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## Terms

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

Ecology: study of the relationship/interaction between organisms and their environment

- Conservation Ecology: study of biodiversity (diversity of species in an area or diversity of genetic material in an area)

Ecosystems (inter-connected, dependent, complex, open/closed) – community of living organisms and their environment. Living and non-living as defined by a certain region.

Regulatory science: working towards solving a specific problem for the regulator.

Command and control regulation: defn' in text. Ex. regulation tells us how many chemicals allowed

Adaptive/reflexive regulation: ex. Permits issued with a monitoring requirement that requires them to report back to the agency to see if the development should continue in case circumstances change.

Precautionary Principle: defn' in text.

Sustainability: development that meets the needs of the present without compromising the needs of future generations

Pollution: the degradation of a system such that the natural balance is thrown out of whack, OR the introduction of a chemical or substance that has a harmful effect.

Polluter pays principle: the entity responsible for pollution should also be the entity responsible for fixing it

Intergenerational equity: giving rights or value to future generations.

Preservation: maintain as is/was. Contrast with conservation.

Conservation: maintain/sustain something but do so such that we can continue to exploit.

## Themes

- questions of complexity and necessity
- jurisdiction to take action – *Constitution Act, 1867*: see text pg. 39 for division of powers breakdown.
- civil litigation, environmental rights & application of the common law
- regulatory (command and control) legislation & administrative review
- Environmental Impact Assessments (EIAs) & public participation
- Enforcement & compliance
- Social Structure (production, consumption, pollution & waste, technological capacity)

## Theoretical/Philosophical Justifications of Environmental Regulation

Environmental law gets its legitimacy not from the Constitution, but from ecology, human health and observation

### Competing paradigms:

- Equilibrium paradigm (Aldo Leopold's *Land Ethic*): "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."
  - The balance of nature. Neutral universal organizing principle that could be applied to the use and management of all natural resources.
- Non-equilibrium paradigm (Daniel Botkin): even left alone nature is dynamic, complex, stochastic and pluralistic.
  - Human action is one of the principle forces operating on ecosystems
  - The accelerating interaction btw humans and the natural enviro makes it impossible to return to an ideal state of nature.
  - At best, ecosystems can be managed rather than restored or preserved
    - management will consist of calculated experimentation

Pluralistic compromise: Where do we get legitimacy to ground environmental law as its own study?

- Science may justify regulation/management (scientific method is adopted & applied in the regulatory context)
- in the absence of science, ethics/morality may justify regulation;

- new branch of law that responds to external forces and challenges application of some of the basic tenets of our western legal system.

### Ethical/Moral Legitimacy of Environmental Law:

1. Anthropocentric justifications
  - welfare economic model/utilitarianism
    - cost-benefit analysis (law & economics approach to enviro regulation)
    - *Tragedy of the Commons* (Hardin) – mutually agreed to regulation.
      - cap & trade and carbon tax trying to regulate this (so doesn't end up like sheep)
    - transaction costs, information costs, and free-riding
    - *pareto-optimality* as the goal (no one loses, some win) & Kaldor-Hicks (efficient redistribution)
    - Mark Sagoff – deliberate model that accounts for community values in its efficiency discussion
      - Ecosystem-services dimension
      - Aesthetic/spiritual dimension
2. Non-Anthropocentric justifications:
  - Biocentrism – animal welfare (sentience) & intrinsic value (subject of a life). Logical extension of the post-Kantian rights discourse
  - Ecocentrism – focus on ecosystems as the product of evolution. Regulate and manage ecosystems to maintain processes.

### Enviro law challenges existing legal structures:

- Uncertainty – legal causation (*Daubert* case: scientific validity test, toxic torts, action in the face of uncertainty).
- Finality – adaptive/reflexive management
- Rule of Law – “consistent application of fixed rules to yield a single, final result”
- Non-legal persons – intergenerational and non-human (standing issues)

## **Environmental Law's Evolution in Canada**

Local problems → Common law (property, tort [strict liability, nuisance, negligence, battery, trespass]): can seek damages & an injunction

De-localized problems → statutory/regulatory intervention & cooperation

### Modern Enviro Law

Enviro regulatory law: sets limits usually

Enviro assessment law: about the process (making sound decisions upfront before the process is resolved)

Enviro rights law: information reception and participation

International environmental law: transboundary & commons problems

### Evolution of Enviro Law

European deforestation (1400-present)

- timber used for ships, forests used for recreation and hunting. Burning wood main source of fuel
- Hans Carl von Carlowitz: *Silvicultura Oeconomica* (1713) – manual on how you have to plant new trees and a diversity of trees – *Nachhaltigkeit* (means sustainability in German)

Connected to democracy because of the needs of the citizens

- public well-being, participation, notification and transparency
- 1800s and 1900s – limit and control waste
- 1960s and 1970s – control and reduce the burst of pollution

### 4 Phased Evolution

## Phase 1: Common Law Rights & Early Statutes

- *Fisheries Act* since 1860s. Prohibition on deposition of “deleterious substances” in waters frequented by fish
- Public health and public nuisance (*Criminal Code*)
- Torts:
  - Negligence: duty owed → standard of care breached → suffered damage → legal & factual causation
    - Elements
      1. Damage
      2. Breach of Standard of Care
      3. Cause in Fact - \*difficult to prove in enviro cases
      4. Duty of care owed to Plaintiff
      5. Cause in Law (is it reasonably foreseeable this damage will be cause to this π?)
  - Private Nuisance: use & enjoyment degraded (damage, seriousness, duration, no particular sensitivity).
    - Elements:
      1. π has interest in land
      2. substantial damage
      3. unreasonable (foreseeable) & substantial interference w/ the use or enjoyment of π’s occupation caused by Δ
  - Public Nuisance: Crown as guardian of public waterways, highways, and amenities. Impacted public right or community at large is impacted.
    - Elements: [private action in public nuisance]
      1. a public nuisance (unreasonable (foreseeable) interference with public comfort/convenience/welfare [health, safety, morality, comfort or convenience])
      2. π suffers unique damage
  - Strict Liability (Rule in *Rylands v Fletcher*): dangerous substance on land, it escapes and causes damage. Negligence is factually irrelevant. No due diligence defence available.
  - Trespass to property:
    - Elements:
      1. π has possessory right to land
      2. Δ physically contacts/interferes with land by direct action
  - Battery:
    - Elements: intentional & direct contact with π (except mere jostling) (don’t have to prove injury)

### *Rylands v Fletcher*, 1865 (UK)

F: Ryland was building a reservoir, unknowing there is a mine underneath and floods Fletchers land

- Δ brought something on their property which is likely to cause damage if escaped and Δ using land in a non-natural way
- STRICT LIABILITY TORT

### *Cambridge Water Co v Eastern Counties Leather* (1993, UKHL)

F: A chemical solvent used by Eastern Counties Leather seeped into the ground and contaminated Cambridge Water Co’s borehole (water source) 175 km away. Almost a decade between the time the chemical was spilt and the detection in the water. Issue was at the time the hole was created the level in the water was fine for consumption but the standards changed. Sued in negligence, nuisance and rule in *Rylands v Fletcher*.

- HL restored trial decision (case dismissed).
- No negligence found at any step of the leather production, very small amount allowed to be spilt
- No nuisance because no foreseeability and you need a lack of reasonable care for nuisance too.
- Cannot recover based on *Rylands v Fletcher* either because still need some sort of knowledge or foreseeability of risk. Narrows application of *Rylands v Fletcher*.

### *Ernst v Encana*, AER, *Alberta Environment*, SCC 2016, decision pending

F: Encana using hydrolic fracturing to get gas out of low permeability shale. Substances used in the fracking (sand + dirty water) now contaminated her well. Action against Encana and the Alberta Environment for not investigating, and the ERCB (now AER) for s. 2b *Charter* violation as she alleges the complaint she filed with the board was not reviewed

properly and the information was surpassed. ERCB statute gives statutory immunity from constitutional challenges. Action in negligence, nuisance and *Rylands v Fletcher*.

*Smith v Inco Ltd*, 2011 ONCA 628 - \*\*Just ONCA

F: Nickel smelter releasing fumes. Individuals argued devaluation of properties and causing sickness. Class action by property owners surrounding the nickel plant that there had been a marked reduction in what they could sell their property for, and a pollution hazard. Class action argued trespass, private and public nuisance, rule in *Rylands v Fletcher*.

- Court of Appeal said no liability, no health concerns based on the evidence. Also looked at foreseeability, not improper for the smelter to continue their operations when the people moved in. People do not live in isolation from each other, one person's use of their property may interfere with someone else's use of their property, competing interests dealt with in nuisance.
- In doing a nuisance analysis based on interference with use and enjoyment of land (not argued in this case), the reasonableness of the interference with the use of land has to be assessed by balancing competing factors. Physical injury to land the plaintiffs would have to show some health risk.
- Narrowed strict liability to only apply with "ultra hazardous" activities. Rule in *Rylands v Fletcher* is triggered by "damage occurring from a user inappropriate to the place where it is maintained" – basically have to show non-natural use.
- Seems to be saying pollution is a reality of our time, innate toxicity to it.
- Also found no proof of reduced property value.

Phase 2: Waste Control & Clean-up Laws

- Broadening of existing laws. Focus is a general offence for waste discharges because need to manage nature's assimilative capacity (ability of ecosystem services to cleanse itself)
- Establish a bureaucracy that is staffed by experts, requires permits/approvals, ect.
- *Environmental Protection and Enhancement Act*, RSA 2000 c. E-12 controls release of substances.

Phase 3: Toxic Control Laws

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

*R v Hydro Quebec*, [1997] 3 SCR 213

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

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

Phase 4: Comprehensive Environmental Assessment + Planning/Management Schemes

- switch to anticipatory & preventative instead of saying we know it is harmful and we are seeking damages
- Environmental Assessment: process through which a proponent – for environmentally significant projects – must predict the consequences and respond
  - *Canadian Environmental Assessment Act, 2012*
  - *Environmental Protection and Enhancement Act Part II*
- Management schemes: fish, forests, mining, ect.

## 5 Associated Trends

1. Local → Regional → Continental → Global
2. Transparency & Participation
3. International Influence and Precaution – International Convention on Biological Diversity was implemented by Canada in the *Species at Risk Act*. London convention on what can be dumped into water, Canada implements this through *CEPA, 1999*.
4. Effective & Efficient Application of the Law - make gov't accountable, stop retreats from enviro assessment, preventative action, cautionary decision making.
5. Sustainability Objectives – 3 major pillars: 1. economic, 2. social, 3. environmental.

## **The Context and Challenges of Environmental Law**

Traditional siloed approaches to enviro law (separate H<sub>2</sub>O, air, land) no longer works, science proved we have complex systems. We have integrated system dynamics, have to use the law to enhance resiliency and adaptive capacity. We have linked connections, feedback mechanisms and non-linear responses (ie. climate change & cod moratorium).

Natural systems have adaptive capacity (defined in text): ex. ocean can take up a certain amount of CO<sub>2</sub> to help stabilize. Once you surpass the adaptive capacity you change the system and reduce its potential capacity.

### Implications for Environmental Law

1. Precautionary decision-making needs to be emphasized
2. Foster resilience (maintenance of ecosystem processes and functionality) & Transformation when necessary (thoughtful abandonment of laws that aren't working).
3. Utilize resiliency indicators (strengthen adaptive capacity, promote self-reliance, diversify resource use, equity, accountability and trust. Ability to adjust)
4. Implement/operationalize sustainability

### Law as a Transformative Agent of Change

3 Part Process for Positive Change (Peter Montague):

1. Local victories (grassroots local successes)
2. New approaches manifest in law & policy
3. Cultural transformation

### Land System Change

Stockholm Resilience Centre – international centre that advances transdisciplinary research for governance of social-ecological systems

“Land use change is one driving force behind the serious reductions in biodiversity, and it has impacts on water flows and on biogeochemical cycling of carbon, nitrogen and phosphorous and other important elements.”

