); this is not mitigating but neutral

c. Potential for harm considers the probability of risk, nature of the product, likely magnitude of damage if the risk materializes and sensitivity of the site (including proximity to people and fragile environments).
    i. Person-sensitive sites also call for special protection (spill at a playground deserves more payback)

5. Deterrence
    a. Should be made aware of the offender's general ability to pay.

Conclusion:
Sentence maintained

Hold, Order:
Appeal dismissed

Ratio:
Contextual basis to consider various factors when sentencing: culpability, prior record, acceptance of responsibility, damage/harm, deterrence

This is a very helpful case when considering what sentence is appropriate for an offender or your client. It is highly contextual. This is also very important since legislation often provides for a wide range of sentences available, and the maximum is almost never achieved.

- These factors will give a clearer picture on where in the range of sentences they should achieve

Environmental sentencing should be different since we are under very different circumstances.

- Should be cautious with fines that don't have a designated purpose if they don't go far enough
- *R v United Keno Hill Mines Ltd* found that special circumstances need to be considered when sentencing: Nature of Environmental Damage, and the Nature of the Offender
    - From this, they can examine within the full range of sentencing options if there are ways we should try to remedy the environmental harm in sentencing corporations
    - There is an inadequacy of fines since we need to identify and prosecute the authors of significant environmental catastrophes
    - In *Syncrude* the damages were targeted at restoration and maintenance and protection, so they serve a real purpose
        - Different than traditional sentencing
        - Craft a response that will tackle the issues as well as deter

Section 234 of EPEA allows the court significant discretion in coming to a remedy. They can take any action they consider appropriate. For example:

- 234(b): directing an offender to take any action the court considers appropriate to remedy the harm of the offence
    - This could be literally anything
- 234(c): can require the offender to publish their wrongdoing for reputational costs
    - Had a case where the offender had to public a newspaper ad highlighting what they did wrong, their house arrest and how to warn the industry not to do the same
    - This can be agreed between the parties or decided by the Court
- 234(h): directing the offender to perform community service

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

Section 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:

(i) prohibiting the offender from doing anything that may result in the continuation or repetition of the offence;

(ii) directing the offender to take any action the court considers appropriate to remedy or prevent any harm to the environment that results or may result from the act or omission that constituted the offence;

(iii) directing the offender to publish, in the prescribed manner and at the offender's cost, the facts relating to the conviction;

(iv) directing the offender to notify any person aggrieved or affected by the offender's conduct of the facts relating to the conviction, in the prescribed manner and at the offender's cost;

(v) directing the offender to post a bond or pay money into court in an amount that will ensure compliance with any order made pursuant to this section;

(vi) on application to the court by the Minister made within 3 years after the date of conviction, directing the offender to submit to the Minister any information with respect to the conduct of the offender that the court considers appropriate in the circumstances;

(vii) directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action that was carried out or caused to be carried out by the Government and was made necessary by the act or omission that constituted the offence;

(viii) directing the offender to perform community service;

(ix) requiring the offender to comply with any other conditions the court considers appropriate in the circumstances for securing the offender's good conduct and for preventing the offender from repeating the same offence or committing other offences.

<u>Judicial Review and Public Participation</u>

Recently, administrative law has trended to be more relevant in environmental law, to hold governments more accountable, since the 1970s:

- Administrative Law: The limits imposed on the exercise of state authority by procedural and substantive legal rights

Things that have a timeline (something designated toxic, Minister has 2 years to submit regulations under *CEPA* provisions) allow judicial review if the Minister is not doing so and force them to

- Application of approval under *EPEA* are also timelined

Under EPEA, the Director has the first decision. Appealing this would be an Environmental Appeals Board hearing.

- The Board acts as an intermediary between Director and Court, but not really because they can make a recommendation to the Minister, who will then make a decision
- So the Board is kind of like an intermediary between the Director and the Minister.
    - From there, you can judicially review the Minister's decision to the courts
    - But, the Board recommendation to the Minister is out of scope for judicial review.
- Both the Board and the Minister can vary, affirm or reject any application it receives
- If an administrative decision is judicially reviewed, the court has to determine the appropriate standard of review: reasonableness or correctness.
    - Most of the case law on this is from the *Dunsmuir* logic, which has since been modified under *Vavilov*.

Canada (Fisheries and Oceans) v David Suzuki Foundation, 2012 FCA 40

Facts:
The David Suzuki Foundation challenged the Minister of Fisheries and Oceans to not protect critical habitat of the Southern Resident Killer Whales as required by s58 of *SARA*

- The Minister did not do so because they found there were adequate protection under the *Fisheries Act*, so 58(5)(b) allowed no order to be made

Procedural History:
Federal Court found the Minister's decision was not correct

Issue:
What is the proper interpretation of s58(5) of the *Species at Risk Act*?

Rule:
Section 58 of the *Species at Risk Act*

(5) Within 180 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, the competent minister must, after consultation with every other competent minister, with respect to all of the critical habitat or any portion of the critical habitat that is not in a place referred to in subsection (2),

(b) if the competent minister does not make the order, he or she must include in the public registry a statement setting out how the critical habitat or portions of it, as the case may be, are legally protected.

Analysis:
This appeal asks to determine what is meant by "legally protected by provisions, or measures under, this or Any other Act of Parliament" in s58(5)(b). As a question of statutory interpretation, the Minister argued Parliament argued he had responsibility under *SARA* and the *Fisheries Act* to regulate the matter and his interpretation should be given deference based on *Dunsmuir*

- This presumes that standard of review analysis is never needed as soon as Parliament confers on the Minister responsibility to administer federal statutes
- This cannot be right. There is a two-step process: see if jurisprudence has already decided this, or a standard or review analysis.
- Deference will apply to interpretation of enabling statutes, but not always for a question of law.
    - Presumed that adjudicators have relevant expertise to interpret legislation that gives their mandate. This means Parliament meant to restrict judicial review but can be rebutted if Parliaments intent is inconsistent with it

  Ministers must take a view on legislation in order to act, but this is not the same as having Parliament delegated power to decide questions of law (stat interpretation).
    - Did Parliament intend to shield a Ministers interpretation of statute?
        - Neither *SARA* nor the *Fisheries Act* have a privative clause which indicates Parliament's intent was not to shield their legal interpretation
        - The purpose of s58 (as in s 57) is to protect critical habitat and orders the Minister to act, indicating Parliament limited discretion
        - Minister acts in an administrative capacity, not adjudicative when preparing a protection statement. No administrative board was set up under SARA indicates Parliament's intent to let courts decide questions of statutory interpretation.
        - While Ministers have expertise in the field of their portfolio, they do not have expertise in statutory interpretation.
- As a question of law (statutory interpretation), correctness should be used.

Conclusion:

Standard of Review is Correctness

Hold, Order:
Appeal dismissed

Ratio:
Questions of law like statutory interpretation are to be decided by correctness if consistent with Parliament's intent to not grant deference to Ministers.

Because the whales were critically endangered, the Minister was required to make a protection order to protect it's critical habitat which has a lot of legal force behind it, but they are allowed to argue that the habitat is already protected enough, which the Minister argued was done from *Fisheries Act* provisions (cannot destroy fish habitat without a permit).

- Based on *SARA* provisions, the Minister thought he should be granted deference to come to that conclusion

Court had to determine what standard of review should apply to the judicial review of that decision?

- Correctness can only be used if there is no deference to the Minister to make decisions
- Reasonableness means there is a range of decisions that could be made, and all that has to happen is the decision needs to fall in that range
- The Court found that since this was a question of law (as a matter of statutory interpretation), it was for the Courts to decide, not Ministers
- The legislation indicated that Parliament did not want the Ministers decisions to be all up to them and constrained their powers
    - This makes it a standard of correctness
    - The consequence was significant since they quashed the order and ordered the Minister to make a new order protecting the habitat

However, this decision was under *Dunsmuir*, which has since been changed to *Vavilov*

- Under the new framework, it is likely that it would have been reasonableness, since it is unlikely the reasonableness presumption can be rebutted (check Administrative CAN)

There are a limited number of recognized grounds upon which the courts will review administrative decisions ("ground of review"). Common ones include:

- Substantive ultra vires questions
- Unlawful fettering of discretion
- Improper delegation of discretionary power
- Reliance on irrelevant considerations or lack of reliance on relevant considerations
- Administrative discrimination
- Breach of procedural fairness
- Exercising discretion for an improper purpose or bad faith
- Justification of reasons
- Errors of law or fact (more restricted to the circumstances)

Given the wide range of decision the Court must consider, there are also various remedies on judicial review.

- Quash the administrative decision (*certiorari*). This is the most common
- Prohibit the administrative action (prohibition)
- Require the decision maker to act (*mandamus*)
- Declare existing rights, duties or powers (declaratory relief)

<u>Public Participation and the Public Interest</u>

Public interest groups have a difficult time gaining access to the court room for various reasons:

1. Environmental concerns are spread across a range of projects, issues and locations. On the other hand, business interests in a particular project are very concentrated so they are likely to forcefully enter their views to the government
2. Environmental interests are not homogenous since environmentalists are also consumers
3. There is a free rider problem. Unless the group is small, or there is rationale to encourage participation , most people won't act to achieve common goals
    a. They never achieve the strength of numbers that the potential beneficiaries would indicate, meaning they "free ride" on the parties that do spend the time and money to follow the process

There are also the problem of "agency captured by regulated interests".

1. Limited resources to administrative agencies given that there is a lot of activity that is required to monitor applications/operations.
    a. Boards thus become dependent on the industry as a provider of information
    b. There is lots to do and limited money, so there is a lot of cooperation with industry to make the rules
2. There is dependence of administrative agencies on regulated industry for political support
    a. Independent tribunals rely on the government to protect them from public scrutiny
    b. This means they must gain favour in the legislature
    c. So, the industry ends up being an informal lobbyist to the government since they are subject to the administrative decisions.
3. Government agencies rarely respond to interests that are not presented in proceedings
    a. Setting up a regulatory agency is insufficient to protect public interest

However, public interest can bring forward a different expertise that are not always analysed in regulatory projects since a project doesn't start and end when a substance enters and exits a pipeline for example.

- People are impacted by the increased oil production before in enters the pipeline
- People are impacted by the increased shipment when it leaves the pipeline.

