

"ENVIRONMENTAL LAW " OR "DEVELOPMENT LAW "?
DECONSTRUCTING LIBERAL GUILT

by

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ABSTRACT

The author uses a case study, arising out of his personal experience as a businessperson and later as a lawyer, to illustrate Canadian environmental law regimes and how they function in practice. The case study is based on events in the Kitimat region of northwestern British Columbia, the site of a massive private hydro-electric development and of the destruction of a traditional First Nations fishery by pulp mill pollution.

The analysis points to a practice of deception wherein what purports to be 'environmental law' is in fact what the author calls 'development law'. An examination of the roots of that deception leads the author to critique the role of Liberalism in defining our environmental relations - there appears to be a fundamental contradiction between Liberalism's essentially self-interested individualism, working from assumptions of efficiency and wealth-maximisation, and the communal, other-oriented values implicit in harmonious environmental relations.

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CHAPTER ONE

INTRODUCTION

"...rather than beginning with a fixed series of prosaic environmental objectives, environmental law should be guided by modern ecological perspectives which can offer a modern reinterpretation of a series of traditional ethical (and other) ideals embodied in our traditions. These ideals - holding the environment in trust for future generations, respecting non-human nature, making secure the citizen 's health and lives, especially vulnerable citizens, protecting nature 's beauty, community sharing o f renewable resources, encouragement of ecologically sensible lifestyles - should be the starting point for reformulating environmental policy and law "¹.

This thesis will take a broad perspective on environmental law. The ultimate aim is to deconstruct what we call 'environmental law ' by firstly critiquing its form and practice, and then conducting an enquiry into its 'deep structure ' in an attempt to understand its failures.

The methodology I will use is perhaps a little unusual, in two respects. The first departure from conventional legal scholarship is my use of a case study. I have chosen to illuminate the present environmental law regime with a case study which I hope will be useful in providing a context, a story, within which we can see how environmental law

¹ R.Blomquist, "'Clean New World ': Toward an Intellectual History of American Environmental Law, 1961-90" (1990) 25 Valparaiso University Law Review 1 at 21 (footnote 83).

really plays in its social milieu. I have attempted to weave the case study through the discussion of federal and provincial environmental law regimes, both as a practical application of the law and, inevitably, as a critique. Of course that is not to say that the case study represents a generalised 'reality', but it does provide a concrete, particularised reality, a narrative, within which to interpret the real meaning of environmental law in a particular social-economic-political context. As with any case study there is a danger of faulty inductive reasoning, of drawing too sweeping conclusions from narrow facts. Any 'truths' to emerge from the case study must be but partial, and situated within it. Where possible I have also drawn on other more general, consistent and independent sources - at least sufficient to indicate that the failures of environmental law which become apparent in the case study are not just unfortunate exceptions in an otherwise competent regime, but on the contrary are most likely quite typical and speak to fatal flaws in the regime. The case study is not just a vehicle for making the journey more comfortable and interesting - it is in a sense also part of the map.

The choice of fact patterns was not random, but is rather an opportunistic use of the author's own experience. In that sense the case study not only locates the analysis, it also locates the author. The physical location of the case study is the mountains, valleys and fiords of northwest British Columbia, an area rich in forests and wild rivers and lakes, where I worked for several years as a businessman on an energy mega-project of some environmental significance. Some years later, in the transition from businessman

to lawyer, I coincidentally worked on an environmental file which involved the pollution of a traditional native Indian fishery by a pulp mill, physically located in the same region as the mega-project. Thus, I was employed on behalf of both a perpetrator of environmental degradation and, later, a victim. Between these two scenarios lay an irresistibly rich store of material, encompassing both common law and legislative regimes traditionally included in 'environmental law', a timespan of some 40 years of economic development during which our environmental consciousness has (we think) been raised, and a juxtaposition of two different cultures with radically different paradigms for social ordering and for relating to the natural world. Having lived and worked in the region, having gained a fairly intimate knowledge of both fact patterns and of the players, and having passed through a personal transition from businessman to lawyer to concerned environmentalist, I am hopefully well placed to take advantage of the material in pursuing the ultimate goal of the thesis, namely to understand the real nature of what we call environmental law, and why it is so.

Despite those qualifications I must emphasize that the case study was in no way selected for any particular view it paints of environmental law, and emphatically not for any outrageous or offensive behaviour by any of the players, or for any egregious failures of the legal regimes. On the contrary, there is ample evidence, drawn on where appropriate, that the story that unfolds is a reasonably typical one for twentieth century North America. There are no "villains", and no "blame" is intended except in the most general social sense. Nobody has behaved particularly badly, in the sense that the

behaviour is perfectly understandable and defensible in the context of the deep structure within which social reality is being played out.

The analysis is unusual in a second aspect in that there seems to be surprisingly little deconstruction of environmental law, even by critical legal scholars, in the literature². However, there are a few exceptions³, and many hints that something is deeply amiss⁴ -

² Unger, for example, is almost silent on the subject - see for example A. Hutchinson, "A Poetic Champion Composes: Unger (Not) on Ecology and Women" (1990) 40 University of Toronto Law Journal 271 at 290:

"[Unger] makes not even a passing reference to the worsening ecological crisis, and he suggests no ways to halt or improve the situation. For anyone involved in a self-conscious and elaborate effort to re-think and re-design society's whole way of being and living, the failure to recognize that the future of the world is inextricably connected to the environmental fate of the planet is gravely problematic. Of what benefit is a super-liberal society of empowered democracy situated in the middle of an ecological wasteland? ...the ecological crisis is as much metaphysical as it is organizational: *environmental devastation is not simply the result of acid rain, but of the way we think about acid rain*" (emphasis added).

The judgement on Unger is perhaps a bit harsh, as he makes enough passing references to show his awareness of the problem - for example, R. Unger, *Knowledge and Politics* (New York: The Free Press, 1975) at 179:

"...nature is to be conceived and treated as the totality of which social relations are a part rather than as a category of external objects whose value lies in their capacity to satisfy human desires."

Other authors settle for passing references to the issue - for example, A. Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill Law Journal 507 at 537:

"...the deep source of the attraction of postmodernism lies in all those aspects of the human condition in which we are no longer as certain as we used to be that things are better today than they were yesterday. The deep significance of the inexorable rise of environmentalism is precisely that what has been the key evidence of the universality of progress, namely, the species' ability to control and subordinate nature, is now the source of its greatest danger."

³ For example, M. Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment* (New York: Cambridge University Press, 1988) - a defense of liberalism in

indeed it is difficult not to be at least something of a de-constructionist in a field like environmental law where the desired (indeed necessary) end points are so far removed from the legal and social reality that one is pretty much forced to ask why. Thus, this project began as an application of environmental law to an interesting case study, but as the pattern of failure became increasingly obvious - as behaviour increasingly contradicted the rhetoric of environmentalism - the analysis was drawn inexorably into an examination of what lay beneath the legislative and common law regimes. That is the beauty of a case study, where one has no choice but to go beyond the intent and wording of the law to its actual interpretation and implementation, to the practice and not the letter of the law, where "it is the text as read, and not the text as written, that becomes the law"⁵. Postmodernism holds that there is no Grand Narrative, no pre-conceived Destination - no Big Answers, and indeed that Big Questions are inappropriate. But if modernity 's legal prescription for environmental problems has been a failure, then a post-modern enquiry favours an analysis, or deconstruction, of deep structure which lies

the context of environmental values.

⁴ For example, discussions of common law actions for environmental degradation frequently (and inevitably) digress into discussions of private ordering and its implications for environmental values (see, for example, P.Elder, "Environmental Protection Through the Common Law" (1973) 12 *Western Ontario Law Review* 107); similarly, analyses of the implementation and enforcement programs for legislative approaches, while not explicitly de-constructionist, and certainly not critical legal theory, often reach such startlingly negative conclusions that their unspoken questions are eloquent enough (see, for example, M.Rankin, P.Finkle, "The Enforcement of Environmental Law: Taking the Environment Seriously" (1983) 17 *University of British Columbia Law Review* 35).

⁵ J.Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 *The Yale Law Journal* 743 at 782.

beneath that failure. In the Western industrial democracies, and particularly in North America, that analysis must include the values and normative assumptions of liberalism, and their implications for the environment. Of course the use of a case study is also within the postmodern tradition, since environmental realities are "not in any way transcendent or representational, but rather particular and fluctuating, constituted within a complex set of social contexts"⁶. The analysis of deep structure in Chapter IV is at once separate from the preceding application of law to a case study, and at the same time an integral part of it - a foundation, as it were, upon which the legal structure sits. If the theoretical analysis of Chapter IV seems to stand apart from the rest of the thesis, it should be remembered that it nonetheless informs the law and social behaviour described in Chapter III - the law and social behaviour cannot be properly interpreted without some understanding of their roots in liberal ideology.

Finally, the analysis is postmodern in its attempt (in the analysis of deep structure in chapter IV) to expose the binary opposition of environment and development, whereby "environmental " law is grounded externally in what I am going to call "development " law - a term I will use to include the legal forms of liberal economics, with its emphasis on efficiency and wealth maximisation. The existing terminology ("environmental " law) simply makes no sense, and only conceals (and not by accident) the more appropriate descriptor ("development " law). In practice, so-called environmental law is very much part of (in the sense of masking) existing value hierarchies rather than a genuine

⁶ K. Bartlett, "Feminist Legal Methods " (1990) 103 Harvard Law Review 829 at 877.

challenge to them. Development law remains privileged. The intent of this thesis is to acknowledge the normative conflicts which environmental values raise, rather than continue to try and conceal them in development ideology. Only then can authentically environmental law develop.

Environmental law is no more value-free than any other kind of law, but is contingent on certain values and assumptions. Unless we understand the roots of our own social reality, including our relations with the natural world, we are unlikely to be successful in writing a new and appropriate reality for our environmental relations. As with all our law, the legal discourse of environmental law is deeply rooted in liberal ideology - it has profound implications for the environment, and the purpose here is to show how liberalism informs our environmental behaviour, how it defines its social constructedness. If it is true that "legal positivism [is] the dominant strand within liberal legalism"⁷, then we must go beyond positivism's claims of the primacy of state-made law (exclusive of ethical or ideological content) to the underlying assumptions of liberalism itself. In environmental law perhaps more than in any other area "postmodernism's critique of instrumental reason, scientism [and] the cult of progress"⁸ is relevant. The intent is not to trash liberalism - to dismiss it as the roots of a rotten tree, producing weak and unprincipled environmental law as one more of its rotting fruits - but rather to look at whether or not it is an appropriate and relevant ideology for environmental values, or

⁷ *Supra*, note 2 at 520.

⁸ *Ibid.* at 516.

whether it is in damaging contradiction to them. Note that the term "environmental values", used throughout the thesis, is intended to encompass the values suggested in the quotation which opened this chapter - holding the environment in trust for future generations, respecting non-human nature, making secure the citizen 's health and lives, protecting nature 's beauty, community sharing of renewable resources, and encouragement of ecologically sensible lifestyles.

Two broad assumptions are made. The first is that the 'environmental problem ' is sufficiently real and dangerous as to require our urgent attention ⁹ - sufficiently urgent in fact to justify a Law-and-Society-based critique. The environmental problem, or at least the perception that there is one, is relatively recent - the recognition that we impact detrimentally on the environment is hardly new; the realisation that the impacts are, or at least are nearly, intolerable is new. For example, in North America that awareness only became widespread in the 1960 's with the publication of Rachel Carson 's "Silent Spring ". The second broad assumption is that we are not yet dealing effectively with the problem. The response by our political and legal institutions has been painfully slow (for, as we shall see, good reason), though the level of urgency continues to increase with the

⁹ Certainly the public think so, as countless public opinion polls have documented. See, for example, a New York Times - CBS poll (New York Times, July 2, 1989, p.1), quoted in M. Sagoff, "I am no Greenpeacer but..." in W. Hoffman, R. Frederick, E. Petry eds. *Business, Ethics, and the Environment: The Public Policy Debate* (New York: Quorum Books, 1990) 101 at 107, which showed that 80% agreed, and 14% disagreed, with the statement that "Protecting the environment is so important that requirements and standards cannot be too high, and continuing environmental improvements must be made at all costs "; in 1981 the numbers were almost equal. See also footnote 35 (at 118) for other statistical data.

realisation that some manifestations of the problem may turn out to be irreversible or catastrophic. Consequently, there is not a long and established tradition of environmental law upon which to draw, nor is there much time to develop one before the consequences of a degraded environment become catastrophic.

Because the environmental problem is a relatively new and "different " one the common law regime appears mostly irrelevant, whilst legislative regimes reflect the ambivalence of traditional political institutions trying to grapple with essentially alien values. However, if, in the postmodernist tradition, there is no "solution " to the "environmental problem ", then there is at least a postmodern response, which is to be fluid, adaptable and flexible in dealing with particular problems in their particular contexts - not an answer but an attitude that informs us every time we engage individually or collectively with the environment. Before aspiring to that state, or any other kind of re-construction, we must first understand the contradictions within the present system. The case study provides both a context and an (unexceptional) symbol.

CHAPTER TWO

THE CASE STUDY

"Each man is locked into a system that compels him to increase his herd without limit in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to us all"¹.

1. Early History (1950 -1970)

The Kitimaat Indian Band are the main band of the Haisla nation, in what is now northwest British Columbia. They have for many centuries made their home at the head of the Douglas Channel, a fiord just south of the Queen Charlotte Islands. The climate is mild and wet, the geography mountainous, and the fish and wildlife bountiful.

Perhaps it is an understatement to call the climate "wet" - in fact it rains and snows a great deal, and the Haisla word "Kitimaat" means "people of the snow". The combination of mountains, high rainfall and heavy winter snows holds the promise of high-country lakes. If geography permits, those lakes can be dammed and a controlled flow of water dropped a sufficient height to drive turbines, which in turn produce hydro-electric power.