Land use generally dealt with by local decisions. But when we aggregated we end up with global problems.

### Urban Sprawl Dilemma

- People have to drive everywhere. Converts undeveloped land to residences. Large homes with high heating costs and large water uses.
- Stratification that leads to socio-economic concerns
- World's “carrying capacity”

Ontario Approach to Urban Sprawl: *Greenbelt Act, 2005*

- Bifurcation protection approach (dual objective), want to protect agricultural land and protect environmentally sensitive areas from urbanization

- Province takes over land use decisions from municipality. Wants a network of parks and greenspaces so there are places where sprawl cannot go. Province can supersede municipal authority legitimately because municipalities are not constitutionally recognized, they have their existence by way of provincial legislation.

#### Alberta's Approach: *Alberta Land Stewardship Act*

- land use decision taken out of municipalities' hands. Setting aside areas for conservation.
- incorporates the objective of sustainability directly
- utilizes cumulative effects management
- incorporates conservation mechanisms (and economic mechanisms). Conservation easements/directives.
- respects existing property rights including mineral rights
- maintains right of appeal
- only two binding regional plans completed: Lower Athabasca and South Saskatchewan.

#### Other Innovative Actions Provinces can Do:

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

## The Role & Influence of International Environmental Law

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

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

Westphalian State Sovereignty: fundamental principle of international law that each nation state has sovereignty over its territory and domestic affairs, to the exclusion of all external powers, on the principle of non-interference in another country's domestic affairs and that each state is equal in international law.

#### Sources of International Law

- Article 38 of the *Statute of the International Court of Justice* [ICJ] – judicial branch of the UN. UN general assembly passes resolutions, but it is not a resolution body because they don't pass treaties. They can call meetings to help promote binding resolutions but they do not themselves create binding laws. UN Security Council can pass binding resolutions when there are things like violent state action or potential war that destabilize global peace and order and countries are obliged to send help. ICJ is part of the UN and is the closest we get to a world court, but there isn't a world court. ICJ not held by *stare decisis*, decision only affects the parties having the dispute. No appeal mechanism.
  - Treaty law – consent based, ex. Kyoto Protocol
  - Customary law – opt-out based and general accretion over time through State practice & *opinio juris*
    - *opinio juris*: principle that for conduct or a practice to become a rule of customary international law, it must be shown that countries believe that international law (rather than moral obligation) mandates the conduct or practice
  - General Principles of Law – generally procedural. Ex. Good Neighbour principle. Also things that are held as laws in most countries, ie. some rules of evidence, will often be considered general principles of law.
  - Subsidiary Sources – ICJ is to apply judicial decisions and the teachings of highly qualified publicists of the various nations, as subsidiary (supplementary) means for the determination of rules of law.
- “Soft Law”
  - no sanctions for breaking soft law (may have social stigma type repercussions)
  - no hard obligations associated with it yet
  - examples:
    - Brundtland Report/Our Common Future (1987) – first definition of sustainable development that we still use: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

- United Nations World Commission on Environment and Development
  - *Stockholm Declaration* - Declaration of the United Nations Conference on the Human Environment
  - *World Charter for Nature* – brings in environmental issues, contains general principles. High watermark for what states should do environmentally but it is not hard law.
  - 1992 Rio Declaration on Environment and Development & Agenda 21 – progressive look at sustainable development.
    - The United Nations Conference on Environment and Development

### Treaty Law

- Bi-lateral or multilateral. Ex. *Migratory Birds Convention*, *Convention on International Trade in Endangered Species* (CITES), Kyoto Protocol.
- Process: negotiation → signature → ratification → entry into force.
  - just because Canada signs treaty does not mean Canada is bound by it. Needs to be ratified.
  - to ensure the treaty is followed it requires domestic implementation. Bring in the requirements under the treaty under domestic laws – ex. prevent import of a substance under *CEPA*.
  - if a country does not implement something they may violate their international obligations and the other states may then be able to get sanctions put on you.
- Canada's executive/dualist approach – our treaty making process is an executive process. We put an international treaty before the House of Commons as a courtesy but they have no say.
- *Great Lakes Water Quality Agreement* – feds agree to new water quality thresholds after negotiating with ON. Federalism – prov control water and natural resources inside the prov but they can't sign international treaties.
- Usually feds consult with provs before it negotiates so that it will be able to have effective implementations. Canada will be held responsible for violating an international treaty even though it is the provs that violate it.
- Treaty examples (and what they are implemented by in Canada):
  - *Stockholm Convention on Persistent Organic Pollutants* → *CEPA, 1999*; *PCPA*; *FDA & Chemical Management Plan*
  - *United Nation Convention on the Law of the Sea (UNCLOS)* → *Oceans Act*
  - *Convention on Biological Diversity* → *Species at Risk Act*
  - *United Nations Framework Convention on Climate Change (UNFCCC) + Kyoto Protocol* → *Kyoto Protocol Implementation Act* (repealed)

### Customary Law

Rules that have developed over the passage of time through State practice and *opinio juris*

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

### Customary Principles

- The Good Neighbour Rule (aka prohibition on transboundary harm)
  - *Trail Smelter Arbitration, 1950* – States have no right to pollute and deteriorate a neighbouring state and if they do the state can seek legal action/sanction against the neighbouring state.
- Duty of Equitable Utilization – states have a responsibility to preserve and conserve such that they aren't using common resources to the depletion of other states. Rule requires fair sharing
- Duty to Notify and Consult – customary if you think there is an action that something is going to negatively impact neighbouring nations or the global community you have to notify and consult with those nation's gov'ts.
- Procedural Requirement to Conduct an Environmental Impact Assessment

- *Pulp Mills on the River Uruguay*, 2010 – pulp mills case before the ICJ, court recognized that there is a customary requirement to use environmental assessments.

### Institutions of International Law

- United Nations
- International Court of Justice (UN Organ)
- United Nations Environment Program \*\* - in so far as we have a coordinating body it is the UNEP. They are responsible for administering international agreements and helping implement treaties. It can be utilized to convene the negotiation of new treaties.
- United Nations Food and Agriculture Organization
- World Bank
- Global Environment Facility
- Regime specific management authorities (ie. COPs/IWC) – a treaty will often create a commission that will establish a body that is responsible for bringing something forward.
- International Union for the Conservation of Nature

### Implications of International Law on Domestic Environmental Law

1. A driver for domestic law/policy (*SARA, CEPA, 1999*, ect.)
2. An interpretive tool for the courts
  - ex. *Spraytech v Hudson* – SCC upheld municipal bylaw limit of pesticide use b/c it recognized that precautionary principle is a customary international law, which help inform the contextual approach to statutory interpretation and judicial review. \*handout on *Spraytech*
3. A normative objective or standard - ex. climate change goals and Canada's recent commitment to limit global warming to 1.5 degrees.

## **The *Legal* Principle of Sustainability (Sustainable development?)**

Sustainability's force resides not in a succinct definition. The fact that it defies such definition does not reduce its effect in shaping and/or critically assessing the efficacy of environmental law in achieving ecological sustainability (the goal). Requires minimally healthy environments, equity and integration.

### Sustainability's Basic Requirements:

1. Socio-economic system integrity
2. Livelihood sufficiency & opportunity
3. Intra-generational equity
4. Inter-generational equity
5. Resource maintenance & efficiency
6. Socio-ecological civility and democratic governance
7. Precaution & adaptation
8. Integration of the immediate & long term

### ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (2002)

- state duty to ensure sustainable use of natural resources.
- principle of inter- and intergenerational equity and poverty eradication
- common but differentiated responsibilities
  - developed countries should reduce and eliminate unsustainable patterns of production & consumption
  - developing countries should aim for sustainable development
- precautionary approach to human health/natural resources/ecosystems
- principle of public participation and access to information and justice
- principle of good governance
  - transparent decision-making procedures
  - due process and rule of law (law applies to everyone)

- integration and interrelationship in relation to human rights and social, economic and environmental objectives
  - these principles are interdependent
  - the needs of current and future generations are interdependent

Sustainability appears in over 90 statutes across Canada (at least indicia of sustainability). Ex:

- *Alberta Land Stewardship Act*
- *Environmental Protection and Enhancement Act*
- *Alberta Utilities Commission Act*

Need operationalization and implementation otherwise it is just rhetoric:

“It is through general principles that express its ultimate purpose, conditions of application and the procedures for its implementation that a framework of norms and legal systems required for its successful completion is being built. The role of the principles of sustainable development is to guide and State intervention [and citizen intervention and lawyer intervention], whereby the legislator must translate them into law, the executive must include them in its strategies, plans and policies and the judiciary must interpret the law when deciding litigation.” – Professor Paule Halley, 2012

#### Inherent Sustainability Conditions:

1. Healthy environment – substantive and procedural.
  - positive, state has an obligation to provide us a healthy environment, or negative, state has obligation to make sure our healthy environment isn’t taken away, right. Probably predominately positive.
  - could argue s. 7 but would probably need dire situations.
  - *Friends of the Oldman River*, 1992 SCC: “environmental protection has become ... a fundamental value in the life of Canadian society” and “we are individually and collectively responsible” for protecting it.
2. Equity – intra and inter-generational
  - *Spraytech*, 2001 SCC: “Today we are more conscious of what type of environment we wish to live in, and what quality of life we wish to expose our children to” which “perhaps indicates the birth of a feeling of solidarity between generations and an environmental debt towards humanity and the world of tomorrow.” – great words, but probably still rhetoric
3. Integration
  - *Labrador Inuit Association*, 1997 NLCA: “[enviro assessment] is an integral part of economic development”
  - *Rio Declaration*, Principles 12-14: “environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

#### Operational Sustainability Conditions

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

#### Ways Fisheries Act can be operationally more sustainable

- re-emphasize habitat protection
- enhance integration with other instruments/laws
- articulate and enshrine a *de minimus* standard
- measured environmental assessment exclusion
- articulate factors to consider re: authorization
- establish a public s. 35 authorization registry.
- fine allocation

- inject authorization flexibility (monitor & report) so there is adaptive management [this achieves regulatory functionality]

## Canadian Environmental Federalism

Want successful laboratories of experimentation and not lowest common denominator of political compromise.

Principle of Subsidiarity: governing should happen at the lowest, local level possible so law makers and regulators are closest to the problem.

### Constitution Act, 1867

Federal:

- s. 91 – National Concern & POGG (peace order and good governance)
  - if something hasn't specifically been given to the provinces than the residual is given to the feds.
  - ex. nuclear power regulation, climate change, ect.
- s. 91(2) – Trade and commerce
  - interprovincial hook. Ex. pipelines, NEB, movement of goods and services.
- s. 91(3) – Raising monies
  - federal carbon tax may be justified here.
- s. 91(10) – Navigation and shipping
- s. 91(12) – Sea coast and inland fisheries
- s. 91(24) – Indians, and land reserved for the Indians
- s. 91(27) – Criminal law
  - major head of authority for federal environmental law
  - regulates interactions between state and citizens
  - *CEPA, 1999* considered valid federal criminal law (*Hydro Quebec*)
- s. 132 – Treaty Obligations
- Paramountcy – where prov and fed laws conflict, the fed law trumps

Provincial:

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

## Federal-Provincial Agreements

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

*Canadian Environmental Law Association v Canada (Minister of the Enviro)*, 1999 FCTD, aff'd FCA 2001

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

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

*R v Crown Zellerbach Canada Ltd*, 1988 SCC

F: Questioned validity of a fed prohibition on dumping (except with a permit) into prov waters under *Ocean Dumping Act*

- SCC finds it a valid exercise of federal jurisdiction under national concern branch of pogg

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

F: Enviro group brought an application to federal court to have the dam stopped because did not follow fed guidelines to complete an environmental assessment. Feds argued that they are just guidelines, don't have to be followed.