1. Provide decision makers with a greater range of ideas when making a decision
    a. Important factual information (what impacts will occur that haven't been considered)
    b. Without these groups, the perspective will not be cast on other affected groups
2. Enhance public confidence of these decisions (judicial or administrative)
    a. Public acceptability eases implementation of these decisions
3. Agency dependence on industry as above is lessened
    a. Provides autonomy and independence as it should be
4. Alternative viewpoints induce decision makers to be more thorough
    a. Enhance the record on which an appellate court can review

There is the idea of a "Social License". While most projects in Canada require a physical regulatory license to go forward (recall EPEA), a social license is the public approval of a project to progress. Without public approval, there will be roadblocks like protests, pressures on governments and shifts in voting patterns which can drive up costs and decrease investment

- This means that it makes sense for a proponent to engage in the communities rather than just fill out the paperwork and submit to the government
- This avoids negative images of the project and achieves social acceptance
    - Social licenses are more common in countries that don't have robust regulatory setups, like developing countries undergoing economic development
- The idea of NIMBY: Not in My Back Yard
- Justin Trudeau: Governments issue permits, but communities grant permission

Public interest groups need standing to participate. Traditionally, the impugned conduct have to affect legal rights, related to property/person/pecuniary (the 3P's) or some other special damages

- Essentially you have to directly affected

Finlay v Canada (SCC, 1986) found a new test for public interest standing that was not as harsh as the previous traditional rule

1. Serious legal issue to be determined
2. Applicant with "genuine interest as a citizen"
3. No other reasonably/effective manner to get the serious legal issue before the court
    a. If there are better groups to bring this forward, they would not be allowed (not blanket approval to anyone who applies)
    b. This has to be a proper vehicle for the judicial review to occur)

Forest Practices Board v Ministry of Forests and Riverside Forest Products Ltd, Decision (1996), 95/01(a), (BC Forest Appeals Commission)

Facts:
Riverside Forest Products ("Riverside")damaged road construction and hauling and was ordered a stop work and remediation order by the Forest Practices Board ("Board").

- A review panel overturned the decision

The Cariboo-Chilcotin Conservation Council ("CCCC") applied to be an intervener

- To be so is to the discretion of the BC Forest Appeals Commission ("Commission")
    - This is under s131 of the *Forest Practices Code of British Columbia Act*

Issue:
Should the CCCC be approved as intervener?

Rule:
Section 131 of the *Forest Practices Code of British Columbia Act*

Analysis:
The test to approve a CCCC is whether the applicant has a valid interest in participating and can be of assistance in the proceedings.

- Valid interest
    - CCCC has claimed they have a valid interest in participating as they represent a coalition of groups in the Cariboo-Chilcotin area, who have an interest in the environment
    - No doubt they have a valid interest through their environmental attachment
- Assistance in proceedings
    - Riverside argues CCCC cannot since their interest is already represented by the Board
    - The Board argues against this, saying they represent the public's interest, not any particular group.
        - Had the legislature intended that the Board would do so, they would have not allowed intervenors at all in the scheme
    - The CCCC claim they are active users to the forest in question, and thus bring a unique perspective. The preamble of the *Act* states that "balancing productive, spiritual, ecological and recreational values of forests… including first nations", indicating that a local environmental coalition can be of assistance in determining what the scope of "damage to the environment" means in s45.

<u>What extent can the CCCC participate</u>?

The Board does not object to full submissions of the CCCC as it would put in perspectives the Board would not have
    - The issue in the appeal can benefit from the ecological perspective of the CCCC as contemplated in the Preamble.

Conclusion:
The CCCC entitled to full participation

Hold, Order:
Full participation granted under s131

Ratio:
Approval of participation requires 1) valid interest in decision, 2) ability to contribute to proceeding.

Interveners are another way groups can represent a public perspective in the courtroom. Intervener status will be granted if:

- Valid Interest in Participating?
- Can the intervener be of Valid Assistance to the Proceeding?
    - Give the court a broader perspective in making a determination of the decision at hand
- What extent of Participation is permitted?
    - Just because they have intervener status doesn't mean they are a full party to the proceedings. It is common for their role to be limited
        - Can be written (make submissions), but not oral testimony or participation
        - The scope will depend on what the court thinks their contribution can be

Sierra Club of Canada v Canada (Minister of Finance), [1999] 2 FC 211

Facts:
Sierra Club applied for a judicial review of the Minister of Finance's refusal to require an environmental assessment of a sale of two nuclear reactors to China.

- The Minister appealed dismissal of a motion to strike the clubs application

Issue:
Should Sierra Club be allowed on the basis of public interest standing?

Rule:
Section 18.1 of the *Federal Court Act*

(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the manner in respect of which relief is sought.

Analysis:
Sierra Club's claim is merely on the appropriateness of the Sierra Club as a representative of public interest, in the claim that the respondents are in breach of their statutory duty under the CEAA.

- Though s18.1 indicates only those directly affected by a decision can intervene, *Sunshine Village v Banff National Park* found that someone who satisfies discretionary public interest standing can seek 18.1 relief.
- In the absence of explicit statutory provisions excluding public interest applicants from the Federal Court, intervenors are not limited to only directly affected

Public Interest Standing at Common Law
Finlay factors lay out if someone has common law standing:

1. Issue is justiciable
    a. Not in question
2. Genuine interest in the outcome
    a. If the applicant has expertise that will inform their written and oral submissions, and assist in reaching a conclusion, they should be allowed public interest standing.

b. Case law does not point that only vulnerable groups or those who reasonably apprehend harm shall be granted standing
    i. If so, a wide range of administrative action would be exempted from restraints of legality.
c. The club has demonstrated a degree of involvement with the subject matter of the application for judicial review (whether there is a statutory duty to subject the export of the reactors to China and requires an environmental assessment).
d. Sierra Club's interest comes from their concern over the environment

3. Persons other than applicant are more directly affected and can litigate the appellants concerns.

Conclusion:
Genuine interest established

Hold, Order:
Application denied

Ratio:
In the absence of explicit statutory provisions excluding public interest applicants from the Federal Court, intervenors are not limited to only directly affected

This case was distinguished from the *Shield v Canada (Atomic Energy Control Board)* because the test had changed

- No longer a test of "direct personal interest" but now "genuine interest"

There are other barriers to public participation

- Adverse cost awards: momentum is building for a costs exception to cover a "responsible public interest litigant"
- Strategic Lawsuits against Public Participation (SLAPP): conversion of economic power into legal advantage

<u>Environmental Assessment</u>

Environmental Assessment: 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.

- Should be both information gathering and problem solving

Environmental assessments are a federal approach. These assessments do not guarantee an outcome, but it guarantees a process to balance other competing objectives of a project

- Environmental Assessments are legislated interventions into decision making
- They are needed because sectoral regulatory regimes are inadequate
    - Despite all regulations that exist, they are not sufficient to tackle environmental problems since most are reactionary or responsive
        - But environmental law is meant to be preventative
- The goals of environmental assessments are to:
    - anticipate, prevent and reduce projects' environmental effects (design and scope)
    - prevent unjustifiable projects from proceedings
    - integrate environmental concerns in the decision making of proponents
        - otherwise would only consider economics
    - encourage participation of citizens in decision making
        - moves towards a sustainable balance (social, economic, environmental)
    - impose the environment as a consideration
        - environment no longer considered an externality

If an environmental assessment ("EA") is working right, it should weed out where the negatives of a project outweigh the positives. However, EAs engage recurring themes, often contentiously:

- Federalism
- Preventative and Precautionary Action
- Transparency and Public Participation
- Public Interest Decision-Making
- First Nations' rights/perspectives
- Sectoral Regulation
- Sustainable Development
    - Contribution limited by a focus on significant adverse environmental impacts and by proceedings on a project-by-project basis

In Alberta, the main regulatory framework under EPEA requires authorization (approval, registration and notice).

- Environmental Assessment should be done before approval is given
- Want decision makers (Minister, Cabinet) to have the requisite information before them before making decisions
- EAs thus become part of the design of a project: information gathering and problem solving
    - Coalesces information based on data, should the project proceed, proceed with conditions or not proceed.
- Public interest decision making asks when a decision maker says yes to a project and when should they say no
- Environmental assessment and the duty to consult often run parallel
- EAs can absorb the duty to consult if it is done adequately well

EAs have progressed significantly since the 1970s:

- 1972 Policy Based EA Process:
    - Assessment required by implementation was discretionary and there were no penalties for non compliance (government could choose to do but no consequence if they didn't)
- 1984 *Environmental Assessment Review Process Guideline Order* under the *Government Organization Act*
    - An attempt to issue environmental guidance in a non-mandatory way – a discretionary order
    - But in *Friends of the Oldman River*, a federal order requiring a broad EA was binding when there is a binding area of authority of that government (in this case, navigable waters which is a federal s91 power)
        - Once the head of power is achieved, the federal government can extend orders to all areas of authority the assessment is involved in, even if under a provincial head of power
- 1980s and 1990s
    - Provinces began creating their own EA process, independent of the federal government
    - This was until the federal government implemented the *Canadian Environmental Assessment Act* (CEAA)
        - There was *CEAA 1995* and *CEAA 2012* (had considerable changes)
    - Then came the *Impact Assessment Act* (IAA) in 2019
- Nearly 4 decades of experience and problems still remain
    - The procedure is quite laborious
    - Fixation on proceeding project-by-project
    - Oriented towards significant impacts only

EAs are a stepwise, deliberative process. They incorporate environmental logic into "conceiving, selecting, designing, reviewing and implementing any proposed undertaking that could have important effects"

- They are initiated into the life cycle of that project: selections, decision-making, review what is possible and review undertakings
- They must be completed in anticipation of the broader approval process; prior to irrevocable decisions being made

Key Issue #1: Fixation on "significant impacts" does not help develop sustainability

- Ignoring environmental concerns, in their totality, or avoiding smaller environmental consequences creates a faulty assumption that we are developing sustainably
- By only looking at "significant impacts", the EA may not be looking at projects in their totality

Key Issue #2: Project by Project basis

- Assessing development project-by-project ignores the cumulative impact on the environment or ecosystem
    - Projects are not in isolation, they must be considered contextually
        - What is the impact of the project in the context of other projects that exist?
        - Kind of like death by a thousand cuts.

The very end of the EA will come down to a single answer to: Is the proposed activity "acceptable"?