¹ G.Hardin, "The Tragedy of The Commons" (1968) 162 Science 1243 at 1245.

A great deal of electricity is required to produce aluminum. In the early 1950 's Alcan, a Canadian multi-national corporation and now the world 's largest aluminum producer, undertook a huge hydro-electric development in the mountains north of the Indian village of Kitimaat. As an incentive to embark on what was then the largest private undertaking in Canadian history, the British Columbia government conveyed to Alcan virtual sovereignty over the resources of the watershed area², granting land, water and mineral rights, forbidding cancellation of licenses, granting to Alcan rights to all the water notwithstanding Department of Fisheries requirements, setting very low water rentals, forbidding any new or discriminatory taxes, and attempting to immunise itself from any future contradictory legislation³. Note in light of later developments that Alcan was stated to be entering into the Agreement "...solely with the expectation that it will have the continuing use of a large quantity of low cost electric energy to be employed according to its needs for the production of aluminum"⁴.

It was an extraordinary resource giveaway, with virtually no economic rent extracted for an enormous public asset. There was no public input, no consultation process - just a carte blanche to exploit the water resource some time before 1999. Of course the

² Industrial Development Act, R.S.B.C. 1960, c.188.

³ *Ibid.* at s.14: "any provision ...that is in conflict with any present or future statute of general application shall not be invalidated by reason of such conflict". Such fettering instruments are of questionable legality - see, for example, L.Warnick, "State Agreements - The Legal Effects of Statutory Endorsement" (1982) 4 Australian Mining and Petroleum Law Journal " 1.

⁴ *Ibid.* at s.11.

historical context should be remembered - aluminum was an important strategic material at this time of the Korean war and the looming Cold war, and at a time when the world was thought of as being energy rich and priced it accordingly. Certainly there were no other serious bidders for the energy potential, and perhaps at the time there was little economic rent to be gained. It is tempting to place the "development at any cost" attitude in its historical 1950 's context, but we shall see whether or not that attitude had really changed by the 1980 's, when Alcan attempted to complete the original project.

A series of high-country lakes formerly emptied into the Nechako river, a major tributary of the Fraser river (one of the world 's most great salmon rivers). Alcan constructed a dam at the head of the Nechako river, thus holding back the lake drainage into the Nechako river and creating a huge reservoir. The water flow was then reversed and dropped through a tunnel bored through a mountain at the other end of this new reservoir. The falling water - a kind of man-made waterfall inside a mountain - drove the turbines of a newly constructed powerhouse at sea level, also inside the mountain. This powerhouse was at a place called Kemano, and the hydro-electric project was called the Kemano Project.

Water flows in the Nechako river were drastically reduced (to some 40% of their former levels) and salmon stocks devastated, notwithstanding protests from local area residents, and from federal fisheries officials. Not all of the vast water reserves were taken up at this stage - only some 40% of the available water flows from the Nechako and Nanika

rivers were required to meet Alcan 's energy needs at that time, so significant surplus waters were still left (even in the Nechako river), though at Alcan 's forbearance should they wish to take them later. In fact they did so wish, and those remaining waters were later to become the subject of a controversial project in the 1980 's (the Kemano Completion Project), now partially complete and, as we shall later see, mired in the courts.

In any event the original Kemano project of the 1950 's proceeded, and the electricity generated at Kemano was transported on a giant new transmission line built across the mountains, eventually cutting through the Indian village of Kitimaat, some 55 miles away, and across the mouth of the Douglas Channel to the site of a huge new aluminum smelter (built on marshes which were once the traditional duck hunting area for the Haisla). The new aluminum smelter was accompanied by the kinds of pollution concerns one might expect in a modern industrial plant - for example, emissions from the electrolytic process, including volatile fluorine compounds, cyanide, polycyclic aromatic hydrocarbons (carcinogens even at low concentrations, though hazardous only to workers in the smelter itself)⁵; toxic waste problems (including high levels of cyanide and fluoride)⁶; polyfluorocarbons⁷; and miles of dead trees on nearby hillsides in the "fume

⁵ Bethel Management Ltd., "A Preliminary Assessment of the Industrial and Municipal Pollution Affecting Kitimat River and Kitimat Arm " (Feb., 1987) (prepared for Haisla Village Council) at 20.

⁶ *Ibid.* at 22.

path " of the smelter.

Along with the new aluminum smelter, a new town was built in 1952 a few miles from both the smelter and the Haisla village at Kitimaat - ironically, the name was misspelled, and the new town was called Kitimat (those names will be used hereafter, as the proper placenames, of the Indian village and the new town respectively).

Whilst this massive project took place for the most part in traditional Haisla territories, literally re-arranging the landscape of rivers and lakes, and of course had far-reaching socio-economic consequences for the Kitimaat Band, the direct environmental impacts also began to manifest themselves at the local level. A local river, the Kitimat river, emptied into the Douglas Channel at the site of the new smelter. As well as the Indian village site, located a few miles away on the other side of the channel, the Haisla had in 1890 been granted a reserve (Indian Reserve No.1) on the Kitimat river just 3 kilometres or so upstream from the site of the new smelter where the Kitimat River emptied into the Douglas Channel. The reserve was the site of the traditional summer fishing village of the Haisla, and of course it bordered the river. The importance of the

⁷ Now apparently suspected of being 8,000 to 11,000 times more potent than carbon dioxide in warming the atmosphere - the smelter pumps out an estimated 600,000 kilograms of polyflurorocarbons a year, the equivalent of 6 million tonnes of carbon dioxide (M.Munro, "New threat suspected from Alcan smelters " The Vancouver Sun (May 28 1992) B6).

reserve was acknowledged at the time⁸.

The Kitimat river was, and is, an excellent fishing river - of course that was why the Haisla were there in the first place. The river is host to a variety of fish, including five species of salmon, trout and a variety of other fish, including a lesser known fish called oolichan⁹. The oolichan are a small, very fatty fish which, because they are weak swimmers, only migrate a few miles upriver into fresh water before spawning¹⁰. The oolichan run could number in the millions¹¹, and the Haisla had for centuries caught them in huge numbers (in excess of 500 tonnes) each Spring. Virtually the entire village (some 60 families)¹² migrated to the summer fishing site (now a reserve).

The fatty nature of the oolichan is, from a human perspective, both its main virtue as

⁸ Letter from J. O 'Reilly (Indian Reserve Commission), May 3, 1890 (accompanying Minute of Decision re Haisla reserves) to L. Vankoryhuet (Deputy Superintendent General of Indian Affairs) noting in respect of I.R.#1 that:

"there is a valuable fishery here, oolichans...[and that] I explained fully the benefit they would derive from having their reserves defined, and that *their right to hunt and fish elsewhere as of old would remain undisturbed* " (emphasis added).

Although not part of this analysis, note that the italicized phrase might ground a claim to constitutionally entrenched aboriginal fishing rights, clearly violated (as the case study shows) by subsequent government legislation and policy.

⁹ This spelling is used throughout, although different spellings, most notably "eulachon ", are common.

¹⁰ *Supra*, note 5 at 42.

¹¹ *Ibid.* at 40.

¹² *Ibid.* at 4.

a source of grease, and its biggest drawback - it is extremely vulnerable to tainting by impurities in the water. Indeed the Haisla have a word "kwexstwajaxwin", meaning something like "touchy oolichan ", in recognition of the need to treat respectfully with such a sensitive fish lest it take offence at, for example, pollution of the water and render itself inedible.

The main source of oolichan for the Kitimaat Band was the Kitimat river. When the village moved to the fishing reserve each Spring for the oolichan run it was not just to catch them for food but also to process the fish for the production of oolichan grease. The grease served many purposes, most importantly as a dietary staple for consumption throughout the year, but also, because it was very high quality grease much prized in the northwest, as a trading commodity along the "grease trails " of northwest British Columbia. Through fishing, processing, consumption and trade the oolichan fishery helped define and affirm the cultural, social and economic life of the Kitimaat Band¹³. As we have seen, the original grant of the fishing reserve recognized the importance of the oolichan fishery to the Kitimaat Band, and affirmed their right to hunt and fish as of old.

¹³ An example of recognition by the courts of the importance of these activities can be found in R. v. Dick (1983) 3 C.C.C.(3rd) 481 at 491 (B.C.C.A.), affirmed [1985] 2 S.C.R. 309, in the words of Mr. Justice Lambert (in reference to another Indian Band):

"...killing fish and animals for food and other uses gives shape and meaning to the lives of the members of the (Alkali Lake) Band. *It is at the centre of what they do and what they are*" (emphasis added).

When the new town of Kitimat was established in 1952 it was located a couple of miles upriver from the Indian fishing village and the aluminum smelter. The first threat to river quality arose with the town - it simply dumped raw, untreated sewage into the river (as it was authorised to do). The oolichan of course were particularly vulnerable in absorbing material, tastes and smells from the water, and by the late 1950 's the oolichan fishery was all but eliminated - not because the fish were killed but because they were simply rendered inedible and became a health hazard¹⁴.

After continued pressure from the Band, and then from local health officials, politicians and civil servants on their behalf¹⁵, the city eventually began to treat its sewage in the mid-1960 's, creating an opportunity for the Band to rebuild its oolichan fishery (although the chemically treated sewage remains a concern¹⁶). But by then there was a new player on the scene, the second major player in the case study.

2. Later History (1970 to 1992)

The other major natural resource of the area, at least in terms of economic potential, is forestry. The provincial government wanted to continue the economic development of northwest British Columbia, and Alcan wanted to broaden the tax base of Kitimat

¹⁴ *Supra*, note 5 at 37 - a local doctor treated Haisla for severe gastroenteritis, and advised them not to eat the oolichan.

¹⁵ *Ibid.*

¹⁶ *Ibid.* at 19.

(moving away from the image of a company town), and so they combined to offer economic incentives for the establishment of a pulp mill in Kitimat. The new company in town, and the new neighbour on the river, was Eurocan, owned by the Finnish government. The new pulp mill was built less than a mile upstream of the Indian fishing reserve.

Unfortunately for the oolichan fishery, treated pulp mill effluent made up of solid waste and scores of chemical compounds was now discharged directly into the river, once again tainting the oolichan¹⁷. This was permitted despite assurances given by Federal Fisheries officials to the Haisla that no effluent would be permitted in the river¹⁸ - apparently cost considerations resulted in a decision to use treatment lagoons (and river discharge) rather than direct discharges of untreated effluent into the deep waters of the Douglas Channel as originally intended¹⁹.

This situation has persisted since 1970, effectively destroying the oolichan fishery (though

¹⁷ This is was by no means the only such incident of its kind -for example, the Fort George (Lheit-Li) band, near Prince George, B.C., lost their traditional fishery as a result of pollution by dioxins and furans (very powerful carcinogens) from pulp mills; the legal action was stalled by lack of funds (M.Hume, "Dioxins kill Lheit-Li way of life but fight for life goes on " The Vancouver Sun, (April 29 1991) B1).

¹⁸ Letter from W.R. Hourston (Director, Pacific Region, Department of Fisheries), Jan.22, 1968 to J.V. Boys (Indian Commissioner for B.C., Department of Indian Affairs and Northern Development):

"...under no circumstances would the Department approve the discharge of pulp mill effluent into the Kitimat River. "

¹⁹ *Supra*, note 5 at 23.

once again not the fish themselves). The authorities were not ignorant of the tragedy - as well as protests from the Band, a federal Department of Fisheries study in 1973 showed dramatic evidence of oolichan tainting²⁰, and their own annual statistical reports through the 1970 's show the rapid elimination of the oolichan catch due to pulp mill effluent. However, the discharges continued under authority from the provincial Waste Management Branch and the federal Fisheries department - more than 65,000 cubic metres of pulp mill effluent are poured into the river every day²¹.

Yet another new industry, a petro-chemical plant, was established in Kitimat in 1981, and again located on the Kitimat river, this time between the aluminum smelter and the pulp mill, and just across the river from the Haisla fishing reserve. Although not part of the case study, it too contributes to the overall pollution loading on the river²², the long term effects of which are unknown²³.

The Haisla 's fishing options were to be narrowed still further. In 1989 the headwaters of the Douglas Channel itself were closed to the fishing of certain types of fish and

²⁰ *Ibid.* at 40.

²¹ *Ibid.* at 38.

²² *Ibid.* at 26 - for example, in its first year of operation (1982) the plant at some time exceeded all of its permit conditions (except for cyanide discharges).

²³ *Ibid.* at 43:

"...the long term incremental and accumulative environmental impacts from industrial development in Kitimat are poorly understood. *Obviously extremely serious impacts will occur*" (emphasis added).

shellfish (including traditional Haisla fishing) due to excess levels of chlorinated dioxins and furans - presumably linked at least indirectly (since it is an unbleached kraft mill) to the pulp mill. The Haisla have two other smaller and less accessible sources of oolichan which at least served to ensure a limited (though expensive) supply and keep some of their traditions alive. These were the Kemano river (upon which it will be recalled the original Alcan Kemano Project powerhouse was located), and the Kitlope river, located in the Kitlope Valley ("...reputed to be the largest undisturbed watershed along the temperate coastlines of the world ...[on] a scale of grandeur unsurpassed anywhere in the world" ²⁴, "...the largest unlogged coastal temperate rainforest watershed anywhere on earth... one of the most extraordinary places ...[the author has] seen in 20 years of conservation work around the world" ²⁵). The Kitlope oolichan (and of course the valley itself) are now threatened by proposed logging by the pulp mill owners, and the Kemano oolichan are threatened by Alcan 's controversial Kemano Completion Project, which would result in still greater water flows through the powerhouse and into the Kemano river.

It should be recalled that Alcan introduced its Kemano Completion Project in 1979, announcing its intention to take up the water flows not utilised in the original Kemano Project. The historical context included the Arab oil price shocks of the 1970 's, assigning

²⁴ Western Canada Wilderness Committee, "Save The Kitlope ", Educational Report, Vol. 10, No.5 (Spring, 1991).