- SCC says it is valid for feds to mandate environmental assessments as a requirement so feds have to do an environmental assessment here.
- confirmed the regulatory binding nature of environmental assessment guidelines. Motivated gov't to get a robust statutory approach to enviro assessments, lead to *Canadian Environmental Assessment Act*

*R v Hydro-Quebec*, 1997 SCC

F: Hydro Quebec releasing PCBs, charged with 2 infringements under *CEPA*. Argued feds have no jurisdiction b/c they said enviro law shouldn't extend to criminal law. How broad is the fed constitutional power to establish a broad and general regulatory scheme to control the emission of substances that are harmful to the environment or human health?

- *CEPA*, 1999 valid exercise of criminal law authority of feds.

*Heppner v Alberta (Minister of the Environment)*, 1977 (AB Sup Ct)

F: AB's legislature, acting pursuant to regulation making power found in the *Department of Environment Act* to establish "restricted development areas" to designate a transmission/utility corridor.

- a transportation/utility corridor purpose not authorized by the Act, therefore the regulations issued thereunder are invalid.

## Federalism and Climate Change

Carbon tax: ex. for each ton of greenhouse gas produced we charge you 17 cents.

- Cost of production would go up, supposed to drive innovation because it will make renewable energy more competitive because they don't have that cost associated.
- taxes would be revenue neutral so justice issue because poor people predominately affected by this.

Cap & Trade: an entity/regulator would set a cap on how much carbon can be released. Then allocate them through an auction, they are tradeable. Also would promote innovation.

## **Idle No More! The Intersection of Aboriginal and Environmental Law**

*Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC

- DUTY TO CONSULT is triggered by:
  1. real or constructive knowledge of an aboriginal claim to a resource of land (can't be wilfully blind) [*Haida Nation*]
  2. gov't proposes conduct or a decision which may adversely impact on the claim or right

- remedies for breach: injunctive relief, damages, order to carry out consultations
- reconciliation is the ultimate goal
- gov't can delegate its consultative duty to admin bodies

Sustainability intervention: an intervention that, properly construed, is at least partially motivated by the desire to move society towards a more ecologically sustainable state. Ex. Idle No More.

Idle No More partially sparked by 2012 omnibus budget bills (and changes to *Indian Act*). Many acts included didn't involve budget, it changed *Fisheries Act*, *Navigable Waters Protection Act*, *CEPA* and others. FN affect by these changes.

### First Nation Rights

*Royal Proclamation, 1763* - protectionist in nature, could not buy land from Aboriginals without it being dealt with via the Crown first.

*Indian Act* – sets out who has status, who is an Indian.

*Constitution Act, 1867*, s. 91(24) – fed gov't has exclusive authority.

Treaties – contain rights, obligations gov't had to provide. Extinguished title and many uses of land.

- both fed and prov gov't responsible for fulfilling treaty obligations

*Constitution Act, 1982* – recognized existing aboriginal and treaty rights.

35. (1) – The existing aboriginal and treaty rights of the aboriginal peoples are hereby recognized and affirmed.

- to not be existing had to be extinguished by statute or be clearly incompatible with sovereignty.
- Gives the ability to still prove rights that would get this protection even if they haven't been formally recognized by the gov't yet.

Aboriginal rights and title are *sui generis*.

Aboriginal rights are held collectively but exercised by an individual.

Aboriginal title is held collectively and exercised collectively.

### *Calder v BC, 1973 SCC*

F: Nisga'a claim to title to over 2600 square kilometers.

- Unsuccessful claim but confirmation *Royal Proclamation* exists in BC
- Aboriginal title recognized as existing in Canada as a common law right
- propagated future title claims and drove land claim agreements

### *R v Sparrow, 1990 SCC*

F: N charged with violating the *Fisheries Act* by using an improperly sized net. Argued Aboriginal right to fish.

- recognition that existing rights are those that were not extinguished prior to 1982
- Sparrow test (questions whether there is a legitimate purpose to limit an Aboriginal right):
  1. Existing Aboriginal right?
  2. Proposed regulatory action an interference with the right because it is:
    - unreasonable
    - imposes undue hardship
    - denies the right holder the preferred means of exercising the right
  3. If the right exists and is infringed, can the infringement be justified because of:
    - valid legislative objective
    - the honour of the Crown being upheld (engaged by s. 35) – requires gov't to act in best interest of FN and to consult.

### *Delgamuukw v BC, 1997 SCC*

- Aboriginal title as *sui generis*

- Affords right to exclusive use and occupation and right to choose the use that land is put to. Land inalienable, except to the Crown (as per *Royal Proclamation*)
- Inherent limit on use – use cannot frustrate initial connection to land.
- compensation payable if title is infringed (which can be justified under *Sparrow* test)
- where title exists, duty of consultation is engaged
- Test for title (difficult to prove):
  1. Occupied prior to the assertion of Crown sovereignty
  2. Exclusive occupation
  3. Continuous occupation (oral history has equal evidentiary value)

#### *Haida Nation v BC*, 2004 SCC

F: What is required to uphold the honour of the Crown? Which is engaged by s. 35 & Crown's fiduciary obligations

- Constitutional duty to consult and accommodate before rights are proven; triggered with real or constructive knowledge of potential right, agreement not necessary but commitment to a meaningful process in good faith is.
- No set consultation requirements, but there must be a meaningful process
- Result of consultation dictated necessary accommodation – courts rarely quash orders but provide guidance on how consultation should occur. Limited enforcement power. Limited remedies.

#### *Tsilhqot'in Nation v BC*, 2014 SCC

F: Started in 1983 with opposition to timber licenses granted in traditional land of Tsilhqot'in. FN said failure in the duty to consult and they wanted a declaration of title in that area (and a removal of Crown ownership of natural resources).

- Environmental purpose. First successful title claim made.
- “culturally sensitive” approach to dealing with these issues
- extends title to nomadic peoples
- “Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes – even permanent changes – to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises... [C]an't destroy the ability of the land to sustain future generations of Aboriginal peoples.” Crown to act in a way that “respects the fact that Aboriginal title is a group interest that inheres to present and future generations.”
  - Intergenerational equality!
  - Operationalization of sustainability for a piece of land that has title.

#### *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48

- treaties can allow for the “take up” of land and the limiting of treaty rights for different uses.
- provinces or feds fulfill the role of the Crown

### Ongoing Issues

#### Site C Dam

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

#### Northern Gateway Pipeline

- 2010: Enbridge applied for approval with the NEB
- Fed/Prov joint approval process initiated. Fed approval granted after environmental assessment, though imposed 209 conditions.
- Judicial review sought by 8 FNs – largely on the basis of failed consultation.
  - BCSC held there had been a failure to consult

## Aboriginal Environmental Rights

*Saiki'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA

F: Dam going in, lots of problems with it. FN groups living and utilizing land around the river, not proven Aboriginal rights or title but arguing them. Some treaty rights with reserve land adjacent to the water course, asserted they had riparian rights to the area. Prov gov't allows the dam. Cause of actions brought in public nuisance – affects everyone but FN greatly affected because they use the land a lot. Aboriginal right to fish impacted, argued that formed a private nuisance. And thirdly, breach of riparian rights.

- common law torts claims available to FN groups.
- Aboriginals don't have to pass through additional hurdles that other individuals would have to; unproven title claim sufficient so long as some sort of air of reality to it
- pleadings struck at trial – to strike a claim: assuming all facts are true, no reasonable likelihood of success (*Imperial Tobacco*)
- Riparian rights – in BC (no longer AB b/c wiped out by statute) owner of land adjoining water has riparian rights.
- Rio Tinto thought they had a defense of statutory authority – nuisance permitted where the act is expressly or implicitly authorized by statute and the nuisance is an inevitable result of the statutorily authorized action (*Susan Heyes Inc v South Coast BC*, 2011 BCCA). Rio Tinto thought they had this b/c gov't approved their license.
- Aboriginals have to prove existence of Aboriginal rights, but don't have to prove rights every Canadian has
- BCCA set aside the order striking the action

## **The Structures of Environmental Protection Regimes**

*The KVP Company Ltd v McKie et al*, 1949 SCR 698

F: π live downstream from pulp mill. Effluent getting put into the river because economic benefit, made it smell and non-potable even to farm animals. πs claim fundamental property rights and initiate a claim based on riparian rights and nuisance (common law rights).

- SCC upholds order for injunctive relief preventing effluent from being put in river claiming fundamental property rights held by these landowners.
- In response, ON gov't created *An Act Respecting the KVP*, which authorized pollution of that river so land owners have no recourse.

Private law has a useful, though limited role in environmental protection schemes (rule in *Rylands v Fletcher*, nuisance (private and public), negligence, trespass; riparian rights [largely extinguished in western part of Canada because of *Water Act* and other statutes]).

- impacts: alters corporate behaviour, influence standards and drive voluntary action
- limits: fails to achieve wide-spread enviro protection and does not act for the benefit of future generations

## Three Iterations of Public Law

1. 1970s & 1<sup>st</sup> Generation Environmental Laws
  - response to catastrophes
  - early forms of licensing schemes, though still driven by industry needs
  - public not engaged except via protest
2. 1980s & 2<sup>nd</sup> Generation Environmental Laws
  - concern w/pollutants persisting & accumulating. Recognized pollutants cross media (ex. from air to H<sub>2</sub>O)
  - recognize deficiencies in public participation and the need for transparency
  - allow more public involvement, but still limited.
  - still geared towards business but also some enviro protection in a more robust way
3. 1990s on & the Quest for a 3<sup>rd</sup> Generation of Environmental Laws
  - Normative objectives of environmental law: precaution, sustainable development, environmental rights, elimination of many pollutants/toxins, market-based incentives, extended liabilities, environmental protection, alternative measures, cumulative effects management

- trend towards smart regulation – unique hybrid of policy and voluntary action by individuals and corporate actors with a backdrop of enforceable regulations.

### Normal Regulatory Structures

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

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

ex. *Fisheries Act*: addition of deleterious substances to fish bearing waters is prohibited, except if authorized by approval

Often see statutes that prohibit activities except if authorized by approval – look to regulations to see if there are activities that don't require approval, they are just allowed. Usually significant fine for violation.

### Common Approaches to Regulation

1. Media-based responses: air/water/land
  - *Environmental Protection Enhancement Act* addresses things in a siloed way
2. Sector-based Responses: ex. oil & gas, forestry, agriculture.
  - Natural Resources Conservation Board
  - *Wildlife Act* for permits for fish, wildlife and hunting
  - AER deals with oil & gas – quasi-independent from gov't, multi-function in task, issues permits, administers major structures, tasked with the public good of developing the sector.
3. Approval-based regimes – normally what appears to be a prohibition is not a prohibition because further down in the act you see that you can apply for approvals.