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

Advanced EAs (which tend to be mostly limited to physical projects)

- Integrate social, cultural, economic and environmental considerations
- Compare and contrast proposed activity with alternatives
    - Do we make another bridge or make the existing one better?
- Grapple with cumulative effects
- Consider the management of uncertainties
- Look to mitigation or positive effects
    - Instead of "here is how we mitigate harm", why not "how do we develop in a way that achieves more sustainable outcomes"

<u>1984 – 1985 Approach: Environmental Assessment and Review Process Guidelines Order ("EARPGO")</u>

The *Oldman River* and *Canadian Wildlife Federation v Canada* cases showed that environmental assessments are not purely discretionary, but they are required in certain cases.

- EARPGO was a federal planning tool introduced through federal policy
- Major project regime that applied when a federal department had an "affirmative regulatory duty" where they may be environmental effects on an area of federal authority
    - Affirmative Regulatory Duty in *Navigable Protection Waters Act*
        - If navigable waters were impacted by a project, there must be federal approval
    - HADD provisions in the *Fisheries Act*
        - If it will disrupt fish habitat, it needs approval
    - *Migratory Birds Convention Act*
        - If it will disrupt migratory birds habitat, it needs approval
- Can extend to any area of federal authority related to that area. Set in motion the mandatory obligations of this EA process

Canadian Environmental Assessment Act, 1995 ("CEAA 1995")

This was the first federal process set down in legislation

- Limited to major projects, which were described as "physical projects"
- Inherently limited, only of projects, not on planning or policy decisions
    - It is a narrower approach
- Application of CEAA was determined through definitions and projects lists
    - *Law List Regulations:* determined which projects would trigger an EA
        - 100s of federal decisions triggered an EA
        - There was a presumption that all of the triggered decisions would be captured by an EA unless they are out (from the *Exclusion List Regulations*)
    - Fully integrated the EA process into decision making and engage the public in a thoughtful and meaningful manner towards sustainable development
    - "responsible authority" ministry or department that oversaw the process
        - National Energy Board ("NEB")
        - Ministry of Environment and Climate Change

When was an EA triggered? This is a legal test

1. Needs to be "projects" (s 2):
    a. (i) undertakings in relation to physical work (i.e., construction, operation, maintenance, abandonment; included unless excluded by regulation); or
    b. (ii) physical activities not done in relation to a physical work included by way of regulation. (i.e., dredging a river, removing timber, remediating land, new roads that connect highway to the project)
2. Where the federal authority was a proponent, financial assistor of the project, seller/leaser of federal land, issuer of an approval/license/authorization within the *Law List Regulations*
    a. These are the 100s of federal decisions in the regulations that trigger EA
    b. Most are when the federal authority uses federal land for it, the other three categories aren't very common

What is the CEAA 1995 process:

1. Screening
    a. Minimum requirements and maximum flexibility
        i. Presumptive track that EAs would go on
    b. Includes public notice, scoping, screening report, and project decision (99% of all EAs)
    c. Not super intensive, just a screening
    d. Control rests with responsible authority, but could be bumped to a comprehensive study at the Minister's discretion
    e. Steps: public notice of assessment, determine the scope, prepare a screening report, final report decision (addressing whether the project was likely to cause "significant adverse environmental effects"). Responsibly authority makes the determination
        i. Feedback allowed, but no hearings
        ii. Screening decision was discretionary and report wasn't very robust
        iii. The report would be forwarded to the Minister who could decide if it proceeds
2. Comprehensive Study
    a. More robust that screening
    b. Only applicable to projects listed in a *Comprehensive Study List Regulation*
    c. Similar process as screening, but with heightened public participation
        i. Coordinated by CEA Agency, with oversight by the responsible authority (NEB)
    d. Steps:

i. Notice of commencement
ii. Mandatory public participation at scoping phase
iii. Decision made to stay the course with a comprehensive study or bump it to a panel review (with public comment)
iv. Responsible authority exercises discretion under Ministerial oversight

e. This is more probing than the Screening, but ultimately the same process

3. Panel Reviews
    a. Process carried out by an independent panel (which had broad powers and operated under terms of reference)
    b. Heightened EA carried out and overseen by panel, appointed by the Minister which had broad powers over process and function
        i. Terms of reference specific to the project at hand
    c. Big addition with the public hearings
        i. Like an administrative panel
        ii. Engaged written or oral submissions, panel had subpoena powers to gather evidence and call witnesses
    d. The report would be made and sent to the Minister
        i. Final project approval subject to Cabinet approval
        ii. Final report usually assessed on whether the project was likely to cause ant "significant, adverse environmental effects", whether it should be allowed to proceed (including any conditions they will attach to reduce harmful effects)
            1. Reports are made public, and are often commented on in the contribution to sustainable development.
            2. Joint panels and panel substitutions available (1-5 per year)
    e. Start of conceiving EAs for their use to sustainable development
        i. Could think of mitigation effects, but also achieves long term goals and a sustainable society
4. Mediation
    a. To complement, but not replace, the other processes
    b. Not meant to be standalone, just available if parties under Screening, Comprehensive Studies or Panel Reviews needed a dispute resolution process
        i. More for comprehensive studies than panel reviews

What does the EA cover (scoping?)

- To determine the scope of the activity to be assessed and the scope of the assessment to be carried out (what is assessed and what questions will be asked)
    - Look at project proposed by proponent and go from there
- Are we only looking at the construction of the facility, or the roads that are built for the project?
- The project as proposed, will not necessarily get fully considered. It is common for the authority to let the project be "scoped down"
    - Narrower scope, narrower range of considerations and environmental effects that are considered
    - This led to a lot of litigation involving questions of cumulative effects, scope of the project, consideration of alternatives, and public participation (*Forest Alliance v Canada (Minister of the Environment)*
        - Did the EA of a bridge project include the forestry that the bridge is meant to facilitate (ie, new roadway that opens up forest that could have been timbered)
            - Court says no, that is too broad
            - Resist bring broader that what the confines of what it was proposed for
    - Legislation contained a list of factors for every environmental assessment (s 16):

        - Environmental effects of malfunctions or accidents that may occur in connection to the project
        - Significance of those effects
        - Measures that are technically and economically feasible that would mitigate the significant adverse environmental effects of the project
    - Upstream and downstream impacts are not considered officially
- Impact of federal decision making
    - Report made from Scoping/Study/Panel will be sent to Minister
    - Projects that would be approved would be those that have no adverse environmental impacts or impacts that are justified in view of the mitigation measures as concluded in the report

Canadian Environmental Assessment Act, 2012 ("CEAA 2012")

This was the renovated along with the *Fisheries Act* by the Harper government. Harper wanted to streamline the process and make it less cumbersome and facilitate resource development.

- Generally, screenings and mediation were eliminated, so only comprehensive studies and panel reviews existed
- Comprehensive studies kind of absorbed screenings but limited them to avoid screenings
- The triggered remained the same: project list or Ministerial discretion
- The scoping was narrowed to include only those issues under direct federal authority and also narrowed in terms of relevant environmental effects
- The responsible authority changed as well: CEA Agency, National Energy Board and the Canadian Nuclear Safety Commission (NEB and CNSC operate with self assessment)

Triggering an EA was coupled with Screening

- Legal "project" test from CEAA 1995 was replaced with the "designated project" process
- Not screening the process, just the proposal itself
    1. Activities listed in the *Regulation Designating Physical Activities* required "registration"
        a. Minister has discretion to include anything not listed as "designated projects"
            i. No longer a list of projects that would trigger screening or comprehensive study, replaced with these "designated projects" lists
    2. Once projects were registered, a description of the project was publicly posted with a short feedback period
        a. Federal Environmental Assessment Agency then had 45 days to determine whether an assessment was needed
    3. If the EA was needed, the responsible authority would do it, or elevate it to a Panel Review (more intensive)
        a. Responsible Authority: CEA Agency, NEB, CNSC
        b. The Comprehensive Study was quite similar to the CEAA 1995 model
        c. Most significant projects would trigger the Panel Review
            i. But, the Panel was constrained by legislation and had to complete work within a prescribed timeline (part of the streamlining)

Panel review process:

1. Minister had 60 days to decide if it should be elevated from Comprehensive Study to Panel Review
2. Panel is appointed (can now be a panel of 1, but as many as the Minister wants)
3. Two year timeline for the Panel to do its work
    a. Public hearings, document review, expert evidence, panel report, final decision

This process still focused on "significant adverse environmental impacts", with the Governor in Council (ie, Cabinet) determining whether the project should proceed

Scoping of the EA:

- The scope of the project to be assessed was largely determined by the project's description on the *Regulation Designating Physical Activities*
    - s2(1) of CEAA, 2012 and the corresponding decision in *Tsleil-Waututh*

Tsleil-Waututh Nation v Canada (Attorney General), 2018 FCA 153

Facts:
There was a proposed expansion of the Transmountain Pipeline between Edmonton, AB and Burnaby, BC. As part of the environmental assessment process under CEAA 2012, the National Energy Board issued its report to Governor in Council recommending that the project be approved

- The basis was that it was in the public interest and that with environmental mitigation efforts within the report, it would not cause significant adverse environmental impacts
- Governor in Council accepted the conclusion and approved the project

Tsleil-Waututh challenged the decision, on the notion that the project had fair ranging consequences beyond the pipeline expansion, namely increased tanker traffic from increased oil shipments. The shipping would scare off the Southern Resident Killer Whale populations, which are integral in the Tsleil-Waututh culture, and also a listed species on SARA

- By not considering the other impacts of the project, Tsleil-Waututh argued that the Governor in Council failed its *SARA* objectives and did not adequately consult

Issue:
What was the proper scope of the project that the National Energy Board should consider and report on?

Rule:
Section 19 of the *Canadian Environmental Assessment Act, 2012*:

(1) The environmental assessment of a designated project must take into account the following factors:
    (a) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out

Analysis:
The Board's scoping decision was to exclude the increased shipping that would increase from completion of the project from the definition of the project. This is a question of mixed fact and law (statutory interpretation and decisions to include)

- *SARA* imposes other restrictions when the designated project would influence a listed wildlife species.

The evidence of the Project admits that a 71% increase in shipping from the completion of the pipeline would occur. It suggest thus that the shipping is, at least, an element that accompanies the project.