²⁵ Glenn Bohn, "Watershed near Kitimat is unique, U.S. group says" The Vancouver Sun (Dec.27, 1990).

new value to energy and rendering uneconomic those aluminum smelters (such as the Japanese) which relied on oil. Alcan 's hydro-electric energy was not only dramatically cheaper than oil, but with the only major costs already sunk in up-front capital investment, the future costs were both modest and above all predictable. Of course the unused hydro-electric potential originally granted to Alcan now represented tremendous economic rent, so of course the company was anxious to develop it before the 1999 deadline.

However, even as the new Kemano Completion Project was being announced, the federal Fisheries department was (after a series of extraordinarily dry years in the watershed area) attempting to protect the Nechako river salmon stocks (now nearing their historic levels some 30 years after the original project had devastated them). Fisheries officials engaged Alcan in court and succeeded in obtaining an injunction granting their desired water releases²⁶, and the action was left in limbo (until 1987). The next ten years were to see a plethora of technical studies, promises of public input, postponement and then renewal of the project, court actions, a compromise agreement negotiated in secret by Alcan and the federal and provincial governments, and finally commencement of a truncated "completion " project. Critical commitments made by Alcan - to holding public hearings, to using the new power only for aluminum production, and to locate a new aluminum smelter in the adversely affected Nechako

²⁶ Attorney General of Canada v. Aluminum Company of Canada Ltd. (1980), 15 D.L.R. (3rd) 495, 10 C.E.L.R. 61 (B.C.S.C.).

river town of Vanderhoof - were not honoured. Further legal challenges against the project, protesting the legality of the compromise agreement and the failure of the federal government to follow its own environmental impact assessment guidelines, were initially successful but eventually rejected in the Federal Court of Appeal²⁷.

3. Focus of the case study

This is an environmental law analysis. The case study offers a plethora of examples of man 's impact on the environment, and begs many questions as to how that impact could or should have been managed. An important focus will be the pulp mill discharges into the Kitimat River, with its resulting devastation of the Haisla oolichan fishery. That will enable us to review both the common law and legislative regimes which govern such industrial pollution.

Another important focus will be the later expansion of Alcan 's original hydro-electric project (referred to as the Kemano Completion Project), which offers an opportunity to examine changing attitudes over the last 40 years, as well as to examine the Canadian government 's commitment to its own project approval process and legislative regime. It will be shown that in 1992, as in 1952, the project was effectively rammed through

²⁷ Carrier Sekani Tribal Council v. Canada (Minister of the Environment (May 8 1992), Vancouver A-560-91, A-561-91) (Fed. C.A.).

over the protests of a variety of interest groups in a fairly naked display of raw political and economic power - again without public hearings, and again with specific legislation to immunise the project from further scrutiny. Environmental concerns were again paid only lip service. In particular, feeble attempts by the relevant bureaucracy (Federal Fisheries) to address a threat to the salmon fishery "...of more vital concern than any other fish habitat question we are likely to encounter in the rest of this century"²⁸ met with much the same fate, and in much the same way, now as then. In fact federal Fisheries proved to be impotent on pretty well every important occasion - with Alcan in the 1950 's and the 1980 's, and with Eurocan in the 1970 's.

The presence of an Indian Band is fortuitous, but not critical to the analysis. It is not critical because the environmental issues stand apart from the identity of the actors (though the outcomes of course do not). It is fortuitous in that it provides a convenient opportunity to discuss differing cultural attitudes as to humanity 's relationship with nature.

The underlying questions to be answered are these: why has our impact on the environment been so devastating? Why has our legal system so conspicuously failed to provide appropriate relief to aggrieved parties such as the Haisla? What accomodation,

²⁸ "Toward a Fish Habitat Decision on the Kemano Completion Project: A Discussion Paper " (Vancouver: Department of Fisheries and Oceans, 1984) at i; further: "...the full magnitude, the enormous extent are not fully appreciated ...there are still a good many unknowns ".

if any, can be made between our liberal values in politics, law and economics and environmental values? In the next chapter we will see what kinds of legal regimes are available for protecting the environment, including those circumstances represented in the case study - not to identify a "correct " legal outcome, but to see how the law has actually worked, and with what result.

CHAPTER THREE

LEGAL OPTIONS FOR ENVIRONMENTAL PROBLEMS

"The law detains both man and woman
Who steals the goose from off the common
But lets the greater felon loose
Who steals the common from the goose".

(Anon.)

1. Introduction

"Environmental Law" is a convenient descriptor but, to the extent that it suggests a tidy and coherent body of law within well-defined borders, it is misleading. One can define it in a variety of ways¹, but it essentially consists of:

- a. a few specifically "environmental" statutes (e.g. Canadian Environment Protection Act², Arctic Waters Pollution Prevention Act³);
- b. other legislation which has as its subject matter some aspect of the environment (e.g. land, water, forests, mining, pesticides, waste disposal - in our fact pattern, for example, the relevant statutes regarding damage to the oolichan

¹ See, for example, J.Swaigen, "Environmental Law 1975-80" (1980) 12 Ottawa Law Review 439.

² S.C. 1988, c.22.

³ R.S.C. 1985, c.A-12.

fishery are the provincial Waste Management Act⁴, which deals with the discharge of waste generally and by industry in particular, and the federal Fisheries Act⁵, ostensibly enacted for the management of the fishery resource, but in its coverage of the protection from pollution of fish and fish habitat, it is de facto the most important federal water pollution statute⁶);

c. those aspects of other branches of law that affect the environment (e.g. common law remedies in public and private nuisance, riparian rights - in our fact pattern these will loom large, as the legislative regime was ineffectual and unenforced, and the Haisla fishing reservation was a downstream riparian property suffering damage to property rights from an upstream polluter);

d. the administrative decisions of various Boards and Tribunals (e.g. approving energy proposals, conducting environmental assessments of mega-projects - in our fact pattern, Alcan 's Kemano Completion Project was to have been the subject of B.C. Utilities Commission Hearings, and was later subject to court challenge as allegedly falling within the federal Environmental Assessment and Review Process (EARP) Guidelines⁷; and

⁴ S.B.C. 1982, c.41 as amended.

⁵ R.S.C. 1985, c.F-14.

⁶ R.Franson, A.Lucas, *Canadian Environmental Law* (Toronto: Butterworths, 1989) at 479.

⁷ SOR/84-467.

e. the strategic use of the Federal spending power⁸ (e.g. to subsidize certain environmental activities such as pollution control, and to influence Provincial environmental regulation where provinces need financial support, such as in conditional grants which depend on satisfying federal rules as in, for example, welfare programs⁹).

As a general comment, legislative efforts at environmental law usually take the form of enabling legislation which empowers an agency to regulate an activity which has environmental consequences¹⁰. There may be no specific criteria, or timetable, nor even a direction that regulations shall be enforced (although as we shall see in the case of the federal EARP Guidelines, a mandatory aspect may be read in). As a result extensive discretionary powers may be vested in agency staff, the Cabinet, and the Minister, with potentially very broad powers at their disposal. On the other hand, agency powers may be significantly constrained in a variety of ways. For example, there may be onerous requirements in the legislation itself, such as "reason to believe ", "significant danger to human health "¹¹, which make agencies reluctant to act .

⁸ *Supra*, note 6 at 273.

⁹ R.Northey, "Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium " (1991) 29 Osgoode Hall Law Journal 127 at 163.

¹⁰ T.Schrecker, "Political Economy of Environmental Hazards " (Ottawa: Law Reform Commission of Canada, 1984) at 10.

¹¹ *Ibid.* at 11, quoting the Environmental Contaminants Act, R.S.C.1985, c.E-12, now consolidated into the Canadian Environmental Protection Act (*supra*, note 2).

As well, there are often constraints arising from the respective characteristics of agencies and industry, especially in an imbalance of resources and expertise available to each¹². This may result in agency reliance on industry-supplied information, self-policing by industry, a relationship of reliance or even "agency capture " (co-optation of agencies by industry), any or all of which may result in a regime of negotiated compliance which renders effective regulation meaningless. Of course the same imbalances apply to other environmental interest groups, though even more so given their lack of recourse to the instrumental powers of government.

We should be careful then to view agency funding and enabling legislation with the caveat of "relative to other expenditure or legislative priorities "¹³. The case study helps us to locate environmental priorities, being balanced as they usually are against competing (normally economic) interests. The state of course has conflicting roles as both promoter and regulator of industry, and often owner as well in the case of natural resources. As well, as we shall see in chapter IV, the state 's conduct in resolving that conflict is significantly determined by the underlying values and normative assumptions of its social and political context - the liberal democratic state.

Another aspect to note is that Canadian regulation is mostly placed under ministerial discretion rather than the (arguably) preferred option of administrative agencies

¹² *Ibid.* at 12.

¹³ *Ibid.* at 13.

possessed of both expertise and a long term view - regrettably so if it is true that "...Canadian ministers traditionally have reduced environmental control to private negotiations with industry"¹⁴. Therefore we should also be aware of the critical role of law in legitimising social regulation, and of the danger of its lending an appearance of substance to what may in fact be merely form. Thus, in environmental law there is a danger that the public mistakenly thinks that government is "controlling pollution" when in fact policy images are emasculated by the realities discussed above - inadequate funding, negotiated compliance, co-optation, and so on. The content and operation of legislation needs to be examined carefully.

Finally, we should be aware that this "white man 's law" of environmental protection did not step into a vacuum in North America - there was already a regime of environmental protection in place, reflecting the animist view of First Nations peoples, and including for example a code of behaviour for dealing with the oolichan¹⁵.

¹⁴ *Supra*, note 9 at 177.

¹⁵ For example, T.McIlwraith, "The Bella Coola Indians" vol.1 at 263 (quoted in "Eulachon: A Fish To Cure Humanity", prepared by P.Windsor for U.B.C. Museum of Anthropology exhibit, May 1992, at 45):

"From time immemorial certain restrictions have been enforced concerning the river: no refuse may be thrown in, otherwise the olachen would remain in the ocean. For the same reason, women at certain periods are not allowed to bathe lest a speck of blood should blind the fish and prevent them from seeing the route ...when the fish are running in the river, women are not allowed on the banks, nor to repair the nets. At high tide it is forbidden to drive stakes for olachen nets ...even accidents such as the upsetting of a canoe, or the spilling of olachen grease are considered to be offences".

Similarly for the Haisla (from personal communication):

2. Legislation

(1) Jurisdiction

The present concerns with environmental problems were not anticipated when the distribution of state powers between the federal and provincial governments was framed -at least in degree, if at all¹⁶.

Broadly speaking, the provinces have wide ranging regulatory powers over environmental matters stemming from their powers over property and civil rights¹⁷, local matters¹⁸,

"We had explicit, complex and elaborate rules for treating with the river, and particularly for the sensitive and fastidious oolichan. We behaved courteously and properly. Nothing must be put in the river which might offend the oolichan. If a man drowned his body would be found and removed. A net fouled with oil and grease could not be placed in the river; loud noises were not permitted ".

¹⁶ A.Lucas, "Harmonization of Federal and Provincial Environmental Policies: The Changing Legal and Policy Framework " in J.Saunders, ed., *Managing Natural Resources in a Federal State* (Calgary: Carswell,1986) at 33; see also note 19 [Gibson] below at 54.

For a contrary view which suggests that environmental problems were to some extent anticipated, see J.Hanebury, "Environmental Impact Assessment in the Canadian Federal System " (1991) 36 McGill Law Journal 962 at 1002 - the author cites such examples as mill waste effects on fisheries and navigation, and (at 1003) sees it as:

"...auspicious that both were established as federal heads of power ".

¹⁷ Constitution Act, 1982 s.92(13).

¹⁸ *Ibid.* at s.92(16); see also *supra*, note 6 at 273.

and from their ownership of most crown rights to land and other natural resources within their boundaries¹⁹. Thus, provinces have rights of ownership, processing, marketing, etc. whereas the federal government has rights of regulation, for example in respect of conservation and pollution²⁰.

Federal jurisdiction relies on general powers (criminal law, trade and commerce, and especially the general peace, order and good government power²¹), or on one of the enumerated heads of power (such as seacoast and inland fisheries, ocean dumping, trans-provincial pollution, and problems of national importance). The federal powers are therefore relatively narrow²², although their reach is potentially longer than they seem²³, and their limits have not yet been determined²⁴.

Clearly there is potential for significant overlap of legislation between the federal and provincial governments. Thus, in the case study we find that on the issue of tainting of

¹⁹ D.Gibson, "Constitutional Jurisdiction Over Environmental Management in Canada " (1973) 23 University of Toronto Law Journal 54 at 58.

²⁰ For example, under s.91(12) (seacoast and inland fisheries) of the Constitution Act, 1982 - see *Ibid.* at 66.

²¹ *Supra*, note 9 at 137.

²² A.Lucas, "Case Comment: R. v. Crown Zellerbach Canada Ltd." (1989) 23 University of British Columbia Law Review 355 at 355.

²³ H.Fairley, "The Environment, Sustainable Development and the Limits of Constitutional Jurisdiction " in *Report of the Canadian Bar Association on Sustainable Development in Canada: options for law reform* (Ottawa: Canadian Bar Association, 1990) 55 at 56.

²⁴ *Ibid.*

the oolichan fishery in the Kitimat river by pulp mill effluent, both levels of government assert a presence - the federal government through the Fisheries Act²⁵, since there is an impact on fish and fish habitat, and the provincial government through the Waste Management Act²⁶, since the discharge of effluent is a "local matter " affecting property and civil rights within the province. Similarly, the province, as owner of the provincial commons, granted Alcan its original water (and other) rights²⁷ whilst the federal government attempted to assert its own jurisdiction over inland fisheries in order to mitigate the project 's devastating effects on the Nechako river salmon fishery.