### Examples of Provincial Regulatory Schemes in Place

- *EPEA* – can't carry on these activities without approval, has list of every facility that needs approval
- *Water Act*
- *Climate Change and Emissions Management Act + Specified Gas Emitters Regulation*

### Responding to Social Trends

- traditional subjects of enviro protection – traditionally rich white men, want to consider poor and marginalized
- environmental justice movement – bring *Charter* arguments
- NIMBY and its perversion

## **Command & Control: Environmental Protection Regimes**

## Environmental Protection and Enhancement Act

- 275 sections, 37 associated regulations and a whole bunch of guidelines and codes.
- Cuts across media (land, water, air). Tries to establish major objectives.
- enables administrative structures that are carrying out the enviro mandate
- sets out broad prohibitions and then the Minister sets regulations. → Activities Designation Regulation sets out what requires what level of approval. See things like waste management, research facilities, chemical manufacturing, and activities like the construction of a fixed facility (except not those in oil & gas industry).
- guidelines, on its face not legally binding but essentially gains the force of law when the Minister looks at it when making its decisions.
- some activities just require you registering your project – least onerous. See ss. 87 & 88
- Environmental Administrative Orders (s. 113-115) important because immediate.

## Command: Standard Setting

Standards found in sector specific regulations and guidelines, also reflected in approvals.

Standard setting is critical – approvals have the force of law.

Approaches to Setting Standards:

1. performance based v construction standards
  - a. performance based: pollution limit imposed upon industry, leave it to the polluter to determine how to meet the limit. Benefit is there is more flexibility for industry and it **allows industry to innovate**.
  - b. construction standards: in issuing approval gov't sets what kind of control technology must be used. Benefits – easier to enforce and monitor. But it is hard to monitor pollutants. Also reduces flexibility.
2. Setting Specific Limits
  - a. Environmental Quality-Based Standards – we use this one the most.
    - Franson, Franson & Lucas Model – \*\*most effective model and best standard setting exercise
    - Step 1 – set objectives for pollution control + uses to be protected.
      - determine law's role in this process. What participation is available? Are there some uses that should be allowed or should it be simply prohibited? In what state is it found? What is it used for? Public good/benefit or legitimate concern?
    - Step 2 – formulate specific criteria, ex. make sure water is safe to drink
    - Step 3 – based on the criteria, set ambient quality standards
      - what ambient level makes things safe but also protects the valid uses? There will be political tradeoffs, why we end up with tailings ponds – suboptimal level of pollution but necessary for the development of the resource, some important uses we want to protect
      - Standards hopefully will be as rigorous as the protected uses allow.
      - The more likely it is to be unsafe and the more uncertainty then the precautionary principle tells us to take a precautionary approach.
      - ambient standard: what level of pollutant is in the water.
    - Step 4 – translate ambient standards into specific limits – rules polluters have to follow
      - regulations and guidelines set the actual quantity/quality of pollutants. Ex. regulations on mercury emissions. Usually at the source.
    - Step 5 – monitoring and information gathering
      - hopefully the law allows for adaptive management – monitoring and feedback in the approval process.
      - How we ensure what we set out in the approval is happening.
  - b. Health Risk Assessment Standards – conduct experiments about what level of pollutant is harmful. Consider the short & long term impacts of exposure. Question whether data available is reliable, is there uncertainty? Try and estimate long term impacts but that is hard. Integrate the precautionary principle.

- integrate precautionary principle by flipping burden of proof: instead of opponents having to prove the pollutant is harmful, have industry prove it isn't.
- c. Technology Based Standards – common in AB. Often is the approval of an activity, but require you to use the best available technology in your pollution control.
  - best available technology has to be economically achievable
- d. Point of impingement v control at source – where are we interested in assessing the pollutant?
  - point of impingement (ex. at the community where people are living)
  - source (ex. smoke stack). Better option than at point of impingement.
    - Normally control at the source because easier and it doesn't respect boundaries.
    - May want it at the community because want ambient considerations, but at the source allows to control for cumulative effects.
- e. Informational standards – something additional to having you control emissions on top of getting an approval. Ex. have companies maintain an inventory.
  - Ex. *CEPA* has a national pollutant release inventory – mostly voluntary, companies can report how emissions are occurring

#### Pollution Prevention Approach

- eliminate rather than regulate certain pollutants – get rid of the dirty dozen & pollutants that bioaccumulate.
- ex. ozone depleting substances (CFCs – chlorofluorocarbon). CFCs not good in any concentration so wanted to phase them out. Changes analysis under (a) the enviro quality-based standards because objectives at step 1 are to get rid of them.
  - *EPEA* regulation *Ozone-depleted Substances and Halocarbons Regulation* to deal with this.
    - Different approach, because not permitted with approval, totally banned (subject to few exceptions, ex. fire retardant uniforms)
    - No person will permit the release of an ozone depleting substance
    - don't see the general prohibition with broad caveats like in other *EPEA* regulations, instead here we see a large prohibition with limited caveats.
    - sets standards for capturing, recycling and disposing of these substances

#### Control: Enforcement and Compliance with Standards

1. Incentives & Financial Assistance to potential polluters - controversial
  - *EPEA*, s. 13 – establish programs
    - ex. Emission trading program from the Federal Sustainable Development Strategy, 2010
      - target: transportation sector
      - implementation tool: Clean Air Strategy, gives subsidies or other transfers of money to parts of industry working on cleaner things
      - pros: may be necessary
      - cons: would rather the big players in the transportation section bear the costs
    - ex. Differential levies in the form of Green Taxes
      - rewards “greener” action by taxing pollutants or the product of polluting industry
      - carbon tax – excise levy on the production of GHG allowed under *EPEA*
      - pros: behaviours modified in the industry
      - cons: a tax that gets passed down to the consumer. Can the appropriate value be set?
2. Licenses & Approvals
  - Satisfy the regulator/licensor that your approach is sufficient and you are then approved/licensed to operate (pollute). Approvals/licenses will have penalties and conditions attached – monitoring and reporting required and consequences for failure to adhere. (may even lead to prosecution under *EPEA*) Approval requirements are legally enforceable by the regulator.
  - Environmental Appeals Board (EAB) is the admin agency under *EPEA* (ss. 90-102).
    - if not granted reconsideration, company can file a notice of appeal with the EAB to get appeal tribunal in EAB to overturn. Appeals of the appeal tribunal go to ABQB.

- Enabling Enforcement
    - EPEA wants people to investigate and inspect things. Allows Minister to appoint investigators, inspectors and directors. (ss. 25 & 27, 196(1), 196-209)
    - though most investigations are started by a member of the public issuing a complaint and then it gets investigated.
3. Administrative orders
- legally binding directives from gov't officials. Usually order or demand a remediation, cleanup or some other specific action. Can also require that an operation be shut down temporarily or permanently.
  - Important because focused on fixing the problem rather than paying damages
  - often pursued contemporaneously with criminal prosecutions
  - EPEA: 2 types of Administrative Orders:
    1. Environmental Protection Order (EPO) – more command focused – aimed at enviro
    2. Enforcement Order – more control focused
  - Typical Process
    1. Enforcement officer investigates and reports
    2. Order type is determined:
      - a. control order – stop an emission
      - b. stop order – immediate cessation of activity due to a threat to human health or the enviro
      - c. remedial order – repair or prevent harm
      - d. preventative order – reasonable ground so believe that an order is required to prevent something from occurring.
  - enforcement orders can turn into court orders that lead to contempt if breached
4. Prosecutions
- Directors, inspectors, investigators, with or without the assistance of Peace Officers, will conduct:
    - inspections and searches, evidence gathering and seizure
      - evidence gathering usually requires technical expertise – note taking, photo taking, sample procurement (names and labelled), comparative samples, ect.
  - Regulatory offence (pseudo-criminal).
    - Strict liability is presumed.
      - Presumption rebutted if *mens rea* included in offence. Ex. s. 108(1) has the word *knowingly*. Higher penalty for things with higher *mens rea*.
    - Standard of proof of the act (and *mens rea* if required) is p.b.r.d. after which the Δ can get out of liability by proving due diligence on a bop.

*R v Syncrude Canada Ltd*, 2010 ABPC 229

F: ~1650 birds died that landed on Aurora tailings pond that had a layer of bitumen on top. Tailings pond in area where migratory birds convene and in a spot where they land. EPEA s. 155 requires deterrence to prevent birds from landing.

- Regulatory strict liability offence. Syncrude tried the following defences:
  - Due diligence – not held to a standard of perfection, just have to take all reasonable steps. Factors:
    - nature and gravity of the adverse effect
    - foreseeability of the effect, including abnormal sensitivities
    - alternative solutions available
    - legislative or regulatory compliance
    - industry standards
    - the character of the neighbourhood
    - what efforts have been made to address the problem
    - over what period of time, and promptness of response
    - matters beyond the control of the accused, including technological limitations
    - skill levels expected of the accused
    - complexities involved
    - preventative systems



- Requires lots of water, fuel and tailings ponds for effluent pollution.
- Can also be made permeable by in situ thermal processing. Inject a bunch of steam to heat the ground so bitumen melted off the sand and stimulates flow into a recovery well. Then it can be pumped to the surface. No tailings ponds required.
- ex. Hydraulic fracturing & Coalbed Methane (CBM)
  - CBM is coal containing methane, can't conventionally get at it because won't flow without being stimulated. Hydraulic fracturing (fracking) stimulates it so they can access the CBM. Inject high pressure fluid into a well that includes a sand like substance to cause a bunch of fractures throughout the coal and other gas containing substances. Liquid (produced water) is then sucked out and the gas migrates and can be extracted.
  - have to manage where fracking occurs, the substrate it can occur at, the proximity to underground water, and proximity to fault lines. The water that comes up is polluted and may even contain uranium. Most water that comes up cannot be made potable again.
    - water conservation also important – pitting water resources against fossil fuel resource
  - dealt with in *Ernst* case.

#### Pre-2013

- Licensing and approvals for oil and gas development was coordinated between AESRD (Alberta Environment and Sustainable Resource Development under *EPEA*) & ERCB (Energy Resources Conservation Board)
  - practically, when approvals were required from both, the AESRD & ERCB operated as a “single window” (MOU – memorandum of understanding).
- *ERCB Act*: allowed consideration of whether the project was “in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment”
- EA also coordinated between the same bodies (AESRD & ERCB) under *EPEA*
- If a hearing was required because of affected people, EA would be part of the evidence.
- Appeals to the Environmental Appeals Board (EAB)

#### TODAY

- 2012/2013 *Responsible Energy Development Act* – created one stop shop for approvals by AER
  - Alberta Energy Regulator (AER) established. Cradle to the grave one-stop-regulation implemented
    - solely responsible from initial application to overseeing everything and dealing with well abandonment, reclamation, remediation, ect. Reclamation and remediation covered under *EPEA*
    - AER responsible for monitoring, inspecting and enforcing actions.
    - issues approvals and licenses under both energy statutes (*Oil and Gas Conservation Act, Mines and Minerals Act, Oil Sands Conservation Act*) and environmental statutes (*EPEA* and *Water Act*)
    - environmental appeals happen here too – sends the question to the AER that sets up a panel. Asking them to reconsider their decision, ask for a new hearing or try and get it taken up by the ABCA though strong privative clause trying to exclude judicial review.
    - does not mention environmental consequences like *ERCB Act* did
    - have to have some sort of direct impact to trigger a hearing (not mandatory now), hearings struck at the discretion of the AER
    - funded by industry

#### Nuclear

Canada is world's 2<sup>nd</sup> largest uranium exporter

In 2013, 17% of our energy produced by nuclear

Regulation largely driven by international law in response to international crisis (International Atomic Energy Agency) Domestic regulation under the *Nuclear Energy Act*, the *Nuclear Safety & Control Act* and the *Transportation of Dangerous Goods Regulations* (as an area of national concern under pogg)

## Mining & Aggregates (fossil fuel mines)

Federal regulatory control over uranium mining and mining on federal lands  
Provincial regulatory control over everything else.