- Board argues it did not have regulatory oversight of assessing increased shipping
    - But under the CEAA 2012, the board must have regulatory oversight of matters to be able to define a designated project and include physical *activities that are incidental to the Project*
- Additionally, the Board *did* assess the impacts on the killer whales in the area from the impact in shipping and found that increased traffic would create noise pollution,

decrease prey availability and risk pollution, causing significant adverse impact on the whales.
        - They chose not to include it in the scope of the project.
    - Tankers carry the risk of significant, if not catastrophic, adverse environmental and socio-economic effects should a spill occur

The NEB thus unjustifiably narrowed the scope of the report to the pipeline only, without reporting on the project-related tanker traffic

- By not including the downstream effects of the pipeline, the Crown did not satisfy its consultation obligations, nor its *SARA* obligations.
- This lead to successive, unacceptable deficiencies in the report given to Governor in Council and thus an erroneous approval of the project.

Conclusion:
Scope includes cumulative effects not considered in report

Hold, Order:
Governor in Council approval order quashed.

Ratio:
Cumulative impacts of project-related activity need be considered in the scope of assessment

The projects description had to be much more broadly considered in *Tsleil-Waututh* that the NEB (and thus Cabinet) did as it did not consider upstream and downstream effects

- Regarding the scoping of factors to be considered, the legislation indicates mandatory factors in s19(1) which could then be applied by the responsible authority or Minister
- The legislation defined "environmental effects" as those within federal authority (s5(1)) and those directly linked or necessarily incidental to federal authority (s5(2))
-

Eventually the Board did submit a report including the tanker impacts, finding the significant adverse impacts on the listed killer whales, but that the completion is justified.

- Just because a project has major effects does not mean that the project will be halted
    - But those effects cannot be ignored
    - This becomes an issue of public policy

Decision making was still: is a designated project likely (or not) to cause significant adverse environmental impacts and, if so, is it justified in the circumstances

Impact Assessment Act ("IAA")

The IAA is the new federal EA legislation passed in 2019 under the Trudeau government. It repeals CEAA 2012 as now the governing EA legislation. Even the title of the Act suggests that it is broader in scope than the CEAAs. Its key features:

- It has a new oversight agency – the Impact Assessment Agency
    - This shepherds the entire process. Under CEAA it was ECC, DFO, CNSC, NEB, not it is just the IAAC
- It adds an "assessment planning" stage
    - After this stage, the project is in the IAA machine and the entire process will go to completion, cannot get out
- It includes an Impact Statement, prepared by the proponent and determines the nature of the Impact Assessment Report (along with legislated timelines)
    - Under CEAA, the regulations described what assessment was needed
    - Now, it is this description that will be the trigger
        - The Impact Statement sends the whole thing down the pipe

- Public interest decision making resides with the Minister of Environment and Climate Change or the Governor in Council
    - CEAA outcome was "significant adverse environmental impacts" with "justification"
    - IAA is now if the project is in the "public interest"
- It also includes enhanced possibility of regional and strategic assessments
    - These were technically available under CEAA, just very buried
    - But in the IAA, they are brought explicitly to the forefront.

The IAA carries a lot of the CEAA framework forward, with the addition of the above key features. However, the CEAA was never constitutionally challenged (other then the Oldman River guideline orders). But with the addition of the key features, it is being challenged constitutionally

- The Alberta Court of Appeal ruled it unconstitutional, and the Supreme Court will be hearing the case in 2023
- There are also challenges to the *Net Zero Regulations* passed by the Trudeau government.
    - There are a lot of questions of what federalism means for the environment at the moment

<u>Triggering an Assessment</u>

The triggering process is largely unchanged from CEAA 2012

- A "designated project" was one that are designed under regulations or by Ministerial decision (same as CEAA)
- It is important that it includes "any physical activity that is incidental to those physical activities" as an almost tip to *Tsleil-Waututh* that cumulative impacts need to be considered

Impact Assessment Act, SC 2019, c 28, s 1
Section 2 designated project means one or more physical activities that (a) are carried out in Canada or on federal lands; and (b) are designated by regulations made under paragraph 109(b) or designated in an order made by the Minister under subsection 9(1). It includes any physical activity that is incidental to those physical activities, but it does not include a physical activity designated by regulations made under paragraph 112(1)(a.2). (*projet désigné*)

<u>Assessment Planning Phase</u>

This is where things start changing quite substantially. This replaces the CEAA, 2012 screening process.

- Everything starts with a proponent's description of the project, rather than the Screening
    - This is not the Impact Statement, but a working description that allows the Screening to go forward
    - Can determine if the project is on the regulations that cover what projects are going to be federally assessed
        - *Physical Activities Regulation*
            - Military or defence matters, nuclear facilities, uranium facilities, offshore gas, interprovincial affairs, offshore wind power, aerodromes/runways, international bridges or tunnels…
                - All have direct connection to federal heads of power
            - Mines and quarries, oils sands mines with bitumen, fossil fuel fire power generating facility, highways, hazardous waste facilities
                - These are a lot more provincial

        - CEAA 1995 had a regulation that had all federal decisions that could trigger it
        - CEAA 2012 had a list of projects that would trigger it
            - The IAA keeps the project approach in 2012
            - But even beyond all the regulations, the Minister has discretion to designate the project if it is not triggered
    - They also need to assess activities incidental to the project
- Public participation is facilitated by the Agency, which will determine whether to proceed with an Impact Assessment, the scope of the assessment, or any inter-jurisdictional cooperation
    - If both federal and provincial governments are doing assessments, they can conflate it and try to do one assessment that covers things of both to avoid double the work (if they can agree on what to do)
- The timelines are only 180 days to give industry certainty of what is happening.
    - This constrains that the planning phase is quite short
- The Assessment can also consider the option of regional or strategic assessments

Regional Assessments (ss 92, 93 of IAA) are new from the CEAA logic.

- These are different from EAs that deal with specific projects
- Regional Assessments assess the impact on something on a regional level, or an understanding of the quality of the environment in a given area, so future assessments can be made with better information in mind.
    - These includes cumulative effects
- The IAA says quite explicitly that assessments may do more than project assessment, but the cumulative impacts (long term sustainable decisions)
- These can help inform federal impact assessment decisions
- Are useful when there is the potential for effects from development within federal jurisdiction, including the cumulative effects, in the region
    - Are appropriate when there are opportunities for collaboration amongst jurisdictions in the region
- Can be intrusive when there is the potential for impacts, including cumulative impacts, to the rights of Indigenous people in the region.
- Are useful where there has been considerable public interest related to development or cumulative effects in the region
- Minister can decide to conduct one based on a public request, or the Agency's recommendation.
    - There is one ongoing in Ontario's "ring of fire" and proposed chromite mining/smelting development
- For example, marine terminals.
    - Can they be added to coastlines on an ad hoc basis?
    - Government of Canada can say they want a regional assessment of the nature of regional shipping in the Maritimes
        - Assessment will be of the regional contexts of marine shipping to tell us the needs of the impacts
        - With what information could the government approve the project in the future

Strategic Assessments (s 95 of IAA) are also new from the CEAA logic

- Can help inform, or improve the efficiency of, future federal impact assessments and decision making, but not assessing a physical project
- Are to be used to assess not a physical project but rather a policy, plan, program or issue is related to an area of federal jurisdiction
- Can be used to address impacts, including cumulative impacts, to the rights of Indigenous people

- Can be applied when there has been considerable public interest related to the policy, plan, program or issue
- Minister can decide to conduct one based on a public request or the Agency's recommendation
    - Strategic Assessment of Climate Change (SACC)
        - This was before IAA, but grandfathered into the IAA

Both Regional and Strategic assessments are contextual, beyond a project-by-project basis; they are done for an additional purpose. These would be additional to the Impact Assessment, not instead of it

- Both regional and strategic assessments can be done for a project that is not yet proposed

Impact Assessment Act, SC 2019, c 28, s 1

Regional Assessments
Section 92
The Minister may establish a committee — or authorize the Agency — to conduct a regional assessment of the effects of existing or future physical activities carried out in a region that is entirely on federal lands.

Section 93
(1) If the Minister is of the opinion that it is appropriate to conduct a regional assessment of the effects of existing or future physical activities carried out in a region that is composed in part of federal lands or in a region that is entirely outside federal lands,
    (a) the Minister may
        (i) enter into an agreement or arrangement with any jurisdiction referred to in paragraphs (a) to (g) of the definition jurisdiction in section 2 respecting the joint establishment of a committee to conduct the assessment and the manner in which the assessment is to be conducted, or
        (ii) authorize the Agency to conduct the assessment; and
    (b) the Minister and the Minister of Foreign Affairs may enter into an agreement or arrangement with any jurisdiction referred to in paragraph (h) or (i) of that definition respecting the joint establishment of a committee to conduct the assessment and the manner in which the assessment is to be conducted.

Strategic Assessment
Section 95
(1) The Minister may establish a committee — or authorize the Agency — to conduct an assessment of
    (a) any Government of Canada policy, plan or program — proposed or existing — that is relevant to conducting impact assessments; or
    (b) any issue that is relevant to conducting impact assessments of designated projects or of a class of designated projects.

(2) The Minister may deem any assessment that provides guidance on how Canada's commitments in respect of climate change should be considered in impact assessments and that is prepared by a federal authority and commenced before the day on which this Act comes into force to be an assessment conducted under this section.

Section 7 is where the IAA gets a lot of heat. It has quite broad prohibitions on designated projects may create effects that, either in whole or in part, are areas of federal jurisdiction

- This is the grounds for the Alberta reference against the IAA.

- There is lots of constitutional case law that the effects of activity are not the sufficient to bring it into a federal head of power, it has to be the purpose.
- The challenge is that this crosses into provincial jurisdiction and that the federal government used s7 and the effects on federal jurisdiction to create a new regulatory tool
    - A new step in the process that covers wholly provincial projects that have an effect in an area of federal jurisdiction
    - Based on that fact alone, an assessment is required, and without it, there is an infraction

Impact Assessment Act, SC 2019, c 28, s 1
Section 7 (1) Subject to subsection (3), the proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause any of the following effects: (a) a change to the following components of the environment that are within the legislative authority of Parliament: (i) fish and fish habitat, as defined in subsection 2(1) of the *Fisheries Act*, (ii) aquatic species, as defined in subsection 2(1) of the *Species at Risk Act*, (iii) migratory birds, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and (iv) any other component of the environment that is set out in Schedule 3; (b) a change to the environment that would occur (i) on federal lands, (ii) in a province other than the one in which the act or thing is done, or (iii) outside Canada; (c) with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on (i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; (d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; or (e) any change to a health, social or economic matter within the legislative authority of Parliament that is set out in Schedule 3.