In addition, s.92A(1) of the Constitution Act, 1982 clarifies provincial jurisdiction over the development, conservation and management of non-renewable resources, including forestry (for example in respect of logging of the Kitlope valley in the case study) and hydro-electric sites and facilities²⁸(for example, Alcan 's Kemano Completion Project in the case study), though subject to the federal fisheries power²⁹. As well as attempting

²⁵ *Supra*, note 5.

²⁶ *Supra*, note 4.

²⁷ Industrial Development Act, R.S.B.C. 1960, c.188.

²⁸ *Supra*, note 16 at 36.

²⁹ *Ibid.* at 43; see also A.G.Canada v. Aluminum Company of Canada (1980), 15 D.L.R. (3rd) 495, 10 C.E.L.R. 61 (B.C.S.C.) - Mr. Justice Berger, granting federal Fisheries an injunction to set water flows in the Nechako river:

"...someone must have the power to determine the discharge of water ...the Minister represents the public interest ...the power ultimately must be his".

(This is the court action from the case study wherein Alcan challenged the federal government 's right to regulate water flows into the Nechako river from the original dam

(ineffectually) to intervene in the 1950 's, the federal Fisheries department again attempted to intervene on behalf of the Nechako river salmon fishery in the 1980 's in the context of the Kemano Completion Project. As well, its own EARP Guidelines were invoked by opponents of the project to challenge the adequacy of technical studies. As we shall see, the federal government went to great lengths to circumvent its own fisheries responsibilities, including the requirement for impact assessment. The federal regulatory power was (and is still) very much in place, but the will to use it was not.

As an aside, note that the constitutional division of powers has the effect of fracturing environmental jurisdiction and as a result dictating the way in which pollution control is implemented in a process sense - that is, it inevitably tends to favour a "point-source " approach to environmental law rather than the more desirable "cradle-to-grave " (eco-system) approach ³⁰. We will see for example that regulation of the pulp mill effluent which destroyed the Haisla oolichan fishery does not comprise a comprehensive scheme to regulate the passage of potentially harmful chemicals from their original production to their use in the pulp mill processes and thence to their disposal through various receiving ecosystems. Rather, the regulations set a negotiated, achievable upper limit for an undifferentiated group of chemicals as they leave the mill, measured in terms of total suspended solids discharged into the receiving waters of, in this case, the Kitimat river.

erected in the 1950 's; it should be recalled that salmon stocks which were all but obliterated by the original project were now finally recovering to near-historic levels).

³⁰ *Supra*, note 9 at 179.

Agency officials don't even know what chemicals comprise those emissions, far less what their individual or aggregate effects might be, on the oolichan or on any other aspect of that ecosystem³¹.

Note also that one of the reasons for a certain murkiness and indeterminacy in the jurisprudence on constitutional division of powers is the reluctance of both levels of government to litigate the issues, due to constraints of cost and time, but most especially the vulnerability they feel given the uncertainty of outcomes³². We will see an example of this when the federal and provincial governments enter into a mediated agreement on the Kemano Completion Project rather than litigate the jurisdiction issue as to which government has the power to determine water flows in inland rivers with fish habitat questions in issue.

However, there was an important exception to this aversion to litigation in the recent case of R. v. Crown Zellerbach Ltd.³³, wherein the Supreme Court of Canada found in favour of the federal government on the question of whether federal legislative

³¹ Personal communication with G.Thompson (Environment Canada, Vancouver) Sept.26, 1990.

³² *Supra*, note 15 at 34.

³³ [1984] 2 W.W.R. 714, 13 C.E.L.R. 29, 51 B.C.L.R. 32, 11 C.C.C. (3rd) 113, 7 D.L.R. (4th) 449, 3 F.P.R. 412 (C.A.), affirming (1982), 11 C.E.L.R. 151, 3 F.P.R. 405 (B.C. Prov. Ct.). Reversed [1988] 3 W.W.R. 385, [1988] 1 S.C.R. 401; 84 N.R. 1, 25 B.C.L.R. (2nd) 145, 40 C.C.C. (3rd) 289, 48 D.L.R. (4th) 161.

jurisdiction (under the Canadian Environmental Protection Act³⁴ - the CEPA) to regulate the dumping of substances at sea, as a marine pollution prevention measure, extends to the regulation of dumping in provincial marine waters. The regulation was upheld under the federal peace, order and good government power, thus strengthening the federal power (under s.91 of the Constitution Act, 1982) to regulate environmental concerns. Because the breadth of the peace, order and good government power was uncertain, the implications for federal powers over pollution legislation under the CEPA were important - the Act has been called "...the first major federal environmental statute in over a decade"³⁵, and "...Canada's widest ranging environmental legislation yet in existence"³⁶. It has even been suggested that the Crown Zellerbach decision may extend federal powers beyond direct harm from pollution to the regulation of natural resource development itself³⁷.

Of course the potential for overlapping jurisdiction includes the potential for jurisdictional conflict. For example, when Alcan decided to proceed with its KCP project in 1979, it felt sufficiently confident of its provincially granted rights under the 1950 Agreement to challenge the federal power to regulate water releases from the Alcan dam into the Nechako river for the protection of salmon spawning grounds. Alcan was

³⁴ *Supra*, note 2.

³⁵ *Supra*, note 22 at 369.

³⁶ *Supra*, note 9 at 132.

³⁷ *Supra*, note 35.

conducting its own technical studies, felt confident in its own expertise and legal rights, and wanted to set water flows in the Nechako river according to its own technical criteria (an extraordinary demand given that water not released to protect fish could be released to the powerhouse at the other end of the reservoir and used to produce electricity for Alcan - a blatant conflict of interest).

Although the federal government was granted an injunction³⁸, the ultimate legal question was never decided, even when the action was revived in 1987. Rather, a mediated agreement (the Settlement Agreement) was reached between Alcan, the federal and provincial governments, and a panel representing the three parties was formed to determine appropriate water flows. In other words, the federal regulatory power over fisheries was delegated to a body in which the federal government was only one of three parties, one of whom was the alleged "polluter" itself! (This was arguably an improper and illegal delegation of Parliament's powers, and an action was commenced on that basis³⁹). The willingness of both levels of government to reach such a compromise was in significant part motivated by a desire to avoid jurisdictional litigation in which one of them must lose⁴⁰.

³⁸ *Supra*, note 29.

³⁹ E. Swanson, "Case Comment: Closing the Door on Government Evasion of EARP: Save the Bulkley Society v. Minister of the Environment" (1991) 1 *Journal of Environmental Law and Practice* 329 at 332 - a statement of claim was issued on 14th. April, 1988 but the action is not presently being actively prosecuted. The federal Crown was named as respondent, and Alcan successfully applied to be added as a respondent.

⁴⁰ Personal communications with G. Bridges (Senior Policy Advisor, Ministry of Energy, Mines and Petroleum Resources) March 13, 1989, P. Osterguard (Senior Co-ordinator, Energy Policy Branch, Ministry of Energy, Mines and Petroleum Resources) March 13, 1989, C. Sanderson (of the law firm Lawson, Lundell - Alcan legal counsel)

Opposition groups (community groups, environmental groups, Indian bands and others) attempted to challenge this Settlement Agreement but lacked the funding to pursue it. Later (in 1989) they mounted a second challenge⁴¹, this time seeking to enforce the federal government 's own EARP Guidelines⁴², asserting that Alcan 's own technical studies were not capable of fulfilling the federal government 's obligations. The federal government immediately passed a special Order In Council⁴³ specifically exempting Alcan 's Kemano Completion project from its own guidelines. As well as casting a bright light on the federal government 's commitment to environmental values, at least for this project, this less than subtle response⁴⁴ also speaks to its recognition of both its own constitutional vulnerability and the realities of federal-provincial constitutional relations. Clearly they enjoyed a higher priority than environmental values, or than any commitment to consensus-building, legitimising public hearings. That is equally true of the provincial government, and indeed there seemed to be an extraordinary effort to

Feb.25, 1989.

⁴¹ Carrier-Sekani Tribal Council et al v. Minister of the Environment (1991) 6 C.E.L.R. (N.S.) 265 (F.C.T.D.).

⁴² *Supra*, note 7; see also *supra*, note 39.

⁴³ SOR/90-729.

⁴⁴ The timing was not lost on the trial judge, who noted (*supra*, note 41, at p.32 of the judgement):

"...can the Minister by the expedient of issuing an Order confirmed by Order-in-Council effectively stop any environmental review under the EARP process by determining that the project is not subject to it? If such a precedent is permitted it could effectively destroy the entire intention of the Environment Act ...this is particularly striking on the facts of the present Motions where these Orders were made coincidentally with the filing of the Motions, with the obvious purpose of defeating them on procedural grounds".

avoid the public scrutiny of environmental and community groups.

In summary, jurisdictional questions tend to reflect the historical realities of the Federal-Provincial negotiating relationship rather than strict adherence to the constitutional division of powers⁴⁵. There is a political as well as a legal constitution - the legal reality is that the federal government has substantial powers, actual and potential, through its pre-eminence in the regulation of the environment and natural resources, rather than in their exploitation. That of course is the name of the game in environmental concerns, and perhaps a desirable thing since in theory it may help avoid the conflict in being both regulator and owner/exploiter (such as the provincial government in the case of Kemano Completion - it was willing to accede to Alcan in regard to environmental impact assessment and public hearings issues in order to reap economic benefits during a severe recession⁴⁶). However, the historical reality of Canadian federalism tends to weaken that position and act as a significant constraint on potential federal environmental reforms⁴⁷ - for example, the regulatory scheme for toxic chemicals in the CEPA became "ambiguous and piecemeal " as a result of constitutional pressures⁴⁸. From our own fact pattern we can see how federal efforts to protect the salmon fishery from the

⁴⁵ *Supra*, note 16 at 51.

⁴⁶ Personal communication with J.Allie (Cabinet Secretary to Environment and Land Use Committee of B.C. Cabinet, formerly Senior Co-ordinator, Project Analysis Branch, Ministry of Mines, Energy and Petroleum Resources) March 14, 1989.

⁴⁷ *Supra*, note 9 at 128.

⁴⁸ *Supra*, note 9 at 129.

consequences of KCP were undermined and arguably defeated by pressures from Alcan and the B.C. government (just as they were in the 1950 's with the original Kemano project), whilst in the case of the pulp mill on the Kitimat river federal Fisheries Act provisions were simply not enforced in respect of the oolichan fishery.

(2) Federal Legislation

(a) Pollution

The new flagship of the federal government 's broad regulatory powers over environmental degradation is the CEPA, proclaimed on June 30, 1988.

In summary, the CEPA⁴⁹:

- consolidates and strengthens various existing environmental statutes (for example, the Environmental Contaminants Act⁵⁰, the Ocean Dumping Control Act⁵¹, and parts of the Clean Air Act⁵² and the Canada Water Act⁵³;

⁴⁹ *Supra*, note 22 at 363-4.

⁵⁰ R.S.C. 1985, c.E-12.

⁵¹ R.S.C. 1985, c. O-2.

⁵² R.S.C. 1985, c.C-32.

- extends federal regulatory authority to ensure uniform national standards for life cycle control and management of toxic substances.

The regulations are backed by diverse and powerful enforcement procedures⁵⁴. The Act is essentially regulatory, implying reliance on the federal government 's peace, order and good government power rather than its criminal law power. However, it is new, largely untested legislation, and only time will tell whether it will be effectively implemented (though as we shall see the precedents are not promising).

The traditional vehicle for federal involvement in the environment has been the Fisheries Act⁵⁵, "...among the most important weapons in the struggle for water quality in British Columbia"⁵⁶.

The Fisheries Act prohibits undertakings harmful to fish habitat⁵⁷ (such as the Kemano Completion Project), and prohibits the pollution of waters frequented by fish⁵⁸ (such

⁵³ R.S.C. 1985, c.C-11.

⁵⁴ *Supra*, note 22 at 365.

⁵⁵ *Supra*, note 5.

⁵⁶ M.Rankin, D.Leadern, "The Fisheries Act and Water Pollution " (1982) 40 The Advocate 519 at 529.

⁵⁷ *Supra*, note 5 at ss.35(1).

⁵⁸ *Ibid.* at ss.36(3).

as the pulp mill pollution of the Kitimat river), though deleterious substances may be authorised by federal regulations⁵⁹ (for example those regulating pulp mill effluent). Note that in our fact pattern, the pulp mill emissions into the Kitimat river which destroyed the Haisla oolichan fishery were in fact authorised (aside from non-complying emissions) by both the Fisheries Act and by overlapping provincial Waste Management Act permits. The effect of such provincial permits on the federal prohibition is not clear⁶⁰, but in practice the federal regulations are based on the provincial pulp and paper mill effluent regulations. As we have seen, they simply regulate a few broad aggregate variables - namely bio-chemical oxygen demand, toxicity to fish, and the total volume of suspended solids in the receiving waters.

An anomaly that features in our fact pattern is that the pulp mill emissions did not, as far as is known (though that is not particularly far), actually harm the oolichan or their habitat. There was no actual fish kill or destruction of habitat. Rather the effluent rendered the fish inedible. However, the Fisheries Act includes in the prohibited category of "deleterious substance" those which are "...deleterious to the use by man of fish that frequent that water"⁶¹. Clearly that category encompasses the oolichan tainting, but the problem is an evidentiary one - the lack of hard scientific data which links in a cause-and-effect way the tainting and the chemical compounds which make up

⁵⁹ *Ibid.* at ss.36(4).

⁶⁰ *Supra*, note 56 at 521.