Mines and minerals definition varies based on common law and different provincial statutory schemes (ie. *Mines and Minerals Act*).

- mines defined as the space around a mineral. Natural caverns are owned by the surface owners. But caverns created by the working of the mine is owned by the mineral title holder.
- pore space and substrates is owned by gov't and always has been.
- aggregates: surface owner owns gravel, sand, clay and marl. It can be regulated provincially though.

## Energy Futures

German Energiwende (energy transition)

Goals:

1. fighting climate change
2. reducing energy imports
3. stimulating technology innovation and the green economy
4. reducing and eliminating the risks of nuclear power
5. energy security
6. strengthening local economies and providing social justice.

Suggestions:

1. Nuclear phase-out
2. Renewable Energy Act with feed-in tariffs
3. Emissions trading
4. Environmental taxation
5. Renewable Energy Heating Act and Market Incentive Program (MAP)
6. Act on Accelerating Grid Expansion
7. Energy-Conservation Ordinance (EnEV) and financial support schemes
8. Ecodesign/ErP Directive
9. International Climate Initiative

Grid should be made smaller scale, localized and community based. Want solar/wind energy produced in your neighbourhood or at individual homes (for solar panels).

## **Species at Risk**

We are in the Anthropocene geological time period: know because evidence of plastics in new rock sedimentary materials and because we have a current extinction rate much higher than background extinction (exponential increase since 1900s). Humans directly killing animals via hunting, habitat destruction and fragmentation.

### Why a Federal Response

1. Species as the building blocks for healthy ecosystems
2. International obligations under the *Convention on Biological Diversity (CBD)* to develop and maintain the laws necessary to protect threatened species – Canada signed on in 1992
3. Avoid provincial patchwork – only have *Wildlife Act* in AB that is pretty much just used for hunting regulations. ON has good species at risk act.
4. Produce an overall recovery plan – habitat does not follow political borders
5. Social license to operate

Federal land in provinces: national parks, exclusive economic zone off the coast (feds have a hook for all aquatic species, primarily for ocean species), Indian reserves, military bases, post offices. 94% of land in AB is not federal.

Migratory birds may effectively be dealt with federally, also fisheries and ocean species.

### Species at Risk Act

Reflects compromise between industry, landowners, First Nations, political parties, and the Canadian public. More of a compromise than *EPEA*, *Water Act*, ect. Same stakeholders if we tried to get a federal agreement on climate change.

Two ways to preserve species:

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

SARA focuses on in situ.

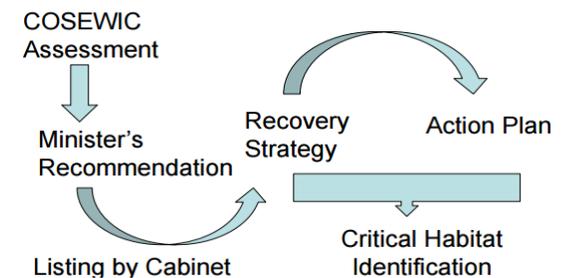
SARA concerned with all species, but in particular “federal species” [aquatic species and migratory birds] and those species on “federal lands”. Can be extended to provincial species/land through a “safety net” when the province lacks laws to protect species or existing laws are ineffective.

### Purposes of SARA (Melissa Gorrie)

- protect and recover species at risk
- prevent wildlife species from being extirpated or becoming extinct as a result of human activity
- provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity; and
- manage species of special concern to prevent them from becoming endangered or threatened

### SARA Process

1. Wildlife Assessment and Listing
  - important b/c dictates the level of protection for a species
2. Recovery Strategy
3. Action Plan



### SARA Wildlife Assessment & Listing

1. Committee on the Status of Endangered Wildlife in Canada (COSEWIC) assessment
  - consists of experts in “conservation bio, pop dynamics, taxonomy, systematics of genetics or from community knowledge or aboriginal traditional knowledge of the conservation of wildlife species” (s. 16)
  - triggered by a production of a “Status report” (s. 21)
  - must produce an assessment within 1 year of status report on the species (s. 23)
  - assessment modeled on international criteria (IUCN-International Union for the Conservation of Nature)
  - recommends “legal listing” of each assessed species – endangered/extirpated/threatened/special concern (s. 15)
2. Power to amend recommended list rests w/“Governor in Council, on the recommendation of the Minister” (s. 27)
  - Minister accept assessment and list; decide not to list; or refer back to COSEWIC
  - List contained in Schedule 1 to SARA
  - reasons to be provided in the public registry (s. 27(1.2))
  - Ministers engaged: Department of Fisheries and Oceans, Environment Canada, or Parks Canada

### SARA Basic Prohibitions (Triggered by the Listing)

- s. 32 – killing, harming, ect. of listed wildlife species & possession, collection, ect.
- s. 33 – damage or destruction of residence
- s. 58 – destruction of critical habitat
- EXCEPTIONS:
  - does not apply to special concern species
  - no applicability to provincial lands (70% of listed species on 94% of Canada’s land-base)
    - though must intervene and make ss. 32 and 33 apply in the province through safety net (s. 34) and can make a critical habitat protection order under the other safety net (s. 61(4)) if provinces

don't have measure in place to protect the species (s. 34), residences (s. 34) or their critical habitat (s. 61)

- can have conservation agreements with provinces under s. 11

#### SARA – Recovery Process: Recovery Strategies

- Minister must provide a recovery strategy if listed as endangered/extirpated/threatened (s. 37)
- s. 37 “recovery strategy” – first determination if recovery possible or not. Question to answer is: “is recovery technically and biologically feasible?”.
  - If possible, s. 42(1) mandates 1 year to post a “proposed recovery strategy” for endangered species and 2 years for a “threatened or an extirpated species” – [or 3 and 4 years respectively is s. 42(2) applies]
    - recovery strategies required of endangered, threatened and extirpated species
    - recovery strategy is a broad strategy to address threats to the species. Identifies:
      - threats to species and its habitat
      - critical habitat to extent possible
      - population and distribution objectives to assist with recovery
  - s. 38 – Minister should apply precautionary principles
  - s. 43 - statutory allowance for public comment (60 days) and finalization (30 days)
  - based on scientific information and NOT socio-economic considerations
    - listing has both scientific and political considerations but once through listing the recovery strategy is just based on scientific information
  - “Critical habitat” assessment becomes crucial (s. 41)
  - Minister must report on the implementation and progress of the recovery strategy within 5 years from its posting (s. 46)

#### SARA – Recovery Process: Action Plan

- Mandatory (s. 47). Goal is to operationalize/implement the Recovery Strategy by specifying concrete recovery strategies. Provides detailed action measure to achieve survival and recovery of the species:
  - further identifies critical habitat and destruction activities
  - measures proposed to protect the critical habitat
  - methods to monitor species recovery
  - identify socio-economic costs and benefits
- socio-economic considerations here – looks at what is actually feasible based on the scientific recovery strategy
- Critical habitat again rests at the core of recovery actions
- NO mandatory timeline

#### SARA – Recovery Process: Critical Habitat

- must be identified in the public registry within 180 days (s. 57) after the recovery strategy or action plan
- s. 57 – purpose
- s. 58(1) – destruction prohibited
- s. 58(2) – protected areas
- s. 58(5) – Order or statement (of how habitat will be protected or what remedial action will take place or if there will be an Emergency Protection Order)
- s. 80 – Emergency orders (public or private lands) if species faces imminent threat
  - if species faces imminent threats the Minister must make the recommendation for an Emergency Order

#### Persistent Problems

- Reassessment by COSEWIC has to happen at least every 10 years; species are 2X more likely to be re-designated as more threatened than less threatened.
- separation of scientific designation & legal designation is significant (445 listings but 551 assessments)
- critical habitat protection only secured for 5% of listed species (even though mandatory)
- economic factors can lead to egregious decisions through the Regulatory Impact Analysis

*Alberta Wilderness Assn v Canada, 2009 FC*

F: Judicial review of recovery strategy for sage grouse, based on failure to identify critical habitat. Wanted mandamus to list critical habitat.

- standard of review: reasonableness (prob incorrect b/c q of law & mandatory). Held decision was unreasonable.
- not discretionary! Have to identify critical habitat under s. 41(1)(c)
- government knew of critical habitat model so unreasonable that they didn't identify any.
- Court ordered fed gov't to identify some critical habitat
- Aftermath: in 2013 there is an Emergency Protection Order issued under SARA (came into force Feb 2014) to protect Crown land in southern AB and SK in which they cannot have oil and gas development and other restrictions. Only time EPO has been utilized under SARA.

*Environment Defence Canada v Canada (DFO), 2009 FC*

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

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

*Georgia Strait Alliance v Canada (DFO), 2012 FCA*

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

- standard of review: correctness, question of law because interpretation of legislation.
- *Fisheries Act* is discretionary, can't rely on a discretionary provision to fulfill a mandatory requirement. Court said s. 36 of *Fisheries Act* might qualify as sufficient existing measure if the existing measures persuade us to believe they are protecting habitat but we don't have that here.
- Illegal action, obligations not discharged.

*Allan Adam et al v Minister of the Environment et al, 2011 FC 962*

F: Caribou listed as threatened. Pops in decline, some by > 70% in 15 years. High levels of habitat disturbance (62-85%). Will not survive for more than 20-40 years without immediate action. Loss of AB herds will increase the risk of extinction for the entire species. Ecojustice (on behalf of NGOs) & FNs went to fed court for judicial review and requested they compel the Minister to make s. 80(2) recommendation AND release a recovery strategy. Imminent threats to recovery (required for s. 80(2)) would have to be assessed against the recovery objectives in a final recovery strategy, which doesn't exist. Since there is no recovery objectives against which to assess whether there are imminent threats to recovery the Minister has authority to subjectively and unilaterally determine what recovery means – based on that determination the Minister concluded that there are no imminent threats to recovery → we can afford to lose AB herd.

- Court found Minister's decision re: no imminent threats was contrary to all of the evidence, decision quashed and sent back to the Minister for reconsideration (with no timeline given)
- Minister given until Sept 1, 2011 to produce a recovery strategy
- Aftermath:
  - proposed recovery strategy was released on Aug 28, 2011
  - Jan 2012, Minister refuses to recommend an EO – said threats not imminent in light of objectives in proposed Recovery Strategy
  - Feb 2012 – 2<sup>nd</sup> Fed Court JR arguing elements of proposed Recovery Strategy relied upon by the Minister were unlawful or unreasonable as it wrote off most of AB herds – withdrawn because moot as proposed recovery strategy the Minister based his recommendation on was replaced by the Final Recovery Strategy on October 25, 2012
  - Final Recovery strategy:
    - population & distribution objectives: stabilize and achieve self-sustaining status for the pops

- critical habitat identified: 65% undisturbed habitat within each herd's range will give a 60% probability of self-sustaining.

## Environmental Assessments

Goal: change/influence project design and scope; for proponents to integrate the environment

1984 *Environmental Assessment Review Process Guideline Order*, under the *Government Organization Act*

- on face value looked like discretionary order – but see these early cases

*Rafferty-Alameda Dam Case*, 1989 FC, aff'd 1990 FCA

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

- assessment/public review was mandatory so once the requisite federal link is made, as it was here, an assessment is mandatory.