<u>Scoping of IAA</u>

Scoping of the project is substantially similar to scoping under CEAA, 2012, but the factors to consider change considerably, both in substance and in breadth

- Section 22 lists factors that are very broad
    - Some of them make sense like cumulative projects (s 22(1)(a)(ii)), Indigenous interests ((c), (g), (r))
    - Others are very large, like how they contribute to sustainability (h) and the intersection of sex and gender under (s) (like the Highway of tears, most people who work on energy projects are men and they are in isolate and remote communities)
- The factors are not only expansive, but they are mandatory
    - All of the subsections <u>must</u> be considered.

Impact Assessment Act, SC 2019, c 28, s 1

Section 22

(1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:

(a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including

(i) the effects of malfunctions or accidents that may occur in connection with the designated project,

(ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and

(iii) the result of any interaction between those effects;

(b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;

(c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;

(d) the purpose of and need for the designated project;

(e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;

(f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;

(g) Indigenous knowledge provided with respect to the designated project;

(h) the extent to which the designated project contributes to sustainability;

(i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;

(j) any change to the designated project that may be caused by the environment;

(k) the requirements of the follow-up program in respect of the designated project;

(l) considerations related to Indigenous cultures raised with respect to the designated project;

(m) community knowledge provided with respect to the designated project;

(n) comments received from the public;

(o) comments from a jurisdiction that are received in the course of consultations conducted under section 21;

(p) any relevant assessment referred to in section 92, 93 or 95;

(q) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;

(r) any study or plan that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition jurisdiction in section 2 — that is in respect of a region related to the designated project and that has been provided with respect to the project;

(s) the intersection of sex and gender with other identity factors; and

(t) any other matter relevant to the impact assessment that the Agency requires to be taken into account.

The IAAC or a Review Panel (for bigger projects) can review decisions. Review Panels are made by Minister and independent of the IAAC

Reporting

At the end of the assessment, a report is made by the IAAC (or the Canadian Energy Regulator (replaced the NEB)) and sent to the decision maker

- The decision is made by either the Minister, or the Governor in Council
- The decision is still the "significance" of environmental impacts, but this time with reference to "public interest" rather than just being "justified" under CEAA
- The relevant "public interest" factors that must be considered are set out in section 63
    - Again, these must be considered
        - (a) how the project contributes to sustainability
        - (b) adverse impacts within federal jurisdiction (including incidental effects)
        - (c) mitigation measures
        - (d) impact of designated project on Indigenous peoples
        - (e) extent to which the project would hinder Canada's "environmental obligations" including climate change
            - This is another reason the IAA is being challenged, since this is a new addition
            - But it is significant. This requires the decision maker to consider climate change in terms of Canada's commitments to the Paris Agreement
                - This would make it hard to justify any massive emitting projects

Impact Assessment Act, SC 2019, c 28, s 1
Section 63 (1) The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors: (a) the extent to which the designated project contributes to sustainability; (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant; (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate; (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; and (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

The *IAA Reference* by the Alberta Court of Appeal is somewhat polarizing.

- Guideline orders from *Oldman River* were valid for needing federal approval.
    - This didn't upon up intra provincial projects to broad federal oversight
    - The process was to make sound decisions about the impacts of these projects as they relate to federal jurisdiction.
        - Nothing new, it is an aspect of federal decision making
        - It does not change because it is an explicit process
- So, what changed with the IAA?

Federal government said the pith and substance "is to establish a federal environmental assessment process to safeguard against adverse environmental effects in relation to matters within federal jurisdiction."

- The [Project List's] pith and substance "is to capture those major projects with the greatest potential for adverse effects on matters within federal jurisdiction";
    - The greatest impact's part is most of the projects under provincial jurisdiction

They then classified IAA within federal heads of power via:

- s 91(12) (Sea Coast and Inland Fisheries)
- s 132 (Imperial Treaties) (migratory birds)
- s 91(24) 'Indians and Lands Reserved for the Indians'
- Parliament's POGG power

Provincial government said the pith and substance was to create a new and expansive regulatory regime that is an encroachment on projects that fall in provincial jurisdiction

- The Court of Appeal found that it was a regulatory regime
- Its pith and substance is "the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval"
    - The subject matter of the IAA is applied to intra-provincial designated projects and falls within several heads of provincial powers, meaning the federal overreach is broad
    - "[Parliament] has self-defined "effects within federal jurisdiction" as various changes or impacts to the environment, health, social or economic matters from or by a designated project. That is the hook Canada claims anchors its jurisdiction over intra-provincial designated projects that do not otherwise require a federal permit"
        - This strays from *Oldman River* since it is not about violating an area of federal jurisdiction (navigable waters), but has *impacts* on federal jurisdiction (impacts on navigable waters)
            - Without the federal approval part of *Oldman River*, this will be hard for Canada to justify
- The legislation has expansive things to consider; it can consider effects in federal jurisdiction, which allows the federal government the ability to claim authority to assess intra-provincial projects
    - May not need regulation, but since it has an effect on federal jurisdiction, it needs a federal assessment. That is very broad, and the ABCA said too broad
- It is no longer the purpose, but the effect on federal jurisdiction that requires the federal assessment process.
    - Fish, migratory birds are not problematic since they *are* areas of federal jurisdiction.
    - It is more 7(d) (any change in Canada to health, social or economic conditions of Indigenous peoples) and 7(e) (any change to health, social or economic matters within the legislative authority of Parliament) that are problematic
        - [Parliament] has self-defined "effects within federal jurisdiction" as various changes or impacts to the environment, health, social or economic matters from or by a designated project. That is the hook Canada claims anchors its jurisdiction over intra-provincial designated projects that do not otherwise require a federal permit
- Effect on jurisdiction is not the same things as jurisdiction
    - "While those changes or impacts may be "effects within federal jurisdiction" for purposes of the Act, that does not make all of them effects within federal jurisdiction for purposes of the division of powers"

- *Fowler*: regulating forest dumping in streams deemed ultra vires of Parliament
  - Canada said it was justified since it had effects on fish, but the dominant purpose was to regulate industry, not protect fisheries
    - It has federal jurisdiction effects, but not federal jurisdiction purpose. They are not synonymous

<u>Protected Areas and Protected Species</u>
<u>Protected Areas</u>
The first park was created in 1872 (Banff National Park) with the goals to protect Canada's "Natural Capital", promote education, tourism, recreation, spiritual enrichment
- Natural Capital was a away to put an economic lens on the natural areas in Canada

These were meant for environments with "unique features"; something that is unique in our landscapes
- There is different value associated for different things

Parks can be considered a Eurocentric approach to the world. Colonially speaking, dispossession and utilization was central to resource extraction (exploitative uses to natural capital
- Post colonialism, what does a protected space mean? This involves us imposing a view on what the land should be, and necessarily involves exclusion
- They are provided for my the government with no opportunity for private actors

There are currently 48 National Parks, 6 National Marine Parks, 2000+ provincial parks
- This means that 11% of Canada's land base falls within some version of protected space
- Marine Parks are hard to enforce and manage
  - They are 3 dimensional but we only use the surface

Wilderness, from a colonial perspective was something that was to be conquered and subdued
- Human tendency is to organize wilderness in order to exploit and utilize it
- But we must also recognize that wilderness is essential to human life
- Thus, perspectives towards wilderness transformed into something to be explored and studied
  - Wilderness areas like national parks are now one of the only places that contain mixes of species at near natural levels of abundance
    - They are the only areas supporting ecological processes that sustain biodiversity over evolutionary timescales

R v Tener: Creation of a park is different than mere zoning and constitutes an expropriation
- This means that compensation needs to follow, so there are complications that follow from park creation

There are multiple values to parks:
- Recreation
  - Gives incentive to protect certain areas
- Profit and eco-tourism
  - As much as parks should not worry about money, there are funds that need to be raised to operate them
- Education
  - Promote awareness
- Spiritual value
  - Most Indigenous spirituality is centered around animals and land
- Cultural heritage

    - These are ways to protect the species and landscapes necessary in Indigenous cultures
- Protecting ecosystems for human needs
    - Protecting the Athabasca icefields in Jasper gives the North Saskatchewan River water and fulfills out water needs
- Intrinsic preservation
    - Nature is worth deserving in and of itself

There are also a lot of challenges when it comes to Parks.

- How much land/water is required to be effective?
- Where should parks be placed?
- How should parks be funded?
- How to balance competing uses of parks?
- How to deal with the threats of pollution, over-utilization, climate change, extractive industry, activities outside park boundaries that influence inside park activities

You can't just put a fence around a park and preserve what is inside. Animals migrate, water flows in and out. Parks are thus not static and any boundaries that are drawn are human made

- Parks need management plans to steward the national park so it is achieving the objectives of national parks
- The Y2Y: Yellowstone to Yukon project
    - This is the idea that parks should not be a dot on a map, but a synergistic ribbon of interconnected natural areas that all achieve the same goal of protecting a mosaic of environments as they fluctuate over time.
        - Creation of a broadly healthy area

Canada's National Parks:

- Established by Parks Canada, which is an agency within Ministry of Environment and Climate Change through the *National Parks Act*
    - Protects landscapes of national significance
    - All federal Crown land

Canada National Parks Act, SC 2000, c 32
Section 4 (1) The national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations. Section 8 (1) The Minister is responsible for the administration, management and control of parks, including the administration of public lands in parks and, for that purpose, the Minister may use and occupy those lands. (2) Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.

- The *National Parks Act* states that the purpose of the park is that they are to be used (s4) since they are "dedicated to the people of Canada, for their benefit"

    - They are to be maintained and made use of to leave them unimpaired for the enjoyment of future generations
    - What does this mean? Restricted use or facilitated use?
    - Intergenerational use sounds like sustainability language
        - Unimpaired is a lofty goal
    - Dedicated to Canada, so all Canadians have a stake; we don't financially benefit from them, but they are ours
- Section 8 says that the Minister is responsible for the administration of the Parks, and that ecological integrity is a top priority
    - Protection of natural resources and natural processes shall be the first priority of the Minister when considering management of parks

Canadian Parks & Wilderness Society v Canada (Minister of Canadian Heritage), 2003 FCA 197

Facts:
Canada approved the establishment of a winter road through Wood Buffalo National Park. The Canadian Parks & Wilderness Society ("CPAWS") applied for judicial review of the approval of the road from the Minister.

- The Minister approved the decision to approve the road after considering an environmental assessment and found it was "not likely to cause significant adverse environmental effects"

Issue:
Did the Minister fail to discharge their statutory duty and the threat that incremental development poses to ecological integrity?