⁶¹ *Supra*, note 5 at ss.34(1).

the effluent, and the levels of concentration at which tainting occurs. But since there is no regulation of individual compounds, far less of their individual effects, then fisheries officials (because of their own macro-regulation) lack an evidentiary base from which to press charges⁶², notwithstanding that their own tests 20 years earlier had clearly pointed to a connection!⁶³

But what is really going on here? The alleged intent of the Fisheries Act legislation is to prevent the pollution of water by "...any substance that...would degrade or alter...the quality of that water so that it is rendered or likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water"⁶⁴. In reality, however, a large number of process chemicals, for the most part unknown to agency officials in terms of their nature and possible environmental effects, are being lumped together in effluent and permitted to pollute a river in certain regulated volume (quantity of suspended solids). The permitted volume is in fact *negotiated* with the pulp mill⁶⁵, and

⁶² Personal communication with W.Knapp (Department of Fisheries and Oceans), Sept.17, 1990.

⁶³ Bethell Management Ltd. "A Preliminary Assessment of the Industrial and Municipal Pollution Affecting Kitimat River and Kitimat Arm " (Feb. 1987) (for Haisla Village Council) at 40.

⁶⁴ *Supra*, note 61.

⁶⁵ M.Rankin, P.Finkle, "The Enforcement of Environmental Law: Taking the Environment Seriously " (1983) 17 U.B.C. Law Review 35 at 39.

is then monitored by them. There is significant non-compliance⁶⁶, but prosecutions are rare⁶⁷. There is little or no knowledge of the effects of the effluent on the receiving environment - that only comes when something goes wrong. Yet when it does, as in the case of the Kitimat river oolichan, agency officials feel they cannot prosecute because of the high burden of evidentiary proof required⁶⁸, but which by definition is not available because of the way the regulations are structured! Whatever else this bureaucratic maze may be, it is not environmental protection - it is, in every sense, a permit to pollute! In fact the circumstances of the case study are even more disturbing. Federal fisheries officials actually conducted tests for oolichan tainting in 1972 and 1973, with dramatic results - the oolichan were so badly tainted that they did not reach even halfway in a taste test from 0 to 10⁶⁹. Newspaper stories of that time told of the destruction of the first industry of Kitimat by pulp mill effluent which met the standards of the (then) Pollution Control Board⁷⁰. No action was taken. The federal government was demonstrably aware of the problem, had empirical evidence of its effects and its

⁶⁶ See, for example, statistics in Attachment to Eurocan Application for Amendment to Permit (1988) (available from Waste Management Branch, Smithers Office) - in tests conducted by the pulp mill itself, 40% of 185 tests exceeded the permit!

⁶⁷ M.Rankin, "Comment: Enforcing the Waste Management Act" (May, 1989) 14 West Coast Environmental Law Foundation Newsletter (No.3) at 16.

⁶⁸ Personal communication with Fisheries official (W.Knapp) Sept.14 1990, Environment Canada official (G.Thompson) Sept.26 1990, and Justice Department lawyer (J.Wallace) Sept. 26 1990.

⁶⁹ *Supra*, note 63 at 40 (quoting The Northern Sentinel (July 12, 1973)).

⁷⁰ *Supra*, note 63 at 41, quoting The Vancouver Sun (May 2, 1974).

source, had the legislation in place under which to act, and yet did not.

One can only guess with hindsight at the reasons. The "victim" in this case was a legally unsophisticated, relatively poor and relatively powerless Indian band. The fish species in question was not salmon but rather the less desirable oolichan, of value only to the Indians. (Significantly, the tainting studies were originally aimed at sockeye salmon, of commercial value to non-natives and also of economic importance as a sport fishery. In fact a salmon hatchery was later established on the Kitimat river itself, just a half mile or so upstream from the pulp mill discharge - unlike the fatty oolichan, the salmon were not significantly tainted in swimming through the effluent). But most important in policy terms must have been the competing economic interest represented by the pulp mill, which may or may not have prevailed against the tainting of a salmon fishery (other economic interests did indeed prevail, as we have seen, with Alcan on the Nechako river), but most certainly did so against a native-sponsored oolichan fishery.

Whatever the policy reasons for not following through with a prosecution, it is clear that this legislative regime in no way honours environmental values. At best it might be seen as a tool to curb egregious impacts on selected fish species (not including oolichan) through some negotiated balancing of economic interests. Note that whatever the competing interests were, "the environment" as such was not one of them. As we shall see, even the Haisla would have to frame any plea for relief in terms of economic damage, interference with a property right, and so on, but never on behalf of, for

example, the river itself, the fish, or future generations (as well as their own) whose options and quality of life would be diminished. Similarly, the relevant section of the Fisheries Act refers to the use of fish by *man* as the value to be protected, not the fish or the river itself. More detailed discussion of these issues will follow.

A similar result will emerge when we look at attempts by fisheries officials to deal with the more dramatic impacts of the Kemano Completion Project on the more highly valued salmon fishery.

(b) Environmental Impact Assessment

Federal Environmental Impact Assessment (EIA) requirements have been evolving through both legislation and judicial interpretations of legislation - from a general discretion to require an assessment (for example under the Inquiries Act⁷¹), to a perceived discretionary power (for example under the EARP Guidelines⁷²) to a mandatory requirement (which the courts have interpreted the EARP Guidelines to be, as we shall see in detail below). This evolution is reflected in the case study through Alcan 's Kemano Completion Project.

Although the original Kemano project was the biggest mega-project of its time, in the

⁷¹ R.S.C. 1985, c.I-11.

⁷² *Supra*, note 7.

1950 's there were no requirements for impact assessments, social cost-benefit analyses, and so on. It was an era of charge-ahead progress, high economic growth, limitless frontiers and an abiding faith in technology. A vast wilderness area was flooded, an Indian Band (the Cheslatta) was uprooted, a major salmon fishery (at the headwaters of the Nechako river) was all but destroyed, an entire watershed was dammed and reversed, a huge new aluminum smelter was built and a new town carved out of virtually virgin wilderness, all without demur but for isolated protest - from the Indians, from residents of the watershed area (who were particularly upset by Alcan 's refusal to even log the trees which would poke above the reservoir waters as a boating hazard for generations to come), and from the federal fisheries department. Fisheries officials were in fact very concerned, but their objections were swept aside⁷³ and the salmon fishery effectively devastated.

But that was another era, and hopefully this is a new one - one which has developed a sense of stewardship toward the environment, an awareness of the finite resources of the earth and its ability to absorb the impacts of progress, and one which now subjects new industrial mega-projects to a critical balancing of the costs and benefits, of all kinds, to society. It will be interesting to see how this new environmental sensitivity plays itself

⁷³ "Toward a Fish Habitat Decision on the Kemano Completion Project: A Discussion Paper " (Department of Fisheries and Oceans, Vancouver, 1984) at i - by their own admission:

"[the DFO 's] ... stipulated positions ...were in the main *ignored*" (emphasis added).

out, firstly in the late 1960 's and early 1970 's with the new Eurocan pulp mill, and later in the late 1970 's, 1980 's and early 1990 's with Alcan 's Kemano Completion Project (KCP).

The pulp mill discharge into the Kitimat river, which as we have seen effectively destroyed the Haisla oolichan fishery (though not the fish themselves), was originally not supposed to occur at all. In 1968 when the pulp mill was being planned, federal fisheries officials apparently recognized the risk to the Haisla fishery in the Kitimat river and insisted that effluent from the mill be piped down to the Douglas Channel (into which the Kitimat river emptied) and discharged into deep water. There would be unsightly discolouration and foaming in the Douglas Channel, but the Haisla were assured that there would be no contamination of the river and no tainting of the fish⁷⁴, and under no circumstances would fisheries officials permit pulp mill effluent in the Kitimat river⁷⁵. (It should be recalled that this was occurring just as more than 10 years of

⁷⁴ For example, letter from S. Copp (Regional Engineer, Department of National Health and Welfare (S.Copp, Regional Engineer) to the Indian Commissioner for B.C. (Department of Indian and Northern Affairs), Feb.19,1968:

"It is expected that most of the bay [where the Kitimat river empties into the Douglas Channel] will become brown because of the effluent and there will be some foam but there is no economical treatment to remedy this problem. *The fish will not be affected and the Indian reserve beach will not be fouled*" (emphasis added).

⁷⁵ Letter from W.R.Hourston (Director, Pacific Region, Department of Fisheries) to J.V.Boys (Indian Commissioner for B.C., Department of Indian Affairs and Northern Development) Jan.22, 1968:

"...*under no circumstances would the Department approve the discharge of pulp mill effluent into the Kitimat River*" (emphasis added).

oolichan tainting by raw sewage from the new town of Kitimat was coming to an end, and the Haisla had some prospect of resuming their traditional fishery). However, this prohibition by the Fisheries department was soon reversed under pressure⁷⁶. They seemed as impotent against the pulp mill in 1968 as against Alcan 's dam 15 years earlier. The next challenge was to be the Kemano Completion Project in the 1980 's - we already know that they succumbed here too, but the manner of their doing so is revealing.

In 1979 Alcan announced its intention to expand its operations in northwest B.C. - the Kemano Completion Project. Recall that the company had originally taken up only 60% of the waters available to it under the 1952 agreement, and that the agreement had a 1999 deadline on it. Alcan 's plan was, as per the original grant, to take further waters from the already diminished Nechako river, plus some waters from another lake system in the area (the Nanika-Kidprice lakes, which flowed in turn into the Nanika, Bulkley and eventually the Skeena rivers, host to another major fishery and, in particular, a world-class steelhead fishery). In recognition of the new era, Alcan gave assurances that this time they would pay due attention to the requirements of downstream users⁷⁷,

⁷⁶ *Supra*, note 63 at 38:

"...based on economic considerations, and a lot of political manipulation, the outfall location was permitted in the Kitimat river...this allowance was directly opposite the absolute position taken by the Department of Fisheries, whom had stated in writing that under no circumstances would they allow the discharge of pulp mill effluent into the Kitimat river".

⁷⁷ "The Kemano Completion Project " (Alcan publicity brochure):

"The company is committed to sharing the water with those other users who have

including the salmon fishery. The additional hydro-electric energy thus obtained would be used to power two new aluminum smelters, in all a \$2.5 billion project.

As well as this new 'shared resource ' approach, Alcan made a number of important symbolic (as it later transpired) gestures in an attempt to show a new and more enlightened face. It withdrew from the court action in which it was contesting the constitutional right of the federal Fisheries department to determine water flows in the Nechako river. (Recall that the Fisheries department had succeeded in obtaining an injunction to restrain Alcan from continuing to determine water flows as they had done for the previous 25 years⁷⁸). Alcan hoped that ongoing consultation between experts from Fisheries and Alcan 's own consultants would resolve the dispute, and the courts were no place for Alcan to win public approval - the company expected (wrongly as it transpired) that the technical debate with federal fisheries officials would be resolved as a sideshow to its overall campaign to win public support⁷⁹. For they now felt a need to win over the public - in whose minds at least this really was a new era, and widespread and vocal opposition to the project had erupted as soon as the announcement was made. As Alcan themselves put it, "...social expectations had changed; wildlife and the environment were considered just as important as jobs, and 'conquering ' nature had

an *economic* base dependent upon it" (emphasis added).

⁷⁸ *Supra*, note 29.

⁷⁹ Personal communication with W.J.Rich (Alcan vice-president for B.C.) Feb.10, 1989.

given way to 'co-existing ' with nature "⁸⁰.

Faced with such opposition, particularly from residents downstream on the already diminished Nechako river, Alcan made another gesture - the first of the new aluminum smelters was to be located outside the town of Vanderhoof, the first significant community downstream on the Nechako river and home to some of the most vocal opposition. There was some cost to Alcan in locating a plant so far from tidewater, but the new jobs and economic benefits were to be the pay-off to the town - a fairly open attempt to buy support⁸¹, and in effect trade environmental values for economic benefits.

Notwithstanding the sweeping rights granted in the original license, public support became critical because of another gesture Alcan made - although it claimed not to be bound to do so, it would submit the project to public hearings to "...permit an impartial decision on the desirability of the project from the public 's point of view"⁸². No doubt the hope was that public hearings would achieve much-needed legitimacy for the project. Although as a major new energy user the proposed new aluminum smelter would be

⁸⁰ "KCP dates back to last century " Ingot (an Alcan employee publication), special reprint, (August 12, 1988), Vol.35 No.15.

⁸¹ "Alcan Chooses Vanderhoof Area as Preferred Location for Smelter " Alcan press release, Vanderhoof, B.C., April 22 1982:

"... the choice [of Vanderhoof] was intended to contribute to the overall acceptability of the project ".

⁸² "The Kemano Completion Project " (an Alcan publicity brochure) at 1.

subject to hearings before the B.C. Utilities Commission, it was not clear if the hydro project, a continuation of the original grant of 1952, was also subject to review. However, Alcan announced its willingness to have both aspects reviewed. The hearings were to be held under the auspices of the Utilities Commission Act⁸³, provincial legislation designed to facilitate the review of energy projects by the B.C. Utilities Commission⁸⁴.

The federal fisheries department announced that it, too, would hold a series of public meetings before announcing its position on the project. It seemed determined to stake out and hold a hard line after the 1952 fiasco. A number of public meetings were held, but resulted in considerable embarrassment to Alcan and some regrets within the Fisheries department⁸⁵. Eventually the two levels of government decided to subsume the provincial Utilities Commission hearings into a joint inquiry with the federal

⁸³ S.B.C. 1980, c.59.

⁸⁴ Note that this was hardly a guarantee of impartiality - an anecdote was related (personal communication with W.Grant, B.C. Utilities Commission, March 8, 1989) in regard to the earlier public hearings on Site C, a major new hydro-electric proposal from B.C.Hydro (the provincial energy utility). Apparently the hearing panel was stacked with partisan industry sympathisers, with only one representative from the Commission itself. The majority recommended the project - the sole dissent came from the Commission representative, on the grounds that the market projections from the proponent were wildly optimistic, and that there was no demonstrable need. Fortunately the Minister accepted the dissenting opinion, history proved it correct, and the Province was spared hundreds of millions of dollars annually in carrying costs for a redundant dam.