*Canadian Wildlife Federation Case*, 1989

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

- Court ordered injunction

*Friends of the Oldman River Case*, 1991

F: Feds said we can approve the dam without an assessment despite similarities to *Rafferty-Alameda* because not dealing with a federal enviro statute. Though approvals needed under *Navigable Waters Act* and *Fisheries Act* for destruction of fish habitat (s. 35), enviro group said that is sufficient to require an enviro assessment.

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

### Modern Environmental Assessment – Most Jurisdictions

- Stepwise deliberation process
- Goal to incorporate environmental logic into “conceiving, selecting, designing, reviewing, and implementing any proposed undertaking that could have important effects.”
- completed in anticipation of a larger approval process; prior to irrevocable decision being made
  - regulatory body will look and see if there was an EA before it approves project
- proponent driven but overseen by gov't agencies.
- Streams:
  1. quick assessment – for projects that at a glance don't appear to have major effects or are not common
    - got rid of in fed assessment processes in 2012 (even though 90% of activities fell here)
  2. comprehensive assessment – heightened level of scrutiny, Minister will set more requirements
- Stumbling blocks:
  - what undertakings are to be assessed?
  - what is the nature/scope of what must be assessed?
  - how to ensure gov't/public scrutiny?
    - proponent initiated because comes to the Minister to see if they need an EA.
  - how do results impact implementation?

### Potential Features of EA, depending on jurisdiction

- beyond physical processes to plans/policies – in what stage of planning should the EA happen?
- integrated social, cultural and economic considerations
- compare and contrast proposed activity with alternatives
- cumulative effects
- management of uncertainties
- mitigation only or mitigation + positive effects
- depth of public participation
- public hearings + funded interveners

## Alberta's Environmental Assessment

1. Environmental Assessment Process
  2. Public Interest Decision by Board/Minister
  3. Approval of project (usually with conditions)
  4. Compliance
- Dealt with under *Environmental Protection and Enhancement Act*, RSA 2000 – see handout
    - *Environmental Assessment (Mandatory and Exempted Activities) Regulation*
      - if mandatory, EA necessary under s. 44(1)(a) of the *EPEA*
      - if not on mandatory or exempted list it is discretionary, steps to evaluate necessity in s. 45(1)

## Federal Environmental Assessment

The key changes brought about by the enactment of *CEAA 2012*, including the shift in responsibility for environmental assessments, a discretionary application of the process, the narrowed scope, new powers of delegation, substitution and equivalency, and more restricted role of the public all function counter to the improvements to *CEAA 1995* that academics have recommended.

- previously, projects that involved federal decisions or approvals generally required a fed EA. Now under *CEAA 2012*, the process is started when the proponent of a designated project registers the project to the Canadian Environmental Assessment Agency (CEA Agency). Application of federal EA process to particular projects is subject to the discretion of the Minister and the Canadian Environmental Assessment Agency. Act doesn't give clear direction on how this discretion is to be exercised
- NEB and Canadian Nuclear Safety Commission can have the primary responsibility for federal EAs (along with CEA Agency) but on a self-assessment basis
- previously looked at a broad range of adverse enviro effects but now just focused on issues within the direct regulatory authority of the federal government
- got rid of screening studies, now basically just comprehensive
- substitution to provincial EA processes mandatory if Minister believes it would be an appropriate substitute and province requests is (s. 32) [Not available for NEB or CNSC EAs]. Equivalency allows the Governor in Council to fully exempt a designated project from this Act if there is an approved provincial substitute process (s. 37).
- result is fewer federal EAs with a much narrower scope of assessment. A thorough assessment of projects will not take place under *CEAA, 2012* unless there is agreement to carry out a joint federal/provincial EA. In other cases, the federal process will look at certain specific issues, such as the impact of the project on fisheries, aquatic species at risk and migratory birds

## The Future of Environmental Assessment

1. Upward harmonization – broad based agreement across Canada about a common approach
2. Cumulative effects and strategic assessment
3. Sustainability-based assessment – contribution to sustainability test that requires “lasting net gains” and should lend itself to revealing the “best option” – Jefferies' recommendation

## **Tour Through Remaining Sectors**

### Fisheries

Primarily federal responsibility with significant provincial overlay. Provinces can help with management, such as giving federal fishing licenses and protecting habitat. Features international and domestic obligations.

- International influences:
  - *Coastal Fisheries Protection Act* – fed legislation deals w/ sedentary bottom dwelling species (scallops, clams, oysters, lobsters) and also prohibits fishing in the international Northwest Atlantic Fisheries Organization Regulatory Area
  - fed law regarding pollution in the Exclusive Economic Zone is based on the United Nations Convention on the Law of the Sea

- federal provisions related to conservation and management of fisheries are implemented through the United Nations Fishing Agreement. This agreement creates regional organizations to manage and protect straddling and migratory stocks of marine species
- Flagged vessel requirements dealt with by feds based on the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (and United Nations Fishing Agreement)
- Federal:
  - *Fisheries Act* – applies to all fish bearing waters and embodies the federal right to impose restrictions on public fishing. Deals with habitat protection and pollution provision
- Provincial:
  - primarily licensing and management; sport fishing regulations

Anadromous (migrate up river to spawn, ex. salmon) and catadromous (ex. migrate down water to spawn, freshwater eel) species – there are provincial statutes dealing with these but could be dealt with federally as well.

*AG of BC v AG of Canada*, 1914

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

*Fletcher v Kingston (City)*, 2004 ONCA

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

### Agriculture

Environmental problems:

- pesticides (fed & prov)
- GMOs (lack of strict regulation/labelling)
- antibiotics in livestock (human and environmental impacts)
- land protection (preservation of prime agricultural land)

Provincial legislation:

- *Agricultural Operation Practices Act* – resolves disputes btw farmers and the public
- *Irrigation Districts Act* – construct, operate and maintain irrigation works in each district for the conveyance and delivery of water
- *Soil Conservation Act* – obligations to avoid soil loss

Federal regulation:

- particular interest in pig farming and its enviro impacts with manure and water contamination and such
- transboundary shipping and trade/commerce

### Aquiculture

Aquiculture regulated by both feds and the provinces by MOU – Memorandum of Understanding for fish farm practices

Federal Leadership - broader aquaculture planning through action plans

Provincial Leadership – licensing to engage in aquaculture (may or may not account for enviro harms)

Environmental problems:

- invasive species
- fish lice
- dredging

### Forestry

Crown forest stewardship achieved through the *Forests Act* and the *Public Lands Act* (both provincial)

Requires the creation of forestry units at first instance – some set aside for forestry, some for no forestry

## Pesticides

Products used to prevent, manage, reduce or repel pests; insecticides, fungicides, herbicides, rodenticides, ect.  
Nervous system disruption, habitat alteration or reproductive suppressor

Traditional persistent organic pollutant (POP) problem

- problem because they don't break down.
- current neonicotinoid problem – insecticide applied to crops that is killing off pollinators which is impacting the reproductive success of plants

Regulation:

- International
  - Stockholm Convention on Persistent Organic Pollutants – banned POPs, uses precautionary principle
  - Organisation for Economic Co-Operation and Development countries have a pesticide program to harmonize between countries.
  - Canada & USA have tried to harmonize review.
- Federal
  - *Pest Control Products Act*
    - requires pest control products to be labelled and registered
    - Health Canada assess potential pesticides and decides if they are going to be registered in conjunction with the pest control regulator agency, value of product and what safeguards need to be in place for human health and the environment
    - 15 year reassessment required (s. 16(2)).
- Provincial
  - regulations implement training programs, sets out sale requirements, can set heightened restrictions for cosmetic or aesthetic pesticides
  - Municipalities able to regulate too.

*SprayTech v Hudson*, 2001 SCC

F: City in QB decided to be more stringent action against pesticides than the feds or the prov. Pesticide company argued invalid under the municipality's enabling legislation, then the municipality came back and made arguments about environmental issues at the international level to justify the by law.

- SCC looked at international law and the goal of sustainable development and the precautionary principle
- Principle of subsidiarity – things should be dealt with at a local level if possible.

## Biotechnology/Engineering

- technical application to biological systems or living organisms/derivatives
- risks associated with uncertainty of how human intervention will interact with the natural world
- 1983 Federal Strategy & Integration throughout existing laws/agencies (see page 207)

## Protected Areas

Regulated at many levels

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

- Private land owners
  - Nature Conservancy of Canada – buys land for the purpose of conserving it

### Land Use Planning

Broad plans → rules & controls → subdivision procedures → administrative processes

Key player are the province and municipalities – prov has a broad land use framework that supersedes municipal plans

Prov and Municipal plans broad, fight happens around legal subdivision.

## **Climate Change**

Contributors: fossil fuel combustion, deforestation & land use changes, animal husbandry, ocean destabilization, natural variation

Consequences: desertification, altered ocean currents, altered precipitation patterns, increased incidences of extreme weather, melting ice caps, altered species habitat, famine, disease, ect.

Weather: conditions of the atmosphere over a short period of time

Climate: how the atmosphere 'behave' over relatively long periods of time

Climate change: changes in long-term averages of daily weather

### 5 Components of the Climate System

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

### Climate Change Basics

- Tyndall (late 19<sup>th</sup> Century) experimented with "coal gas" and found it is not transparent to long wave radiation
- fossil record indicated changes in climate in different regions
- Ice ages explained by alterations in solar intensity
- Natural variations of earth's change in temperature 40,000-100,000 years called Milankovich cycles.
  - based on how Earth moves around sun –orbit shape changes, coupled with tilt of the Earth
- 1963 – Keeling predicts that doubling atmospheric CO<sub>2</sub> could lead to a 4°C temp increase
- paleoclimatology: ratios of oxygen isotopes suggests different temperatures (mechanism: the heavier molecule only evaporates with hotter temperatures) – proving large scale changes

### Understanding the Trend

- emergent CO<sub>2</sub> primacy theory
  - want to maintain a CO<sub>2</sub> concentration level at about 350 ppm. We are probably past that already.
- Scientific method not appropriate for testing effects of CO<sub>2</sub> outside of the laboratory
- Coupled Ocean-Atmospheric
- Climate sensitivity – how resilient is the system to CO<sub>2</sub> alterations
- By 2100 we could have an increase in temp as high as 4-6 degrees (unlikely but catastrophic), but are definitely trending to pass 2 degrees (high probability and problematic)

Prevailing "multifactor explanatory theory"

## Uncertainties

- clouds and their albedo impact
- models that are not responding as predicted
- carbon soot
- positive and negative feedbacks
  - positive feedback: climate warming leads to decrease in ice thus decrease in albedo effect, leading to more absorbed atmospheric energy and even more warming → decrease in ice.
  - Cloud coverage works as a negative feedback – as temps increase, more water evaporated, greater cloud cover, which has a cooling effect
- natural variability and climate sensitivity

## Climate Change Economics

1. present expenditures will benefit the future
  2. present expenditures will assist the developing world
  3. present expenditures will result in uncertain benefits
  4. engrained status quo (consumers and producers)
  5. corporate manipulation
  6. scientific manipulation
  7. political reluctance
- problem with climate change cost benefit analysis: we cannot properly estimate expected harm; if present generations spend money now to possibly benefit future generations, who will be “wealthier”; politics; how to adjust for uncertainty in models and peer-reviewed literature