Rule:
Section 8 of the *Canada National Parks Act*
(2) Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.

Analysis:
Section 4(1) does not provide a comprehensive statement for the purposes by which the Minister may exercise their powers over management of National Parks

- This would be far too restrictive
- Section 4(1) does not apply to the purposes of the Act, but the purposes of National Parks
- Not everything done by the Minister must advance one or more of the purposes for which the Parks are established (ie, the "benefit, education and enjoyment" for the people of Canada).

The environmental assessment marked each risk of the roads as low and the Minister addressed all concerns. The construction also has extensive mitigation efforts

- Even though the Minister did not specifically state that she applied her mind to the concept of ecological integrity itself and her duty to afford it the first priority, the evidence, report and process indicate that her decision was reasonable
    - It cannot be said she was dismissive of ecological integrity

Conclusion:
No failure

Hold, Order:
Appeal dismissed

Ratio:
The priority of ecological integrity is discretionary and contextual on whether it was duly considered

While it appears that section 8(2) is couched with affirmative language, it is discretionary and the Minister shall consider many things. Because the environmental assessment found little adverse impacts, her approval was reasonable.

- Seems like a funny precedent. The road brought no benefits to the Park, it was to reach remote communities to bring socioeconomic benefits to them, but not the park
- Court makes it clear that ecological integrity is not a trump card, nor something that even needs to be explicitly considered and it is open for the Minister to consider other endeavours and outcomes.
    - Kind of hard to reconcile this take based on the benefits of parks

Alberta's Provincial Parks

- Established pursuant to the *Provincial Parks Act, Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* and designated by Orders in Council
- Alberta has 7 types of protected areas, each with varying levels of protection and utilization:
    - Wilderness Area
    - Ecological Reserve
    - Wildland Provincial Park
    - Heritage Rangelands
    - Provincial Parks
    - Provincial Recreation Areas
    - Natural Areas
- Each park is the subject of a 10 year management plan
    - Advantages: assessed and managed locally
    - Disadvantages: less emphasis on ecological conservation and the legislative requirements are generally less onerous

Maintaining Ecological Integrity

- The approach to ecological integrity set down in the Act may be insufficient because it would tend to suggest that a goal of natural ecological integrity might not be possible within the Act's broader framework that emphasizes socio-ecological integrity
- Issue is that wilderness functions is not meaningfully positioned at the core of the legislation
    - 4(1) dedicates national parks for the use and enjoyment by people, however achieving natural ecological integrity probably requires excluding humans from where they otherwise want to be or from conducting the activities they otherwise want to perform
- There is broad use, but also human use. The Minister will consider the ecological integrity first, but will decide at the end of the day what is used for the benefit of Canadians
    - If we want real protection, do we need law reform or a fundamental shift in the way we think about parks systems

An alternative to our current approach is the Public Trust Doctrine

- English law recognized the public right to access all navigable waterways for the purpose of fishing and navigation, and the sovereign has a duty to manage all navigable waters to uphold this right (*Gann v Free Fishers of Whistable*)
- This common law duty was adopted by the SCC in *Rhodes v Perusse,* but didn't recognize it as a public trust, whereas the US courts did.
    - If you are subject of public trust, it is generally thought of as a fiduciary duty which are fairly significant legal obligations
    - It could still be argued in Canada though
- Closest it has come in Canada is the *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 case

    - BC argued that because of a negligent fire that consumed a lot of harvestable, habitable and protected land, the province should be compensated for the loss of timbering royalties, loss of protected areas, arguing they had a public trust obligation
    - SCC didn't bite, saying the doctrine does not exist in Canada.
- Since it was not found at common law, some argue that it is statutory
    - Is there not a trust like duty to protect public resources for the benefit of the public (present and future) in protected areas by s 4 of the *National Parks Act*
    - The language just isn't clear enough in the statute to ground this claim
    - To create a trust, the subject matter (money, resource) trustee and beneficiary need to be clear. A national park at large is an amorphous idea that is not concrete enough to make a trust
        - But what if the statute was made clearer? The government would have to impose a duty on itself
- In the US, the *Sierra Club v Department of Interior* successfully argued the public trust doctrine
    - Off park logging was affecting sedimentation and erosion of redwood cedars in the park. This was argued as breaching the Public Trust doctrine
        - They argued the duty extended to beyond the boundaries to adjacent lands
    - SCOTUS agreed, saying the state had powers within their realm to fulfill the duty.
        - For example, purchase the areas around the park to create a buffer around the park; essentially a core park and a buffer to protect the interior
        - State parks around the national park creates a contiguous zone
            - Industrial activity is only allowed to get further away
- The same was argued in *Green v Ontario*, but the court said they lacked standing, saying you can't prove a special interest above that held by the general public at large
- Also barred because the legislation does not create a statutory trust
    - Need very clear language to create a trust
    - Courts are loathe to them unless there is a very clear intention for the government to be bound by the language
        - "Benefit for the use and benefit of all future Canadians" is not explicit enough

<u>Protected Species</u>

Why should we care about biodiversity?

(1) It has existing practical value
    a. Food, goods (cotton, silk, leather), medicine and research (1/2 of prescription drugs derive from wild organisms), ecosystem services (photosynthesis, soil renewal, flood mitigation)
    b. "The web of life is complex, how many strings can we cut before it falls apart?"
(2) Future practical value
    a. Newly discovered species emerge as valuable resources of innovation
    b. Scientific, food related, medicinal
    c. "The cure for cancer is somewhere in the Amazon"
(3) Intangible value
    a. Animals offer companionship, comfort, and many find beauty in nature
(4) Moral duty
    a. To not exterminate our fellow passengers on this planet
(5) Economy
    a. Canadians spend about $41,300,000,000 on nature related activities in 2012

Extinctions happen naturally, with or without humans. They have happened throughout the course of biological history. However, the rate of extinction is particularly concerning. Species are currently going extinct at 100-1000x the background extinction rate throughout Earth's history. Species can be affected by other forces and adapt. But the current fear is that the rate at which they are being affected is faster than the rate they can adapt to. The major threats to species loss are:

- Habitat loss: the greatest threat
- Direct human exploitation: overhunting and poaching
- Pollution: particularly dangerous for small, aquatic or amphibian species
- Climate change

This has prompted a worldwide movement to save species. In Canada, this approach is largely federal.

(1) Species as the building blocks for healthy ecosystem, don't respect political boundaries, so there needs to be a federal, as opposed to provincial approach
(2) International obligations under the *Convention of Biological Diversity* ("CBD") are to develop and maintain the laws necessary to protect threatened and endangered species.
(3) A provincial patchwork of laws would not be preferable to a uniform national approach
    a. There are provincial laws on this, Alberta has the *Wildlife Act*, but it is more for using species rather than protecting them
(4) Produce overall federal recovery lands

The largest problem with a federal response, is that they can only control species protection on federal lands, which is about 41% of Canada, but only 4% of the land within provinces.

The American approach is to:

(1) List species as endangered or threatened
(2) Protect their critical habitat
(3) Prohibit at law taking of that species or harming them
    a. They also give citizens the legislative mechanism to directly challenge action and decisions for being not in conformity

The *Northern Spotted Owl v Hodel* case challenged the decision to not list the owl as endangered or threatened.

- The court found that the US Fish and Wildlife Service disregarded expert evidence in making its determination
- Decision was ruled arbitrary, capricious and contrary to law

The US then listed the species, but then didn't list the critical habitat or protect the owl saying it was not determinable, so it was challenged again in *Northern Spotted Owl v Lujan*

- Again, the court found that this was not reasonable. Identifying the forest in that region was sufficient to target, identify and protect critical species in the area
    - The mature old growth forest in question was identifiable

Takeaways: need to protect the species itself as well as its critical habitat. There is a prohibition from taking a species

In *Babbitt v Sweet Home Chapter of Communities for a Great Oregon,* there was a challenge to the statutory definition of "take" and "harm" in the regulations

- Did the government have authority to determine in the regulations that "harm" considers habitat modification? Court says yes
    - The ordinary meaning captures it: supported the purpose of the act
- Significant habitat harm constitutes harming a species:
    - Harm includes extensive change to their habitat

    - Direct harm is hunting the animal
    - Indirect harm is harassing the animal (for example, whale watching)

Canada signed and ratified the *Convention on Biological Diversity* in 2002. Section 8(k) of the CBD requires parties to create the necessary laws to protect endangered species. Canada lagged on this

- So, in 2002, it passed the *Species at Risk Act* ("SARA")
    - SARA reflects a compromise between industry, landowners, Indigenous people, political parties and the Canadian public
    - Part of the compromise is reflected in the way decisions are made in the legislation. The extent to which species protection is political vs scientific is a particular tension.
    - This is a common theme in environmental law at large
        - Politics vs Science

SARA is a long and extensive piece of legislation

- Section 6: the purposes of the Act is to both prevent extinction or extirpation (extinct in Canada but found elsewhere) and manage species of particular concern to prevent their endangerment
    - So, SARA is both preventative and proactive
    - Also recognizes in the Preamble that humans are the ones causing extinctions
- SARA generally is concerned with all species, but in particular "federal species" (aquatic species under the *Fisheries Act* and migratory birds under the *Migratory Birds Convention Act*) on federal land
    - Federal lands is extremely limiting, since very little of Canada is federal lands. Federal lands include First Nation reserves, national parks, military bases and post offices)
    - National parks isn't helpful, because isn't the point of national parks to conserve the things inside it, so SARA wouldn't add any more protections in there
    - In essence, SARA only helps aquatic species and migratory birds

A species can be listed as various different categorizations:

- Extinct: formerly present in Canada, but now longer exists anywhere
- Extirpated: no longer exists in the wild in Canada, but exists elsewhere in the world
- 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 concern threatened or endangered
- Species at Risk: species listed as extirpated, endangered or threatened
    - Species listed as "special concern" aren't afforded significant protection in SARA

Once a species is listed, it gets significant protections. Unfortunately, more species move down the list rather than move off it. Legal listing is a pre-requisite to protection. So, how do species get listed?