⁸⁵ Personal communication with R.Bell-Irving (formerly Chief of Water Use, Habitat Branch, Department of Fisheries and Oceans), March 7, 1989.

government under the federal Inquiries Act⁸⁶, to be chaired by Dr. Andrew Thompson, a law professor who had earlier described the original grant to Alcan as a huge resource giveaway, and who was later to act as legal counsel for opposition groups.

Meanwhile, during this period (the early 1980 's) both Alcan and the Fisheries department continued with their own technical studies on the project 's impact on the Nechako river salmon fishery (now returning to near historic levels after the 1952 devastation). Clearly the stage was set for a classic confrontation, both between Alcan and the Fisheries department, and between Alcan and opponents of the project - community groups in the watershed area, environmental groups, Indian bands, and even the union in Alcan 's own Kitimat smelter. It was an awkward time for Alcan. They had made a number of concessions to the changed world of the 1980 's, modifying their project to meet (they thought) the new realities - recognizing that some water would have to be given up to protect the fishery, placing a smelter in Vanderhoof to spread the economic benefits, and recognizing the right of other stakeholders to participate in the approval process through public hearings. But, despite a large commitment of money and manpower, they had failed to defuse or win over their more strident opponents, and failed even to make significant inroads into public opinion. Support for the project had never been very firm - Alcan 's own ongoing polling showed, even after its concerted efforts to win public approval, some 15% in support, an equal number against, and some

⁸⁶ *Supra*, note 71.

70% undecided⁸⁷. Another critical concern was the failure to win over the federal Fisheries department to Alcan 's proposed flow regime in the Nechako river - what had been expected to be a sideshow to the main event (public hearings) was still very much front and centre. Finally, over the same period Western economies had moved into serious recession, aluminum prices had plunged and moved into a new era of instability (now trading as a commodity on the London Metal Exchange), and the company had posted its first ever loss (in 1982).

In 1984 Alcan announced that it was putting the project "on hold ", citing "current poor market conditions "⁸⁸, although it "remain(ed) committed " and when the time came to resurrect the project the company "...hoped to be able to work with the government to *expeditiously complete the public review* of the [project application] "⁸⁹ (emphasis added).

So for a time it seemed that the new era of environmental consciousness really was becoming manifest in the process by which the 1952 project was to be completed in the 1980 's. Whether it was just too much for Alcan to swallow - despite spending tens of millions of dollar on technical studies and preparation for the public hearings, despite

⁸⁷ *Supra*, note 46.

⁸⁸ "Alcan Postpones Kemano Project " Alcan press release, Vancouver B.C., Oct.26, 1984.

⁸⁹ Letter from W.J.Rich (Alcan vice-president for B.C.) to the Hon. Stephen Rogers (B.C. Minister for Energy, Mines and Petroleum Resources), Oct.26 1984.

making what it saw as major concessions to gain public support, and despite more than five years of ongoing dialogue with Fisheries, the project was still in real trouble - or whether the depressed economy had merely forced a delay, was difficult to say. However, as the story continues to unfold, a somewhat darker picture emerges as the project is revived.

In the mid-1980 's economies (and aluminum prices) improved, and Alcan decided to resume the project, but this time with a different face, or perhaps without the mask. The old 1979 court action with the Fisheries department was re-activated, with the province of British Columbia joining with Alcan in disputing jurisdiction over water flows. Opposition groups were initially successful in gaining intervenor status, but later lost it in the Court of Appeal⁹⁰. On one side, Alcan and the province challenged the federal power to set water flows; on the other side the federal government was prepared to challenge the validity of the original 1952 Agreement. A great deal was at stake for all the parties.

There was no longer a commitment to public hearings, and opposition groups had been shut out of the courts as well, leaving them no public forum at all. Nor was there a commitment now to build an aluminum smelter in Vanderhoof - indeed, there was no

⁹⁰ Attorney General of Canada v. Aluminum Company of Canada et al; B.C. Wildlife Federation, intervenor (1987), 26 Admin. L.R.18, 15 C.P.C.(2nd) 289, 10 B.C.L.R.(2nd) 371, [1987] 3 W.W.R. 193, 35 D.L.R. (4th) 495 (C.A.), reversing (1986), 15 C.P.C.(2nd) 8, [1987] 1 C.N.L.R. 10 (B.C.S.C.).

longer a commitment to build a smelter at all. That gave the parties an excuse to evade the previously promised public hearings (notwithstanding their old promise to also review the hydro project). Alcan simply wanted to nail down the balance of its very cheap hydro power before the 1999 deadline. The province was prepared to assist the company in light of its own financial problems, and a new strategy for its own utility company (B.C. Hydro)⁹¹.

So now after 10 years of trying to harmonize the approval process with the project, a process meant to be symbolic of a more enlightened environmental era, the end point was now a naked exercise in power, with issues of growth versus environment now entangled with political and constitutional wrangling over fisheries jurisdiction. Community and environmental groups were now excluded, but at least the underlying fisheries question was to see its day in open court, with the environment having at least one champion (the federal government) for one of its parts (the salmon fishery of the

⁹¹ Personal communications with J.Allie (formerly Senior Co-ordinator, Project Analysis Branch, B.C. Ministry of Energy, Mines and Petroleum Resources) March 14, 1989; and with P.Ostergaard (Senior Co-ordinator, Energy Policy Branch, B.C. Ministry of Energy, Mines and Petroleum Resources) March 13, 1989 - B.C. Hydro had faced rough going in trying to have a dam (Site C) of its own approved in public hearings (it was subsequently shelved), and faced difficult hearings for rate increases. By purchasing relatively inexpensive power from Alcan these controversies could be postponed; there was also opportunity to undertake necessary debt reduction and downsizing of B.C. Hydro. Alcan would get to complete its Kemano power project with a guaranteed buyer for the power until such time (if ever) it decided to use it for aluminum smelting (as it had promised all along to do - recall that this promise of economic prosperity had originally been the main selling point for the project).

Nechako river). This was arguably progress over 1952, when a similar issue was simply ignored in the interests of progress, and more than was achieved in the oolichan/pulp mill effluent problem in 1970, which was never litigated at all. But even that semblance of public scrutiny was soon stripped away, and the actors assumed more traditional roles.

Shortly after the court action commenced in 1987, the 3 parties convened in a three day meeting of technical experts, under the auspices of an independent mediator (University of British Columbia President Strangway), and hammered out a water flow regime acceptable to all. The resulting Settlement Agreement⁹² allowed the two levels of government to back off from a jurisdictional dispute of great risk and uncertain outcome, it allowed Alcan to complete its development of some of the cheapest hydro energy in the world -less than its original 1952 entitlement (since it "gave up " the Nanika-Kidprice waters), but this was to be offset by compensating power from B.C. Hydro, the provincial electric utility. The two levels of government also gave something up - the province contributed compensating power to Alcan, and the federal government of course compromised its fisheries jurisdiction on the Nechako river, just as it did in 1952. Importantly for Alcan, it could now sell electricity to the province without having to build any risky aluminum smelters⁹³, at least until it was ready (if ever) to do so. The original \$2.5 billion energy-plus-smelters project was now scaled down to a \$600 million

⁹² Approved by Order-In-Council 1987-2481, Dec.10, 1987.

⁹³ *Supra*, note 80 quoting W.J.Rich (Alcan vice-president for B.C.) describing a new aluminum smelter as "...a billion dollar roll of the dice ".

energy-only project, but that was all Alcan needed - ownership of more extraordinarily cheap energy, a guaranteed market for it, and the option to build a smelter later should it choose. Once again the federal Fisheries department acquiesced to Alcan 's flow regime on the Nechako river salmon fishery (with some mitigation measures) - indeed, determination of water flows was now to be made by a tri-partite committee made up of the 3 parties to the Settlement Agreement. In addition, the federal government undertook not to challenge the validity of the original 1952 Agreement, and the Provincial government acknowledged that the federal government had not ceded any jurisdiction.

Of course opposition groups had been shut out of all policy and administrative processes, public hearings and court actions, but as we shall see they were not yet finished - and perhaps herein lies a lesson in the perils of leaving the public (or at least that public who make up actively concerned community and environmental groups) out of important environmental decisions. After ten years of struggle, at the end of the day they saw no real difference between Alcan 's 1950 's "bulldozer " approach and their approach in the 1980 's, other than, for a time, a more polished public relations performance ⁹⁴. They felt that they had received nothing from what they perceived as an "inappropriate " Settlement Agreement, that the federal and provincial governments had failed to support

⁹⁴ Personal communication with L.Kaneen (former president of the Nechako Neyenkut Society, the leading community opposition group in the 1980 's on the Kemano Completion project) March 9, 1989.

the public interest, that the result was "undemocratic",⁹⁵ and that the process lacked legitimacy⁹⁶.

The point is well taken - in the end, the major part of a hydro-electric megaproject, described by the Fisheries department as being "of more vital concern to salmon than ...we are likely to encounter in the rest of this century"⁹⁷, was to go ahead without public scrutiny or formal government review in the face of widespread opposition, and now without even its compensating socio-economic benefits. Clearly the approval process was seriously flawed, and although principled ways of deciding issues like these may not necessarily lead to principled decisions, they are important in the sense of legitimising and building social consensus. Lacking that consensus, the project was vulnerable to further challenge.

The first challenge by opposition groups was to the legality of the 1987 Settlement Agreement - could Parliament's delegation of the federal fisheries power legally be sub-delegated to a group in which the Fisheries department was only one of 3 members? That action was started in 1988, but owing to lack of funding it has not been actively

⁹⁵ Personal communication with L.Burgener (President, Nechako Neyenkut Society) March 2, 1989.

⁹⁶ Personal communication with E.Rogers (Director, B.C. Wildlife Federation) March 1, 1989.

⁹⁷ "Toward a Fish Habitat Decision on the Kemano Completion Project: A Discussion Paper" (Vancouver: Government of Canada, Fisheries and Oceans, Jan. 1984) at i (quoting W.Shinners, Director-General, Pacific Region, Department of Fisheries and Oceans).

pursued⁹⁸. The second challenge is even more interesting, and its disposition even more revealing than the process leading to the Settlement Agreement. It raises the issue of the federal government 's own regime for assessing the environmental impact of projects in which it has some decision-making responsibility.

The major federal mechanism for environmental impact assessment is the Environmental Assessment and Review Guidelines Order⁹⁹ (the EARP Guidelines) originally established as a federal Cabinet directive in 1974, which was refined in 1977, and which was formally established in 1984 the purpose of ensuring full consideration of the environmental implications of proposals for which the federal government had a decision making responsibility, and to do so as early as possible and before irrevocable decisions are made¹⁰⁰. Assessment may include the social effects of projects, and any public concerns relating to the environment¹⁰¹. Note that a potential problem arises with the prospect of jurisdictional confusion when a project within a province impinges, as inevitably it sometimes will, on areas of federal jurisdiction such as inland fisheries (for example Alcan 's Kemano Completion Project) or navigation.

⁹⁸ *Supra*, note 39.

⁹⁹ *Supra*, note 7.

¹⁰⁰ J.Hanebury, "Environmental Impact Assessment in the Canadian Federal System " (1991) 36 McGill Law Journal 962 at 969.

¹⁰¹ *Ibid.* at 970.

Early application of the EARP Guidelines was erratic¹⁰², and it was uncertain whether the Guidelines were "a mere description of a policy or program", that is to say a non-legal Cabinet directive, or whether they had mandatory force in imposing a responsibility on the government, thereby giving rise to rights which were enforceable by way of mandamus¹⁰³. The federal government at least did not consider that the Guidelines imposed a mandatory duty on them¹⁰⁴. That question was resolved in Canadian Wildlife Federation v. Canada (Minister of the Environment)¹⁰⁵, which decided that the Guidelines were both an enactment and a regulation, and that because the dam in question fell within a number of areas of federal responsibility, then the Minister was obliged to apply the EARP Guidelines to the proposal (he had already granted approval on the basis of a controversial provincial environmental impact assessment)¹⁰⁶. Those findings were upheld on appeal¹⁰⁷. In 1989, in another dam case Friends of the Oldman River Society v. Canada (Minister of Transport)¹⁰⁸, project opponents sought

¹⁰² *Ibid.*

¹⁰³ M. Bowden, "Damning the Opposition; EARP in the Federal Court" (1990) 4 C.E.L.R. (N.S.) 227 at 227.

¹⁰⁴ M. Jeffery, "The New Canadian Environmental Assessment Act - Bill C-78: A Disappointing Response to Promised Reform" (1991) 36 McGill Law Journal 1070 at 1072.

¹⁰⁵ (1989), 37 Admin. L.R. 39, [1989] 4 W.W.R. 526, 26 F.T.R. 245, affirmed (1989), 99 N.R. 72 (Fed. C.A.).

¹⁰⁶ *Supra*, note 103.

¹⁰⁷ *Supra*, note 105.

¹⁰⁸ [1992] 2 W.W.R. 193, 88 D.L.R. (4th) 1 (S.C.C.), affirming (1990), 5 C.E.L.R. (N.S.) 1, 68 D.L.R. (4th) 375, 108 N.R. 241, 33 F.T.R. 160 (note), [1990] 2 F.C. 18, 76

to require that the federal government follow its own EARP Guidelines because of environmental impacts on inland fisheries, a federal jurisdiction. That application failed at first instance, but was subsequently granted on appeal¹⁰⁹, the finding being that areas of federal responsibility (fisheries, Indians and Indian lands) would be adversely affected. The federal Minister of Transport was bound by the Guidelines, as was the Minister of Fisheries and Oceans, who had declined to act on a request for action and thus brought himself within the Guidelines. That decision was in turn appealed, and the Supreme Court of Canada (in an 8-1 decision¹¹⁰) held that the Minister of Transport was bound as the "initiating department " with a regulatory duty under the Navigable Waters Protection Act. The Minister of Fisheries and Oceans was not bound as the Fisheries Act did not contain an equivalent regulatory scheme¹¹¹. However, the Minister of Transport was bound to consider the environmental impact on all areas of federal jurisdiction, including fisheries. It should be noted that in both the Canadian Wildlife Federation and Friends of the Oldman River cases the dams had already been commenced when the court orders came down, and those orders did not require that construction cease pending the required environmental assessments, rendering the results of any assessment potentially moot.