## Steady-State Economy

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

## Global Commitments

- *United Nations Framework Convention on Climate Change (1992)*
  - framework convention; cooperation over liability
  - goal: stabilize GHG concentrations in atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner [found in article 2]
- *Kyoto Protocol (1997)*
  - Entered into force in 2005 when 55 countries accounting for 55% of global GHG emissions had ratified
    - Canada ratified in 2002 – but withdrew in 2011
  - Annex A – GHG that are to be limited (CO<sub>2</sub>, CH<sub>4</sub>, N<sub>2</sub>O, HFCs, PFCs, SF<sub>6</sub>, NF<sub>3</sub>)
  - Annex B – industrialized countries that are limited in their emissions of Annex A gases (includes Canada)
  - Art 3(1) – Annex B states are to, in the aggregate, reduce emissions by avg 5.2% below 1990 in the first implementation period (2008-2012) [Canada’s was set at 6% below 1990 levels]
    - this corresponds to a 30% reduction below current levels
  - operates through economic instruments:
    - Art 12: clean development mechanism
    - Art 6: joint implementation
    - Art 17: emissions trading

- 2009 - COP 15 “Copenhagen Accord” [COP stands for Conference of the Parties]
  - not legally binding but “taken note of” – voluntary to commit to
  - seeks to limit increase to 2 degrees
  - national targets voluntarily established
  - Canada: 17% reduction from 2005 GHG levels (612 Mt) by 2020 through a sector by sector approach
- *Kyoto Protocol* (1997) – 2<sup>nd</sup> Commitment Period (2013-2020)
  - 18% reduction by 2020 compared to 1990 levels for participating nations
- *Paris Agreement* (2015-2016) – Canada said it will sign up and ratify
  - in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
    - holding increase in global avg temp to well below 2°C above pre-industrial levels and to pursue efforts to limit the temp increase to 1.5°C above pre-industrial levels – prob at 400Mt/year
      - 30% reduction from 2005 levels (523 Mt/year)
    - increasing ability to adapt to adverse impacts of climate change and foster climate resilience and low GHG emissions development, in a manner that does not threaten food production
    - making finance flows consistently w/ a pathway towards low GHG emissions and climate resilient development
  - Agreement implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances

#### Canada’s Sector by Sector Accounting

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

#### Canada’s Federal Approach

Canada repealed the *Kyoto Protocol Implementation Act*.

*Canadian Environment Protection Act, 1999* – good for acutely toxic substances

- Many regulations, some examples:
  - *Passenger Automobile and Light Truck Greenhouse Gas Regulations* – fuel efficiency standards for cars
  - *Heavy-duty Vehicle and Engine Green House Gas Emission Regulations*
  - *Renewable Fuels Regulations* – GHG benefit of renewable fuels (fuels not from a fossil source, come from crop derivatives like corn). To manufacture and market these products the gov’t can restrict and control the amount of renewable fuels that has to go into the gasoline and diesel.
  - *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*
    - set harsh limits on coal fuel to phase out coal energy facilities

#### Challenges

- indigenous and poor communities most affected by climate change
- *Kyoto Protocol Implementation Act, 2007 Private Members Bill*
  - not allowed to spend money on Private Members Bill so how can we meet Kyoto requirements?
- International human rights petitions
- domestic litigation against the fed gov’t
  - failed attempts at trying to sue gov’t but should not be read as saying climate change is not justiciable

*Friends of the Earth v Minister of the Environment, 2008 FC 1183*

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

- Court said no, language is ambiguous and does not create this obligation
- Also said court is not the best place to enforce this, the public should be

### *Turp v Minister of Justice and Attorney General of Canada, 2012 FC 893*

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

- Nothing in Kyoto protocol said you couldn't withdraw
- Nothing in *Kyoto Protocol Implementation Act* set a requirement not to withdraw.

### *Operation Dismantle v R, 1985 SCC*

F: peace group said s. 7 right was violated by the USA missile storage in Canada.

- majority Dickson says not susceptible to proof so shouldn't try to interpret, not getting into justiciability here. Causal link btw gov't action and increased threat of nuclear war cannot be proven
- concurring Wilson says judicial obligation to deal with cases that may infringe rights. Just no evidence of that being the case here (looked at a justiciability analysis and found no infringement)

### Alberta Approach

#### *Climate Change and Emissions Management Act, 2003*

- efficiency based reduction – GHG emissions to be reduced per unit of production. Emissions aren't set to an overall cap but the emissions are relative to a unit of production (ex. per car).
- target for AB is 50% below 1990 levels by 2020
- *Specified Gas Emitters Regulation, AR 139/2007* tells us what the act covers. Specified gas = GHG
  - requires facilities that emit 100,000 tonnes or more of GHG emissions to annually reduce their site-specific emissions intensity by 12% (only covers large emitters like big oilsands operations)
  - allows for a net GHG increase in GHG emissions in the short term, increased pollution so long as the increase is efficient
  - status quo would result in a 14% below 2005 levels by 2050
  - captures 45% of provincial emissions
  - amended in 2015 – reduction increases, 20% as of Jan 2017 [compared to 12% before]
  - Acceptable compliance techniques:
    - make improvements at their facility to reduce emissions
    - use emission performance credits generated at facilities that achieve more than the required reductions
    - purchase AB-based carbon offset credits
      - a carbon offset credit is a 1 tonne reduction in GHG emissions from a independently verified GHG project. Range in scope and involves implementation of a new management practice, technology and/or control systems that reduce emissions of a given process.
      - GHG projects listed in the Alberta Emission Offset Registry (AEOR) are quantifiable reductions of emissions, and are verified by an independent 3<sup>rd</sup> party
      - offset should be something that did not exist but for the investment by the company – ex. maintaining forest carbon sink, fuel switching, ect.
    - contribute to AB's Climate Change and Emissions Management Fund (pay a fine to exceed limits)
      - \$30 per tonne over the reduction limit as of Jan 1, 2017
      - money put back into sustainable initiatives

### Alberta's New Approach

1. Implementing a new carbon price on GHG pollution [Carbon Tax]
  - No more specified gas emissions process likely and fix a price on carbon paid by big industrial emitters
  - Allocated (output or value-added) by permits as in any cap and trade program. Have to keep pollution within those permits and can trade with other companies. Also can still use offset mechanisms and fund purchases. Will be set up in a new regulation.
  - Economy-wide carbon pricing adopted already (\$30/tonne over ceiling).
  - Revenues from the carbon pricing to be used for renewable and sustainable development projects
2. Phasing out coal-generated electricity and developing more renewable energy

- Under fed initiatives 12 of our 18 plants will retire by 2030 but Notley plans to phase out other 6 by then
  - Industry-wide carbon pricing to help drive the shift to renewables (offset loss of energy production with the generation of new energy sources)
3. A legislated oilsands emission limit
    - \$30/tonne carbon price will be applied to oil sands facilities based on results already achieved by high performing facilities. Goal is to drive reduced emissions and carbon competitiveness rather than rewarding past intensity levels
    - a legislated emissions limit on the oil sands of a maximum 100 mT in any year. Provision made for cogeneration and new upgrading capacity.
  4. Employing a new methane emission reduction plan
    - reduce methane emissions from oil and gas operations by 45% by 2025, to be achieved by:
      - applying new emissions design standards for methane control to new AB facilities
      - developing a 5-year voluntary joint initiative on methane reduction and verification.
        - will include AB industry, enviro groups, and indigenous communities
        - will include enhanced measurement and reporting requirements for new and existing facilities

## Select Issues in Monitoring Compliance and Enforcement

### Criminal Law

Used in the event of severe injury or loss of human life

Criminal negligence (ss. 219, 220, 221) – using hazardous substance in a way that endangers people

Common nuisance (s. 180) – substance released causing harm, usually health issues

Benefits:

- criminal stigma
- accompanied by the full force of the law
- can be brought against corporate actors that have control over corporate policy

Drawbacks:

- enhanced burden of proof – larger than civil sphere
- prosecutorial triage – environmental concerns normally won't take priority

### Regulatory Offences

See *EPEA, Fisheries Act*

Apply where punishment without specific intent made sense. Defence of mistake of fact or reasonable care (due diligence). Likely only able to justify no fault for very minor infractions.

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

- Set regulatory offence standards:
  1. True Crime - *actus + mens rea* have to be proved beyond a reasonable doubt
  2. Strict Liability – *actus* to be p.b.r.d. but defences of due diligence (reasonable care) or mistake of fact available on a b.o.p.
  3. Absolute liability – no fault required. Just requires *actus* proved b.r.d. No defences available.

*Levis (Ville) v Tetreault, SCC 2006*

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

## Private Prosecutions

Every citizen has the right to initiate a private prosecution against a person, or an entity, who allegedly violates the Criminal Code or a legislated statute that provides for penalties for violation.

The Attorney General can step in on a private prosecution, and then simply stay the charges if they wish.

*R v Syncrude Canada* (ducks case) started as a private prosecution

## Sentencing

*R v United Keno Hill Mines Ltd*, 1980 (Yukon)

- sentencing will vary based on whether we are dealing with an individual or a corporation
- punishment shall vary based on the nature of the environment affected and the extent of damage inflicted
  - more harm should lead to more punishment
  - damage to a more unique environment will be met with a heavier penalty
- Other factors a court will consider:
  - degree of criminality
  - diligence towards compliance
  - remorse of actor (actions to remedy/voluntary reporting/participation of corporate executives)
  - size and wealth of corporate actor
  - prior record
  - evaluation of available sentencing tools (what else is available) – Creative sentencing!

Traditional approach to sentencing:

- fines that are sufficiently high to secure deterrence (modified by aggravating and mitigating circumstances)

Re-vamping the traditional approach:

- increase fines
- creative sentencing – focusing on restoring the environment and diversion processes (move them out of court)
  - *EPEA* s. 234(1)

## **Using the Courts & Administrative Tribunals in Pursuit of Justice**

Hurdles to effectively using the courts:

### 1. Standing

- a. Traditional Standing test: 3 p's – property, personal or pecuniary interest impacted
- b. Public interest standing test:
  - i. Is a serious issue being raised?
  - ii. Does the applicant have a "genuine interest" in the litigation, as demonstrated by:
    1. his or her having worked on this issue for a long time, and
    2. his or her being knowledgeable about it?
  - iii. Is the applicant in a better position to bring the case than anyone else?

### 2. Class Actions

- group of similarly impacted property owners usually, with an individual litigant representing the class. They all succeed or fail together. Class has to be certified, and they have to be able to demonstrate that there are common issues and the class action approach is the most appropriate way forward. (*Inco* was class action)
  - See *Hollick v Toronto (City)*

### 3. Interventions

- intervener to represent interest in a case that may not have otherwise been considered.
  - i. Added Party
    - essentially become a party to the pleading. You get to participate in cross-examination, write pleadings, bring evidence forward.
    - Traditional test: whether or not you have a direct legal interest
    - New test: whether the proposed intervener will be adversely affected by the issues at hand

- ii. Friend of the Court
  - limited right to present evidence in written or oral forms
  - to get added this way you have to demonstrate you have an ability to help the court resolve the issues at hand. Will usually turn on whether you have a unique way of looking at the issue or specialized knowledge.
  - Ex. *Eng v Canada* – animal justice tried to intervene to argue the definition of animal to include derivative parts, denied intervener status. [Animal Justice intervened on *R v DLW!*]
    - can be denied even if you *prima facie* meet the test
- iii. Public Interest
  - often in *Charter* litigation
  - Court looking at whether or not they would benefit from hearing submissions about the implications of various interpretations.
  - their opinion to show what the possible interpretation might do in the future
  - Common in enviro law since so many cases have broad public interest implications

#### 4. Causation Hurdle

- Ability to prove that the damage wouldn't have occurred "but for" the defendant's conduct
- plays into nuisance and negligence analysis (*Berendsen v Ontario* dealt with this)
- Damage assessment also

#### *Hollick v Toronto (City)*, 2001 SCC

F: Landfill with fumes and emissions impacting residents around it. Looking to get certified as class to bring class action.