- Section 14 of SARA establishes the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC")
    - COSEWIC is 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)
        - COSEWIC was pre-SARA but SARA gave it a specific role and statutory roles and obligations
- Assessment of a species can be requested by anyone and commences with the production of a "Status Report" which details basic biology (population sizes and trends, distribution in Canada, and habitat availability) as per ss 21, 22

    - The assessment must be done within 1 year of preparing the Status Report of the species (s 23)
    - COSEWIC will then recommend a legal listing of each assessed species.
        - The assessment process is modeled on the international criterion (IUCN standard is regarded as the best, so COSEWIC follows it)
    - The assessment must be re-assessed every ten years (s24), but this can be expedited if there are particular threats

Even if COSEWIC does the scientific determination on the species, the power to amend the "List of Wildlife Species at Risk" rests with the Governor in Council, on the recommendation of the Minister

- So, COSEWIC will give the Minister (of Environment and Climate Change, and Fisheries) their recommendation on the status of the species, who can then take the assessment, accept it and list the species, or decide not to list it, or refer it back to COSEWIC for further evaluation (s27)
- If Cabinet does not decide within 9 months, the species is automatically listed as per COSEWIC's designation
    - The legal list of species is contained in Schedule 1 of the Act
    - This means that while COSEWIC's report is completely political, the decision to list a species is purely political
        - This is the compromise of SARA
- The Minister is required to give reasons in the Public Registry if they chose not to list the species
    - Economic reasons have been given the reason to justify about 50% of listing rejections

The Prohibitions under SARA only apply to Species at Risk (not special concern)

- Section 32: cannot kill, harm, harass, capture or take a listed species, or possess, collect, buy, sell or trade one either
- Section 33: cannot damage or destroy the den or nest of a listed species
- Section 34: prohibitions only apply to federal lands (unless migratory bird or aquatic species)
    - So, provincial lands do not get covered.
    - Section 34(3): The only way provincial lands can be covered is if the Minister can recommend that an order should apply on them after consulting with the Province that the species is not adequately protected in the species, called the "safety net"
        - Can be used to extend protection into areas of provincial jurisdiction
        - National Concern or Criminal Law
            - Wouldn't know, since it has never been challenged since it has never been used

Once a species is listed, it kickstarts a recovery process that is laid out in SARA

(1) Recovery Strategy: overall scientific framework within which recovery will be implemented; exclusively science based (section 37)
    a. This is what would happen in an ideal protection only focused world
    b. This is when critical habitat should be identified
    c. Incomplete scientific record is not a reason to not protect the species
    d. Step 1: Determine if recovery is technically and biologically feasible
    e. Step 2: Identify threats to species, habitat, critical habitat, population and distribution objectives
    f. Step 3: 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 5 years of its posting (s42)

g. Section 38 states that the Minister must consider Canada's commitments to biodiversity conservation while also embodying the precautionary principle
h. Statutory allowance for public comment is allowed on the recovery strategy

(2) Action Plan: specific actions taken to implement the recovery. Socio-economic considerations are allowed at this stage (section 47)
   a. This is as much of the recovery plan that the Minister is willing to adopt, while also considering socioeconomic factors
   b. This is required; the Minister must prepare an Action Plan from the Recovery Strategy
   c. Goal is to operationalize and implement the Recovery Strategy by specifying concrete recovery actions
      i. This is where socio-economic considerations are accounted for
      ii. What is appropriate based on socioeconomic impacts of implementing the recovery strategies
   d. Critical habitat rests at the core of recovery actions, and critical habitat must be identified in the action plan (s 41, 49)
   e. This involves lots of ministerial discretion

(3) Critical Habitat Protection: "the habitat that is necessary for the survival or recovery of a listed wildlife species" is identified and legally protected (s57, 58)
   a. Section 57 states that, within 180 days after the Recovery Strategy and Action Plan identify critical habitat, it must all be protected by provisions in SARA or other Acts abd section 58
   b. Section 58 makes a new prohibition: cannot destroy critical habitat of any species at risk act on federal land or any land for aquatic species or migratory birds
      i. 58(2): it must be published within the Canada Gazette
      ii. 58(5): if the critical habitat is not in a National Park, the Minister must make an order to protect those lands on federal lands

(4) (Optional) Emergency Orders: Minister can extend protection of critical habitat to provincial lands under s61(2) in critical, emergency situations where the fate of the species is in immediate and direct danger of survival
   a. This is another safety net provision.
   b. Emergency orders can be made to protect a listed wildlife species on provincial or private lands by limiting the activity that can occur there (s 80)
   c. This is a very strong legislative tool
      i. It is rarely used; only two in effect today
   d. What is needed, is a finding by the Governor in Council that a species is critically endangered and they can take that action

Emergency orders are an interesting point to examine because it allows to fully highlight the scientific vs political divide of Ministerial discretion.

- The Minister must move to protect critical habitat on federal lands and water, but can choose to apply protections outside of usual areas of federal jurisdiction
   - Once a listed species critical habitat is saved on federal lands, if the land off federal lands are not saved (which they almost always aren't), there is a reason the Minister chose not to protect it.

Species at Risk Act, SC 2002, c 29
Section 2 "critical habitat" means the habitat that is necessary for the survival or recovery of a listed wildlife species

"endangered species" means a wildlife species that is facing imminent extirpation or extinction. (*espèce en voie de disparition*)

"extirpated species" means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild. (*espèce disparue du pays*)

"federal land" means

(a) land that belongs to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above that land;
(b) the internal waters of Canada and the territorial sea of Canada; and
(c) reserves and any other lands that are set apart for the use and benefit of a band under the Indian Act, and all waters on and airspace above those reserves and lands. (*territoire domanial*)

"species at risk" means an extirpated, endangered or threatened species or a species of special concern. (espèce en péril)

"species of special concern" means a wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats. (*espèce préoccupante*)

"threatened species" means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction. (*espèce menacée*)

Section 6
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.

COSEWIC
Section 14
The Committee on the Status of Endangered Wildlife in Canada is hereby established.

Section 15

(1) The functions of COSEWIC are to
    (a) assess the status of each wildlife species considered by COSEWIC to be at risk and, as part of the assessment, identify existing and potential threats to the species and
        (i) classify the species as extinct, extirpated, endangered, threatened or of special concern,
        (ii) indicate that COSEWIC does not have sufficient information to classify the species, or
        (iii) indicate that the species is not currently at risk
    (b) determine when wildlife species are to be assessed, with priority given to those more likely to become extinct;
    (c) conduct a new assessment of the status of species at risk and, if appropriate, reclassify or declassify them;
    (c.1) indicate in the assessment whether the wildlife species migrates across Canada's boundary or has a range extending across Canada's boundary;
    (d) develop and periodically review criteria for assessing the status of wildlife species and for classifying them and recommend the criteria to the Minister and the Canadian Endangered Species Conservation Council; and

(e) provide advice to the Minister and the Canadian Endangered Species Conservation Council and perform any other functions that the Minister, after consultation with that Council, may assign.

Section 16

(1) COSEWIC is to be composed of members appointed by the Minister after consultation with the Canadian Endangered Species Conservation Council and with any experts and expert bodies, such as the Royal Society of Canada, that the Minister considers to have relevant expertise.

Species Assessment

Section 21

(1) COSEWIC's assessment of the status of a wildlife species must be based on a status report on the species that COSEWIC either has had prepared or has received with an application.

(2) The Minister may, after consultation with COSEWIC, the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations establishing the content of status reports.

Section 22

(1) Any person may apply to COSEWIC for an assessment of the status of a wildlife species.

(2) The Minister may, after consultation with the Minister responsible for the Parks Canada Agency, the Minister of Fisheries and Oceans and the Canadian Endangered Species Conservation Council, make regulations respecting the making of applications to COSEWIC under subsection (1) and the dealing with of those applications by COSEWIC.

Section 23

(1) COSEWIC must assess the status of a wildlife species within one year after it receives a status report on the species, and it must provide reasons for its assessment.

Section 24

COSEWIC must review the classification of each species at risk at least once every 10 years, or at any time if it has reason to believe that the status of the species has changed significantly.

Listing Recommendation to Governor in Council

Section 27

(1) The Governor in Council may, on the recommendation of the Minister, by order amend the List in accordance with subsections (1.1) and (1.2) by adding a wildlife species, by reclassifying a listed wildlife species or by removing a listed wildlife species, and the Minister may, by order, amend the List in a similar fashion in accordance with subsection (3).

(1.1) Subject to subsection (3), the Governor in Council, within nine months after receiving an assessment of the status of a species by COSEWIC, may review that assessment and may, on the recommendation of the Minister,

(1) accept the assessment and add the species to the List;

(2) decide not to add the species to the List; or

(3) refer the matter back to COSEWIC for further information or consideration.

Prohibitions

Section 32

(1) No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.

(2) No person shall possess, collect, buy, sell or trade an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species, or any part or derivative of such an individual.

Section 33
No person shall damage or destroy the residence of one or more individuals of a wildlife species that is listed as an endangered species or a threatened species, or that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada.

Section 34
(1) With respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*, sections 32 and 33 do not apply in lands in a province that are not federal lands unless an order is made under subsection (2) to provide that they apply.
(2) The Governor in Council may, on the recommendation of the Minister, by order, provide that sections 32 and 33, or either of them, apply in lands in a province that are not federal lands with respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994.*
(3) The Minister must recommend that the order be made if the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals.

Recovery Strategy
Section 37
(1) If a wildlife species is listed as an extirpated species, an endangered species or a threatened species, the competent minister must prepare a strategy for its recovery.
(2) If there is more than one competent minister with respect to the wildlife species, they must prepare the strategy together and every reference to competent minister in sections 38 to 46 is to be read as a reference to the competent ministers.

Section 38
In preparing a recovery strategy, action plan or management plan, the competent minister must consider the commitment of the Government of Canada to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to the listed wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.

Section 41
(1) If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include
    (a) a description of the species and its needs that is consistent with information provided by COSEWIC;
    (b) an identification of the threats to the survival of the species and threats to its habitat that is consistent with information provided by COSEWIC and a description of the broad strategy to be taken to address those threats;
    (c) an identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction

Section 42
(1) Subject to subsection (2), the competent minister must include a proposed recovery strategy in the public registry within one year after the wildlife species is listed, in the case of a wildlife species listed as an endangered species, and within two years after the species is listed, in the case of a wildlife species listed as a threatened species or an extirpated species.
(2) With respect to wildlife species that are set out in Schedule 1 on the day section 27 comes into force, the competent minister must include a proposed recovery strategy in the public

registry within three years after that day, in the case of a wildlife species listed as an endangered species, and within four years after that day, in the case of a wildlife species listed as a threatened species or an extirpated species.