Alta. L.R. (2nd) 289, [1991] 1 W.W.R. 352 (C.A.), reversing (1989), 4 C.E.L.R. (N.S.) 137, 70 Alta. L.R. (2nd) 289, [1990] 2 W.W.R. 150, 30 F.T.R. 108, [1990] 1 F.C. 248 (T.D.).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* (from the headnote).

Clearly then in the late 1980's the time was ripe for a challenge to the Kemano Completion Project on similar grounds, namely that it was a major dam project whose environmental impact assessment lacked even the legitimacy of provincial authority, having been conducted by the proponent itself (although some technical studies had been conducted by the federal fisheries department). Alcan, too, had commenced construction of its new hydro facilities, but as we have seen that was not an impediment. Thus, after repeated requests to the federal Environment Minister to review the project under the EARP Guidelines, opposition groups finally filed suit in October, 1990 in Save The Bulkley v. Minister of Environment¹¹². On the following day, the Environment Minister issued an Order¹¹³ (the Exemption Order) exempting the KCP and the 1987 Settlement Agreement from the EARP Guidelines. There was an "evident intention of preventing any review other than the extensive studies already made for the most part by or on behalf of Alcan ..."¹¹⁴.

Alcan opposed the action on a number of procedural grounds but the court rejected the procedural motions and, against the wishes of Alcan, chose to rule on the substantive issues as well. The Alcan studies were rejected¹¹⁵, and the 1987 Settlement Agreement

¹¹² *Supra*, note 41.

¹¹³ *Supra*, note 43.

¹¹⁴ *Supra*, note 41 at 17.

¹¹⁵ *Ibid.* at 37 (Walsh J.):

"...It is not sufficient to be satisfied with a review, however extensive, performed by the Proponent of a proposal, even in cooperation with the Ministers involved, without a public assessment by an independent panel at which all interested

was set aside, as was the later exemption Order. The federal government was ordered to comply with its own EARP Guidelines and to hold an environmental assessment of the KCP. The judgement was interpreted by one author as saying that "...the public interest in having the potential environmental impacts of projects assessed in accordance with the EARP Guidelines Order is not to be arrogantly bargained away..."¹¹⁶. The case was also described as being of interest and importance not only for its application of the EARP Guidelines, but also for "...address[ing] complex procedural issues which have the potential to block or delay public interest litigation brought to compel compliance with the environmental impact assessment process ...[it] confronts the legitimacy of procedural gameplaying in circumstances in which the resources available to the parties to the litigation are clearly unequal"¹¹⁷. (In response to the Save The Bulkley decision Alcan threatened to sue the federal and B.C. governments for \$500 million to recover its expenditures on the project should it ultimately be rejected in a full environmental impact assessment¹¹⁸). However, the victory was shortlived - the judgement was appealed and reversed by the Federal Court of Appeal¹¹⁹, which

parties may be heard".

¹¹⁶ *Supra*, note 39 at 339.

¹¹⁷ *Ibid.* at 334, 339.

¹¹⁸ F. Shalom, "Alcan looks at lawsuit over delay on new dam"; *The Vancouver Sun* (April 24 1992) D1. Note also that the provincial government announced the appointment of law professor Murray Rankin "...to advise ...on the environmental, economic and social impacts of the Kemano completion project" ("Lawyer to advise on Kemano Project" *The Vancouver Sun* (3 July 1992) B8).

¹¹⁹ Carrier Sekani Tribal Council v. Canada (Minister of the Environment) (May 8 1992), Vancouver A-560-91, A-561-91 (Fed. C.A.).

followed the Supreme Court of Canada requirement in Friends of the Oldman River that there be a regulatory duty on the federal government before invoking the EARP Guidelines. The court held that no such duty lay on any of the departments involved in the Alcan project, and that even if it did (thereby invoking the EARP Guidelines) then the Exemption Order passed by the federal cabinet dealt with issue.

Finally, note that in the wake of these EARP cases, but before the SCC decision on Friends of the Oldman river, the federal government submitted a new Canadian Environmental Assessment Act¹²⁰ to Parliament in June 1990. It was claimed that the new procedures would go further than the EARP Guidelines in asserting a strong federal role in environmental assessment¹²¹. However, the real scope of the legislation will depend significantly on the regulations to be passed under the new Act, for example in the determination of the mandatory review list and the exclusion list. As well, there appears to be an effort to actually narrow federal jurisdiction from the expanded scope granted by the courts¹²², and the new legislation has already been criticized as inadequate¹²³.

(3) Provincial Legislation

¹²⁰ Bill C-13 Canadian Environmental Assessment Act, 3rd. sess., 34th. Parl. 1992, c.37 (given Royal Assent June 23, 1992).

¹²¹ *Supra*, note 100 at 977.

¹²² *Ibid.* at 982; also *supra*, note 104 at 1087.

¹²³ For example *supra*, note 104 at 1087.

(a) Pollution

Provincial regulation of waste discharge and handling is managed by means of a licensing system under the Waste Management Act¹²⁴ - pollution permits are issued, and reinforced by penalties for non-compliance.

In theory such schemes offer some advantages in requiring potential polluters to identify themselves by applying for a license, and wielding a coercive power to withhold a license and thus threaten the continued operation of the enterprise¹²⁵. However, they also require significant staffing to monitor compliance and a willingness to impose sufficient penalties to enforce compliance¹²⁶ - the case study will provide a good example.

The predecessor of the B.C. Waste Management Act was the Pollution Control Act, introduced in 1956¹²⁷ and repealed and replaced in 1967¹²⁸, around the time the Eurocan pulp mill was being built on the Kitimat River. Enforcement of that Act was less than draconian - in 1973-74 the average fine for failing to have a license, or for

¹²⁴ *Supra*, note 4.

¹²⁵ D.Trezise, "Legal Controls " (1975) 21 McGill Law Journal 404 at 414.

¹²⁶ *Ibid.* at 415.

¹²⁷ S.B.C. 1956, c.36.

¹²⁸ S.B.C. 1967, c.34.

failing to comply with the terms of a license, was \$460¹²⁹. The Waste Management Act of 1982 replaced the old Pollution Control Act, but continued the permitting system. Fines for non-compliance were increased to a maximum of \$50,000 per day (now up to \$1 million per day)¹³⁰. However, enforcement continues to be weak. For example, a survey of compliance enforcement conducted in the late 1980 's¹³¹ found that many firms habitually violated their permits and yet remained virtually immune from punishment¹³². Prosecutions were extremely rare, and fines continued to be minimal - in 1986, for example, there were only 9 convictions, with a mean fine of around \$500¹³³. For pulp and paper mills and sawmills specifically permits were surveyed in

¹²⁹ *Supra*, note 125 at 415.

¹³⁰ *Supra*, note 4, at s.34.

¹³¹ M.Rankin, "Issues of Compliance and Enforcement " in "Environmental Liability and Hazardous Waste Management " (B.C. Continuing Legal Education, 1989); see also *supra*, note 67 [Rankin].

¹³² *Ibid.* at 1.4.02.

¹³³ *Ibid.* at 1.4.04. The pattern is reinforced elsewhere - see, for example, R.Northey, "Conflicting Principles of Canadian Environmental Reform: Trubeck and Habermas v. Law and Economics and the Law Reform Commission " (1987-8) 11 *Dalhousie Law Journal* 639 at 647-8, citing low fines for pulp and paper companies in the 1970 's (\$18,500 total fines over 12 federal prosecutions, and \$18,600 total fines over 17 Ontario prosecutions), and criticising the standard-setting process (quoting D.Estrin):

"The procedures for approval of new pollution sources ...is that such applications are handled in a secret process between the applicant and the agency. No notice of the application is given to other industries or residents in the area, nor are they given, even if they are aware of it, any legal right to meaningfully make their views known ...".

The author concludes that:

"In its day-to-day operations, government has committed itself to industry, not the environment " (emphasis added).

two regions of the province, with the finding that more than half (12 of 21 permits) were not in compliance¹³⁴ - in some cases standards had been relaxed to accommodate a non-complying polluter, and even these looser standards were being violated!¹³⁵ In no cases were penal sanctions even contemplated as a response to non-compliance with a permit - at most, consistent non-compliance resulted in a meeting with the permittee!¹³⁶ The conclusion was that habitual violators of Waste Management Act permits are virtually never prosecuted¹³⁷. (The author concludes that criminal sanctions are much less effective than are administrative penalties, due to "...the lack of political will to enforce the pollution laws stringently"¹³⁸).

This bleak picture of weak and unenforced pollution legislation is reinforced in the case study. We have already seen that pulp mill effluent standards do not even attempt to enumerate, far less monitor or control, individual chemicals in the effluent. Rather, scores of chemicals are simply undistinguished ingredients in an aggregate discharge of total effluent, for which standards are set only in respect of a few broad criteria for the receiving waters - bio-chemical oxygen demand (which relates to required levels of dissolved oxygen in the water), toxicity to fish, and total suspended solids. As we would

¹³⁴ *Ibid.* at 1.4.07.

¹³⁵ *Ibid.* at 1.4.08.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.* at 1.4.10.

¹³⁸ *Ibid.* at 1.4.14.

expect from the survey data, there was significant non-compliance - for example, in 185 tests conducted by the pulp mill itself over the period Jan.1987-March 1988, 40% exceeded the permit¹³⁹. However, far from evoking fear of prosecution, this non-compliance merely suggested to the polluter a need to re-negotiate the permit¹⁴⁰!

The point, if it is even necessary to make it again, is clear. This is in no meaningful way legislation for the protection of the environment - not in its design (regulation by broad, aggregate criteria of chemicals of unknown nature and effect in the receiving environment); not in its standard setting (negotiated with the polluter to that level which is achievable, not desirable or 'safe '); not in its monitoring (usually by the polluter itself); and not in its enforcement (there is virtually none). When asked why they had not acted on the oolichan tainting, given their own conclusive studies in 1973-74 and ongoing protest from the Haisla, federal officials cited lack of hard scientific data as to which compounds were causing the tainting and at what levels (as noted, the regulations set standards which are so broad that individual compounds are not even specified or

¹³⁹ Attachment (Letter from Eurocan to Waste Management Branch) to 1988 Eurocan Application for Amendment to Permit (available from Waste Management Branch, Smithers office).

¹⁴⁰ *Ibid.* - note the following extract:

"...[the Waste Management Branch official] responded, stating that 'those mills requiring relief should negotiate with the Regional Manager '...asa result *mills discharging to inland receiving waters have been active in pursuing alternative TSS [Total Suspended Solids] measurement due to consistent non-compliance...these mills are currently in negotiation with the WMB [Waste Management Branch] to re-define the sample location and procedures* " (emphasis added).

monitored), and lack of resources - they suggested the Haisla do the tests themselves!¹⁴¹

(b) Environmental Impact Assessment

As well as the federal provisions (EARP Guidelines) discussed above, there are also provincial Environmental Impact Assessment (EIA) procedures in place. As we have seen, there was provision to review energy projects by the B.C. Utilities Commission, including the Alcan Kemano Completion Project (though recall that when the project was postponed in 1984 and then revived in 1987 the requirement for hearings was dropped as part of the Settlement Agreement between Alcan and the provincial and federal governments).

Further provincial project review guidelines were put in place to supplement those on mines and energy projects¹⁴². Should Alcan decide in the future to build a new aluminum smelter based on its new KCP power then it would presumably fall within the guidelines under "primary production of aluminum industry"¹⁴³. Note, however, that Alcan originally submitted both the smelter and the hydro project for joint approval by the Utilities Commission. With Alcan's decision not to go ahead with the smelter, and

¹⁴¹ *Supra*, note 68.

¹⁴² "Major Project Review Process Guidelines" (Vancouver: B.C. Ministry of Environment, 1989).

¹⁴³ *Ibid.* (industry category #2951).

with the exemption given to the hydro project (already effectively a fait accompli), the public hearing question probably becomes academic. If the smelter project were to be revived, note that the Major Project Review Guidelines are in any case described in the provincial government 's own materials as being merely "non-legislated working policy supported by the Environment and Land Use Act"¹⁴⁴, so that any review would be at the government 's discretion. (The wording looks like an obvious attempt to avoid the risk of the guidelines being found to be mandatory by the courts, as happened with the federal EARP Guidelines). In any event, a smelter-only application would presumably face a much smoother course through public hearings as it not only lacks the devastating and spectacular environmental damage of a hydro project, but it also carries with it the promise of direct, long-term jobs and economic prosperity. Perhaps that is why Alcan linked the two projects in the first place when faced with controversial public hearings over the hydro project.

The end result is that, with the active collaboration of both the federal and provincial governments and private industry, a major and highly controversial hydro-electric project is set to proceed in the 1990 's with no public hearings and no independent impact assessment or socio-economic cost-benefit study. That is an extraordinary outcome, and in the play of environmental versus economic interest it is not significantly different than the events of the 1950 's.

¹⁴⁴ *Ibid.*

(4) Conclusion

With regard to environmental impact assessment of proposed projects, the pattern from the case study is clear. In the 1950 's, faced with Alcan 's original Kemano project, the federal government 's attempts to protect the fisheries resource (at that time the only surrogate for environmental values) was easily overwhelmed by development interests. In the 1980 's, in the context of the Kemano Completion Project, the result was little different, with the Department of Fisheries once again bowing to industry. This time there were other potential surrogates for the environment, in particular the now-mandatory EARP Guidelines (albeit foisted upon a reluctant government by the courts), but they too were nakedly circumvented in the interests of economic development. Similarly in the 1970 's with the pulp mill pollution, where the federal government again reversed itself to allow effluent in the Kitimat river. The province of British Columbia, having literally given the resources (commons) away in the first place, actually aligned itself with industry and actively assisted in the outcome, showing a willingness to avoid its own already weak assessment requirements. The pattern is consistent and eloquent.