- SCC said not a class b/c a variety of claims (*Inco* was a class b/c all property owners claiming value had fell). Here different residents arguing different things, health issues, property value issues, contamination issues, ect.
- Difficult to get a class certification in the environmental context because best dealt with on a case by case basis

#### *Berendsen v Ontario*, 2009 ONCA 845

F: Ministry did road work in 1960s which resulted in concrete and asphalt being dumped and buried on nearby dairy farm. Burial site was beside watercourse. Plaintiffs bought farm in 1980s and cows were sick from not wanting to drink the water

- Crown was not negligent when it deposited waste material because risk of harm was not then reasonably foreseeable -did not breach standard of care
- Causation in fact likely not proven (but not necessary because no breach of standard of care found). Cows weren't drinking from well far away either. Some chemicals complained of also in far well, no explanation for how those got there.

#### Administrative Law

Generally concerned with procedural fairness:

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

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

Generally:

- no automatic right of appeal; look to see if granted by statute
  - look for a statutory right (see s. 45 *Responsible Energy Development Act*) or seek judicial review
    - for judicial review, you need standing (*Finlay v Canada*, SCC 1986)
- hold *de novo* hearings
- may allow for oral and/or written submissions
- hearings, when allowed, will be public

- to participate as an individual you have to be “directly affected”
  - whether an individual is directly affected varies from case to case. Generally, to be directly affected a person must prove that the effects upon them are greater than the average Albertan
- can challenge Minister orders (*Fenske v Alberta (Minister of the Environment)*, 2002 ABCA, though court found the Minister’s order was not unreasonable)
- Two standards of review (*Dunsmuir*): correctness and reasonableness with more and more deference given to administrative decision makers (sometimes even with statutory interpretation that should be a question of law and thus should use correctness!)

See *EPEA*, s. 90

*Finlay v Canada*, SCC 1986

- standing is discretionary
- with a judicial review, a private individual may not sue for declaratory or injunctive relief without the consent of the AG unless they can show what amounts to a sufficient private or personal interest. Have to show sufficient personal interest in the legality of the decision.

## Environmental Rights

Free Standing Bio-centric rights: say the environment itself has rights

Anthropocentric Environmental Rights: human right to a healthy enviro, right to ecosystem services, clean air & H<sub>2</sub>O, ect.

US Citizen Suits – not like Canadian private prosecutions, there is a statutory grant of power that gives private citizens enforcement capability. This citizen suit can be triggered when the state has failed to pursue prosecutions. If successful in maintaining a citizen suit, the court will award you costs. One way costs – if you are unsuccessful you won’t get costs award against you. Considered a civil prosecution so the standard of proof is b.o.p. (Canadian private prosecutions have to p.b.r.d. – even if pursuing regulatory offences)

- easier to be successful than Canadian prosecutions because:
  - reduced standard of proof (p.b.r.d. vs b.o.p.)
  - less financial strain with costs award.

### The Canadian Experience

- Early 1970s: ENGOs emerged and challenged a lack of public participation in enviro governance/decision-making
- Late 1970s: push for enviro bill of rights began
- *Charter* negotiations: right to a “clean and healthy enviro” considered at Standing Committee; rejected
- 1984: first proposal for a Federal Environmental Bill of Rights (since revived in 2009, 2011, and 2013-2014)
  - most recent attempt Bill C-634 in handout, still not successful
- Environmental Bill of Rights type documents in QB, ON (since 1993-94) and MN (promised)
  - broad normative purposes in these statutes (see ON example page 368 of textbook)
  - these enviro rights bills have focused on public empowerment: (points here from ON Bill of Rights)
    - public participation rights
      - right to receive Notice & opportunity to comment on proposed statutes/regulations
      - A caveated right to appeal approval of an instrument
        - gives an ability for interested individuals (not just directly affected individuals) to challenge approvals.
        - before a challenge will be heard, an individual suggesting they are interested must show:
          1. Does the person have an interest in the decision – that is, a relationship, history, or involvement with the subject matter of the decision?
          2. Does it appear that there is good reason to believe that the decision is unreasonable, having regard to the relevant law and gov’t policies?

3. Does it appear that the decision could result in significant harm to the environment?
  - A right to request to review of an existing law/instrument
    - if you think an existing enviro law or regulation is ineffective, you can make a request to the ministry in charge of implementing that statute for a review of the law/regulation. Generally it is discretionary if the minister wants to take it on, though.
  - A right to request an investigation into a potential violation
    - instead of taking up a public prosecution, the bill of rights is giving you a way to request the gov't initiate an investigation. If decision by gov't is not to investigate they have to give written reasons why not.
- court access
  - can create new civil actions (or change old ones)
    1. Ability to sue for "harm to natural resources" – akin to USA citizen suits. Fairly strict process for engaging in this civil action, due diligence defence available.
    2. Lower thresholds for public nuisance actions – don't have to show more affected than the public at large, this now says ANYONE that suffers a loss as a result of public nuisance can bring a claim.
- whistle-blower protection
  - added guarantees beyond wrongful termination lawsuit.
  - this is absent from most enviro statutes
  - broad scope for who you can hold liable – can prosecute an employee, officer, director, company, ect.
  - gives statutory protection against possible retribution by employer
- accountability
  1. Environmental Commissioner – position created by the Bill of Rights, this individual monitors the implementation of enviro statutes and the effectiveness of the enviro bill of rights itself and reports back to the legislative assembly. Based on the recommendations you may see amendments or improvement of implementation of the bill of rights.
  2. Statements of Environmental Values – any implicated ministry making decisions about the environment has to provide a statement of environmental values. Ministers have to consider that statement at every reasonable step to ensure the environment is considered whenever decisions that might significantly affect the environment are made.
    - Uncertain if you can have a judicial review of these. But one way to start things if their justification is unreasonable.

### Access to Information

How do interested parties generally access information?

1. Legal actions – notice and disclosure (procedural fairness)
2. Environmental statutes – mandating disclosure
3. General Access statutes – what can be or must be produced (ex. *Freedom of Information and Protection of Privacy Act*). Try and make an application that the gov't has a duty to provide this.

## **Constitutional Right to a Healthy Environment**

United Nation on Recognizing New Rights – and how it applies to enviro context

1. Consistent with existing human rights – similar to s. 7
2. Fundamental in nature – yes, we rely on it as animals
3. Premised on the inherent dignity of the human person – maybe your dignity as a human is at risk if you don't have clean water to drink, ect.

4. Can provide effective implementation machinery – yes, have had some troubles in past but it is possible
5. Attracts broad international support – yes! Most countries have some sort of constitutionalized enviro right

### Cost-Benefit Analysis

#### Benefits

- impetus for stronger environmental laws (constitutional supremacy stated in s. 52 of *Constitution, 1982*)
- improve enforcement (equivocation is not an option: substantive & procedural)
- safety net (gap filling in the absence of specific legislation) – application of precautionary principle
- prevent statutory rollbacks (place enviro law “above the vicissitudes of everyday politics” & set a base level of protection)
- pre-enactment screening
- strengthen democracy (enhance access to information and participatory rights)
- foster accountability (enhance judicial oversight & remedy)
- re-balance the economic-social-environmental equation – will increase significance of enviro considerations in gov’t decision making
- environmental justice (re-distribute environmental benefits and burdens by protecting minorities from majoritarian action) – poor marginalized communities would benefit the most from having enviro rights
- educate & represent societal values (towards acceptance as a fundamental right necessary to fully enjoy other human rights) – help people understand we have a right to a clean environment and future generations do too

#### Costs – and some arguments disagreeing

- vagueness (mere assertion does not establish acceptable thresholds & appropriateness of ambiguity)
- economic threat (environmental trump card?) – we know rights are rarely absolute with s. 1, we also know that with the notwithstanding clause. It would likely change economic activity though, corporate structures would have to adjust.
- redundant – NO! this class demonstrates this is not the case
- undemocratic in its transfer of authority to unelected judges (“rights serve as a check on democracy and democracy serves as a check on rights”) – well what are rights? they are meant to serve on a check to democracy because these are things we hold individually or collectively.
- justiciability (unelected judges lack social spending and program creating power) – *Operation Dismantle*. If there are rights engaged that is well within the domain of our judicial branch, it is an obligation for the judiciary to consider those things. Obvs not all issues would be justiciable but that is the case of many rights that somethings have to be determined on a case by case basis whether or not something is justiciable.
- unnecessarily focuses a public good discussion on individuals – yes there are commons out there getting air and water from the same sources, but there will be individuals that will be suffering more. Can have both individual rights and public good considerations as a whole.
- Floodgates – in Canada we don’t see endless litigation. Tests and thresholds you would have to meet to be able to litigate these cases. Yes, there would be an initial surge in litigation but they would set precedent.
- Dilution of existing rights – rights are organic, have to constantly advance, think about women’s rights, racial segregation, same-sex marriage, ect.
- Anthropocentric (does this impede progress towards rights held by nature?)
- bound to fail (constitutional amendment, in itself, would not save anything – paraphrasing J.B. Ruhl)

### Pathways Forward

1. Formal and direct amendment through federal and provincial agreement (*Constitution Act, 1982, Part V Amending Formula*)
  - likely would have to use s. 38 general amending formula (7/50 Rule) – 7 provs containing 50% of the pop
  - options: clarify s. 7 includes right to healthy enviro; add a stand-alone right to a healthy enviro to the *Charter*; follow France and include a new detailed Charter of Environmental Rights into the constitution
  - difficult but not impossible, has been amended a few times in the past.

- But don't forget about Meech Lake Accord (1987) & Charlottetown Accord (1992) – linkage problems. People are going to want new social and economic rights too, can't have isolated minor amendments. Though David Boyd suggests narrow, focused changes that have high levels of public support have high chance of success.
2. Litigation seeking a Court's declaration that the right to a healthy environment is implicit in an existing constitutional provision (s. 7 likely)
- *Vriend v Alberta*. [1998] SCC – s. 15, read in discrimination based on sexual orientation. This case shows you don't need to have to have an official amendment to add something to the *Charter*.
  - argue right to healthy environment valid interpretation of s. 7 security of the person.
    - while s. 7 often engaged in criminal context, *Chaoulli v Quebec*, 2005 SCC clearly demonstrates its applicability beyond the criminal context (dealt with health insurance)
    - s. 7 test:
      1. deprivation of life, liberty or security of the person has occurred
      2. said deprivation does not accord with the principles of fundamental justice (principles also open for interpretation)
    - *Gosselin v Quebec*, 2002 SCC suggests it may be possible to interpret s. 7 as putting a positive obligation on the state to ensure each person sustains life, liberty, and security of person
      - dissent already found positive obligation to meet basic needs
    - Other Challenges (w/ litigation)
      - Standing
      - Link to an alleged gov't action that violates a person's rights (investment, activity on public land, approval/license)
      - alleged harm must be significantly connected to the gov't action in question
      - violation must be contrary to the fundamental principles of justice
      - gov't can justify a breach in accordance with s. 1 (though s. 7 likely requires super exceptional circumstances, such as natural disasters, outbreak of war, epidemics, ect.)
3. Ottawa/province initiates a judicial reference
- Ask for the court's opinion on a hypothetical question absent any actual dispute
  - SCC has heard more than 70 references (ex. *Persons case*, *Reference Re: Senate Reform*)
  - a reference Re: Right to a Healthy Environment that asks "does s. 7 of the *Charter* include an implicit right to live in a healthy environment" OR "does the presence of mercury in the blood, fat or other tissue of Canadians violate s. 7?"