Action Plan
Section 47
The competent minister in respect of a recovery strategy must prepare one or more action plans based on the recovery strategy. If there is more than one competent minister with respect to the recovery strategy, they may prepare the action plan or plans together.

Section 49
(1) An action plan must include, with respect to the area to which the action plan relates,
    (a) an identification of the species' critical habitat, to the extent possible, based on the best available information and consistent with the recovery strategy, and examples of activities that are likely to result in its destruction;
    (b) a statement of the measures that are proposed to be taken to protect the species' critical habitat, including the entering into of agreements under section 11

Critical Habitat
Section 57
The purpose of section 58 is to ensure that, within 180 days after the recovery strategy or action plan that identified the critical habitat referred to in subsection 58(1) is included in the public registry, all of the critical habitat is protected by
(a) provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11; or
(b) the application of subsection 58(1).

Section 58
(1) Subject to this section, no person shall destroy any part of the critical habitat of any listed endangered species or of any listed threatened species — or of any listed extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada — if
    (a) the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada;
    (b) the listed species is an aquatic species; or
    (c) the listed species is a species of migratory birds protected by the *Migratory Birds Convention Act, 1994*.
(2) If the critical habitat or a portion of the critical habitat is in a national park of Canada named and described in Schedule 1 to the *Canada National Parks Act*, the Rouge National Urban Park established by the *Rouge National Urban Park Act*, a marine protected area under the *Oceans Act*, a migratory bird sanctuary under the *Migratory Birds Convention Act, 1994* or a national wildlife area under the *Canada Wildlife Act*, the competent Minister must, within 90 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, publish in the Canada Gazette a description of the critical habitat or portion that is in that park, area or sanctuary.
(5) Within 180 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, the competent minister must, after consultation with every other competent minister, with respect to all of the critical habitat or any portion of the critical habitat that is not in a place referred to in subsection (2),
    (a) make the order referred to in subsection (4) if the critical habitat or any portion of the critical habitat is not legally protected by provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11; or

(b) if the competent minister does not make the order, he or she must include in the public registry a statement setting out how the critical habitat or portions of it, as the case may be, are legally protected.

Section 61

(1) No person shall destroy any part of the critical habitat of a listed endangered species or a listed threatened species that is in a province or territory and that is not part of federal lands.

(2) Subsection (1) applies only to the portions of the critical habitat that the Governor in Council may, on the recommendation of the Minister, by order, specify.

Emergency Orders

Section 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.

(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

(3) Before making a recommendation, the competent minister must consult every other competent minister.

(4) The emergency order may

(a) in the case of an aquatic species

(i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(ii) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat;

(b) in the case of a species that is a species of migratory birds protected by the *Migratory Birds Convention Act, 1994,*

(i) on federal land or in the exclusive economic zone of Canada,

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

(ii) on land other than land referred to in subparagraph (i),

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and provisions prohibiting activities that may adversely affect the species and that habitat; and

(c) with respect to any other species,

(i) on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada,

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

(ii) on land other than land referred to in subparagraph (i):

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions prohibiting activities that may adversely affect the species and that habitat.

Unfortunately, about 20% of listing recommendations from COSEWIC don't follow scientific evidence, and most of them are because of economic factors. There is a lot of Ministerial foot dragging on this. Critical habitat protection is only secured for about 5% of listed species. There are also massive delays in the process

- Luckily, litigation is often brought to accelerate federal action.

Alberta Wildlife Association v Canada, 2009 FC 710

Facts:
The Greater Sage Grouse is a species native to the prairies of Alberta and Saskatchewan. While their population is well in the USA, it is very small in Canada, and the species is listed as "endangered" under *SARA*.

- The Recovery Strategy of the Grouse was made, but the Strategy, and thus the Action Plan had no mention of "critical habitat". The Crown stated that there was not enough data available to make the determination
- Grouse have areas called *leks* which are vital raised areas of land where males attempt to court females and they mate and raise the chicks in the sage bushes.

The Alberta Wildlife Association sought judicial review of the decision to not include any critical habitat for the Sage Grouse.

Issue:
Is the Minister permitted to not report on any critical habitat under *SARA*?

Rule:
Section 41 of the *Species At Risk Act*

(1) If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include
    (c) an identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction

Analysis:
The Crown argues that insufficient data was available to add "critical habitat" safeguards in the Recovery Strategy for the Greater Sage Grouse. Upon challenge of this decision, the Minister stated that their inclusion of critical habitat was discretionary based on the scientific evidence available.

- However, there was a PhD thesis by a student at the University of Alberta who identified different areas of Grouse habitat important to it's life traditions, including leks, mating grounds, nesting grounds and feedings grounds. All these areas were identified as important for the life processes of the Grouse in it's Recovery Strategy
- This "source habitat" as labeled in the thesis presented the necessary detail. The government even recognized this thesis in the Recovery Strategy, but did not use it's information on critical habitat.
    - This means evidence existed as needed for critical habitat protection

Given the availability of evidence was not an issue, the next question becomes if the Minister had to include it, or had the discretion to not use it?

- The mandate under s41 is clear. The Minister must include critical habitat, according to the best science
- As such, s41 is *not* discretionary

Having established that the standard of review is reasonableness, it was not reasonable for the Minister to not protect critical habitat of the Grouse given the information available to them.

Conclusion:

Not discretionary; decision not reasonable

Hold, Order:

Application granted

Ratio:

Where sufficient scientific evidence is available, the Minister does not have the discretion to include critical habitat protections (and presumably other information) in the Recovery Strategy

Ironically enough, the areas that the thesis of Dr. Aldridge designated as source habitat were promising for future oil and gas development on the prairies, and the Minister used her thesis in the recovery strategy, except for these passages to do with critical habitat. The Crown dragged it's feet so much that the Grouse eventually became critically endangered and the Minister had to issue an Emergency Order:

- *Emergency Order for the Protection of the Greater Sage-Grouse,* SOR/2013-202
    - "Whereas the Minister of the Environment is of the opinion that the Greater Sage-Grouse faces imminent threats to its survival and recovery;
    - Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to section 80 and subsection 97(2) of the Species at Risk Act, makes the annexed Emergency Order for the Protection of the Greater Sage-Grouse."

The Emergency Order prohibited tall structures, loud noises, new roads and fences to be erected on the over 1600km² of critical habitat of the Grouse.

- This is largely against oil development: no new oil and gas drilling, pumpjacks, drilling rigs, service roads
- The Emergency order only applied to Federal and Provincial Crown lands, not private lands

Similarly, for the Nooksack Dace, a freshwater fish that lives primarily in the shallow areas of streams with high flow rate and a rocky substrate area (the riffles), it was designated as endangered.

- The Minister identified the geographical area of their habitat, but removed the geophysical areas from the critical habitat report, saying there was no way to protect that critical habitat.
- This was challenged in *Environmental Defence Canada v Canada (Department of Fisheries and Oceans),* 2009 FC 878
    - The court did not agree with the Minister – it was clear that this area needed to be protected. Excluding it was against the correct interpretation of s41(1)(c)
    - It was possible to identify the area that needed protecting, so removing it was incorrect as a question of law and violated s41
    - This means that the s41 criteria are mandatory
        - A Minister actively removing these criteria is illegal, contrary to the precautionary principle and the rule of law

Canada (Department of Fisheries and Oceans) v David Suzuki Foundation, 2012 FCA 40

Facts:

The Southern resident killer whales are a species that live off the coast of British Columbia. Beginning in the 1990s, their population crashed due to overfishing of salmon, and increased human activity on the water made the waters noisy, which the whales avoided since they need silent to hunt, navigate, communicate and for their social structures.

- Vessels in the area increased noise and damaged acoustic factors, decreased prey and increased pollution. Pollution was found to be a cause of decline since it declined in the animals tissues and decreased both birthing rate and infant survival

The Minister of Fisheries and Oceans decided not to protect the critical habitat of the whales, since section 35 of the *Fisheries Act* already sufficiently protected their habitat.

Issue:
Was the Minister's decision to not include critical habitat protection by virtue of s58(5)(a) correct?

Rule:
Section 58 of the *Species at Risk Act*

(5) Within 180 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, the competent minister must, after consultation with every other competent minister, with respect to all of the critical habitat or any portion of the critical habitat that is not in a place referred to in subsection (2),
    (a) make the order referred to in subsection (4) if the critical habitat or any portion of the critical habitat is not legally protected by provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11; or

Analysis:
[previously established that the standard of view was correctness because a matter of statutory interpretation]
It is true that the Minister may not issue a critical habitat order if there are other agreements or statutory provisions in place to protect the critical habitat. Section 35 of the *Fisheries Act* does prohibit destruction of fish habitat and certainly affords a certain level of protection to the listed whales. However, section 58 requires more protection than s35 of the *Fisheries Act* can provide

- Section 35 is permissive regulation; habitat can be destroyed with permits, which are purely discretionary and part of a management scheme
- Section 58 is a protection scheme; looking at SARA as a whole, s 74 finds that operations that influence critical habitat can be approved only if scientific, for species protection, or have incidental effects, which are all high marks to meet. This indicates that s 58 requires more protection than permissive regulation
    - Relying on s35 is insufficient as it does not guarantee long term protection

Section 58 operates to provide compulsory and non-discretionary legal protection against destruction that extends beyond a mere geophysical description

Conclusion:
Decision incorrect

Hold, Order:
Appeal dismissed

Ratio:
Critical habitat protections (s58) operates to provide compulsory and non-discretionary legal protection against destruction that extends beyond a mere geophysical description

Critical habitat, as of now, does not go far enough to manage an ecosystem. The Minister declined to make an emergency order for the whales

- They did do other things like restrict salmon fishing and restrict vessels in certain areas of the habitat

To achieve protection, it is more than *SARA*, it is better to act anticipatorily, than to protect a species once they are already in danger.

- This requires rethinking about how environmental law works.
- What is an ecosystem? The interactions between abiotic and biotic things in a describable area

- Environmental law ecosystem: the way law interfaces between human activity and the natural world. Law conceptualized at large; common, regulatory, criminal, international, constitutional law; it is all these laws as it is put to work
- Put to work at specific questions and issues, or larger societal issues; how do we as species operate in the long term within the sustainable limits that we have been given
    - Interacts with all these areas of law, we are left with common goals and outcomes. Can question its efficiency or find better outcomes
    - A more just society for people, disadvantaged societies, species…
    - Balance a more ecological-economical
    - Problems at the micro or macro will engage different strands of environmental law, and how we weave them together is how we are able to get a full picture