In the area of pollution control, where regulation by the two levels of government overlapped, the pattern was remarkably similar - weak legislation further corrupted by lack of enforcement. The case study merely illustrated (without exaggeration) a more general scheme of pollution tolerance, at least in respect of pulp mill effluent, a major

water pollution source from the most important industrial sector in the province. The licensing schemes do indeed appear to be, quite literally, permits to pollute. (The controversial questions of management of the forests themselves, often referred to disparagingly as the 'Brazil of the North ', is beyond the scope of this paper).

If government 'command and control ' models are so compromised and ineffectual, it will be interesting to see if the common law regime offers any better hope.

3. Common Law

(1) Introduction

It must be acknowledged at the outset that the common law role in dealing with environmental degradation is very limited¹⁴⁵.

One problem is that the common law is usually re-active (unless the plaintiff can meet

¹⁴⁵ See, for example, the landmark article by P.S.Elder, "Environmental Protection Through the Common Law " (1973) 12 Western Ontario Law Review 107 at 112:

"... the common law is useful for an individual or a group with a property interest, sufficient resources and determination to assist the general environment through the vindication of private property rights. At the same time, *this combination of prerequisites will occur so rarely that it is illusory to look toward the common law as a systematic tool with which to improve the environment* " (emphasis added).

the tests for injunctive relief¹⁴⁶) - it acts retrospectively to environmental damage which has already occurred¹⁴⁷, and so is of little use in pro-actively protecting environmental values (except perhaps as a deterrent). There are none of the trappings of the legislative 'command and control' model - universal scope, a priori standards, monitoring, enforcement by the state (although as we have seen those trappings have been more honoured in the breach than the observance). Common law environmental actions may (like the law of torts generally¹⁴⁸) be more suited to single-event occurrences with acute effects rather than the long-term, subtle, incremental effects which so often characterize environmental problems. Thus, for example, we shall see that in the case study the common law may offer a remedy for the Haisla Indians in respect of the pulp mill pollution of the oolichan fishery (really a single dramatic occurrence of tainting, endlessly repeated in the long term), whilst it has little to offer in dealing with (say) acid rain, ozone depletion or, from the case study, the long term effects of emissions from the Alcan smelter.

¹⁴⁶ See for example Palmer v. Nova Scotia Forest Industries (1983), 26 C.C.L.T.22, 12 C.E.L.R. 157, 2 D.L.R. (4th) 397, 60 N.S.R. (2nd) 271, 128 A.P.R. 271 (T.D.), (cited to D.L.R., from the headnote):

"Besides proving the elements of an ordinary injunction, namely, irreparable harm and that damages are not an adequate remedy, to obtain a *quia timet* injunction a plaintiff must show a strong case of probability that the apprehended mischief will arise".

¹⁴⁷ E. Elliott, "Forewood: A New Style of Ecological Thinking in Environmental Law" (1991) 26 Wake Forest Law Review 1 at 3.

¹⁴⁸ M. Gelpe, "Organizing Themes of Environmental Law" (1990) 16 William Mitchell Law Review 879 at 899.

Worse, the common law remedies are to be found only in civil litigation - notoriously costly, unpredictable in outcome, and (as we shall see) restricted in accessibility¹⁴⁹.

Finally, as we shall see in the next chapter, the very ideology of the common law - wedded as it is, in fact creating, a system of private ordering and individualistic property rights; geared to, in fact defining, the economic relations of liberalism (capitalism) - is fundamentally at odds with group-oriented, non-wealth-maximising environmental values.

However, as we shall see from the oolichan fishery example in the case study, for those who are appropriately situated there is a role for common law environmental actions.

(2) Common Law Environmental Actions

There are a number of traditional common law actions within whose ambit an environmentally inclined plaintiff might fall - nuisance actions (public and private), riparian rights, negligence, Rylands v. Fletcher, and trespass. The relevance of each (or

¹⁴⁹ See, for example, another classic article in the field of common law environmental actions, J. McLaren, "The Common Law Nuisance Actions and the Environmental Battle - Well-Tempered Swords or Broken Reeds?" (1972) 10 Osgoode Hall Law Journal 505 at 505:

"...the common law, with its substantive limits apparently tied to the resolution of narrow conflict between individuals, and the capricious incidence of litigation has seemed to the environmentally sensitive lawyer to be essentially impotent as the source of a viable response. "

a combination) will depend on the circumstances of the case. There are also different defences available to each, although a discussion of these is beyond the scope of the paper. It is tempting to try to unite the different actions through some logical structure but difficult to do so - for example, the private nuisance action, which requires a property interest in the plaintiff, is not really related to the public interest action, which requires no such interest¹⁵⁰, and similarly between the other actions¹⁵¹.

An important distinction to note is that nuisance actions focus on the degree of interference experienced by a plaintiff and her neighbours, that is to say the *consequences* of the defendant 's conduct, as opposed to the focus in negligence, which is on the *conduct* of the defendant (or at least the legal characterization of that conduct)¹⁵².

Public nuisance is essentially a criminal action which has historically provided protection for individuals in exercising their public rights, for example from persons inflicting air and noise pollution (obnoxious smells, objectionable noise, and so on)¹⁵³. However, the right to bring an action in public nuisance is vested in the attorney-general, unless an

¹⁵⁰ *Supra*, note 145 at 113.

¹⁵¹ *Supra*, note 149 at 520, noting the:
"...lack of any comprehensive rationalization of the relationship between nuisance, negligence and Rylands v. Fletcher".

¹⁵² See, for example, *supra*, note 145 at 117, and *supra*, note 149 at 521.

¹⁵³ *Supra*, note 149 at 511.

individual can show special or extraordinary damage suffered beyond that inflicted on the affected class of persons generally. In other words, the nuisance must affect the public, but cannot be brought on behalf of the public by any person except the attorney-general, unless that person is in some way specially affected. That requirement clearly restricts the use of public nuisance for environmental plaintiffs¹⁵⁴, although it should be noted that a serious health risk will always amount to special damage¹⁵⁵. Note also that, at least in Canada, there is some confusion as to whether 'specially affected' means damage which is different in kind from that suffered by the public, or whether it is sufficient that it be simply different in degree (for example, a greater economic impact, such as that on commercial fishermen versus the public right to fish)¹⁵⁶. Where the criterion of damage different in kind is followed, not only is the standing threshold more difficult to meet but it actually serves to handicap an environmental claim since the more widespread the pollution then the wider is the affected class, and the more

¹⁵⁴ See, for example, *supra*, note 145 at 122:

"...ordinary persons enjoying the natural environment will obviously be wholly dependent on the almost unfettered discretion of the Attorney-General to decide whether to protect the public domain. The paucity of public nuisance cases would justify deep pessimism on this point. "

See also *supra*, note 149 at 512:

"The agonizing truth is that the only common law tort action which has its origins in solicitude for the public welfare is of negligible utility in satisfying a growing public concern for the conservation of the country 's natural heritage. "

¹⁵⁵ *Supra*, note 146 at 485.

¹⁵⁶ See, for example, B.Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991) at 52-58.

difficult it is to distinguish it from the public at large¹⁵⁷. However, the alternative criterion of degree of damage is an easier test, and there is some evidence of its use in recent cases¹⁵⁸. In the case study, it is questionable whether or not the Haisla could successfully sue in public nuisance as being specially affected by the pulp mill tainting of the oolichan fishery. On the one hand, there certainly appears to be a good argument for the Haisla, given the economic and cultural importance of the oolichan, and the fact that they were essentially the only group fishing them. But if that is so then can it be said that the "public" was not affected, or if the Haisla themselves are the affected public class, can any individual member claim to be specially affected within that class? Also, on the other hand, there is the precedent of Hickey v. Electric Reduction Company of Canada¹⁵⁹ - a group of commercial fishermen were found not to have standing in a public nuisance action against the polluter of fishing waters, since all fishermen (including commercial fishermen) had had their rights similarly violated¹⁶⁰. It is not a critical issue in the case study as the Haisla also meet the criteria for standing in the more potent actions of private nuisance and riparian rights.

¹⁵⁷ *Supra*, note 149 at 513.

¹⁵⁸ See, for example, C. Harvey, C. Macdonald, "Environmental Clean Up Costs and Damages: The Common Law" (1992) 50 *Advocate* 33 at 34 - in British Columbia it may now be sufficient to show a different degree of damage as a result of Gagnier v. Can. Forest Prod. Ltd. (1990) 51 B.C.L.R. (2nd) 218 (S.C.) at 230.

¹⁵⁹ (1970) 2 Nfld. & P.E.I.R. 246, 21 D.L.R.(3rd) 368 (Nfld.).

¹⁶⁰ For a discussion of the Canadian cases on this point see *supra*, note 145 at 121, and *supra*, note 149 at 513.

Private nuisance reflects private property interests rather than the public rights of individuals - it protects individuals in the use and enjoyment of their land from any interference (damage, injury or inconvenience) by others (either on their own land or in public places)¹⁶¹. It affords protection to the landowner (from the activities of others), not to the public. Historically it marked a beginning of restrictions on the unconstrained use of one's property, as one could no longer ignore the rights of neighbouring property owners¹⁶². Of course one must have an interest in land in order to avail oneself of the remedy - there must be both right to the land and effective occupation of it¹⁶³. The rights which are protected are the beneficial use of property, the protection of physical property, and the undisturbed enjoyment of servitudes (natural or acquired) connected with an interest in property¹⁶⁴. Note that the natural servitudes include rights in respect of light, air and water¹⁶⁵ - clearly of interest to environmentalists.

¹⁶¹ *Supra*, note 149 at 516.

¹⁶² J.Searle, "Private Property Rights Yield to the Environmental Crisis - Perspectives on the Public Trust Doctrine " (1990) 41 South Carolina Law Review 897 at 913:

"Historically, private property owners were buttressed by nineteenth century laissez faire ideals of ownership and enjoyed unfettered freedom within the domain of their parcels of property...Private ownership also included the right to manage the property and direct the manner in which resources were to be used and exploited. The development of the law of nuisance marked the beginning of curbs on the rights of owners. "

¹⁶³ *Supra*, note 149 at 517.

¹⁶⁴ *Supra*, note 145 at 122.

¹⁶⁵ *Ibid.*

Note that the question of whether or not the conduct of the defendant constitutes a public nuisance is irrelevant, what is important is the consequences of that conduct i.e. whether or not there is unwarranted interference with the plaintiff 's property interest - if so, then liability follows as a matter of course¹⁶⁶. Note also that in deciding whether a defendant 's use of property is "unreasonable " courts may take into account contemporary concerns with respect to pollution¹⁶⁷.

Clearly if it is possible to do so a plaintiff should sue in private rather than public nuisance in order to avoid the standing (special damage) problems associated with public nuisance. In the case study the Haisla could do so as they hold a property interest, although care must be taken in defining the property right to be protected - recall that it is water pollution which is at issue, and in particular its effects on fish in the vicinity of the Indian reserve. That aspect of property rights leads into the next common law rights to be discussed - those of riparian (waterfront) owners.

If a property owner is fortunate enough to border on a watercourse (for example a river or a lake) then certain additional rights accrue to the property, including a right to the use (though not ownership) of the water¹⁶⁸ - in particular, the riparian owner "...isthus

¹⁶⁶ *Ibid.* at 114.

¹⁶⁷ Gauthier v. Naneff [1971] O.R. 97, 14 D.L.R. (3rd) 513 (H.C.), [cited to O.R.] at 101 (Dunlap L.J.S.C.):

"I deem it appropriate to interpret the word 'unreasonable ' in the light of present day knowledge of a concern for pollution problems ...".

¹⁶⁸ *Supra*, note 145 at 134.

entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality "¹⁶⁹. As a result, most Canadian water pollution cases have been claims to infringement of riparian rights¹⁷⁰. For example, the Haisla fishing reserve borders on the Kitimat river (though it does not include the river itself), which river has been diminished in "character or quality " of water by the pulp mill effluent. But the real issue in the case study involves tainting of the oolichan, so the question then is whether or not the Haisla 's status as riparian owners includes any kind of property right in the fish themselves. It may very well do, but the analysis is a bit convoluted.

Traditionally the riparian owner also had a property right in the bed of the river¹⁷¹ - the solum - and that right included a usufructuary right in the fish passing over the river bed. The property right extended to the mid point of the river (the ad medium filum rule). It was that right which elevated the riparian owner 's interest in the fish above that of the general public. Thus, the riparian owner not only had an assertable right as to the quantity and quality of water in the river, but also in the fish themselves. However, in Canada the ownership of river beds is mostly vested in the Crown¹⁷²- in British

¹⁶⁹ John Young and Co. v. Bankier Distillery [1893] A.C. 691 at 698 (H.L.).

¹⁷⁰ *Supra*, note 149 at 528 (footnote 111).

¹⁷¹ See, for example, 4 Canadian Encyclopedic Digest (West. 3rd) Title 19 ("Boundaries ") at para.9.

¹⁷² See, for example, *supra*, note 149 at 538.

Columbia, for example, this is accomplished through the Land Act¹⁷³. Similarly, the Crown has legislated water rights for itself (to be dispensed to applicants through a licensing system) under the Water Act¹⁷⁴, although these are arguably rights to quantity of water, leaving intact the riparian right to quality of water and therefore the potential environmental tool¹⁷⁵. Note that riparian owner does not have to prove damage, merely that there is a deterioration in water quality¹⁷⁶. However, the point is that a riparian owner whose rights extend to the solum is in the strongest of positions vis a vis water pollution - for example, in the English case of Pride of Derby v. British Celanese Ltd.¹⁷⁷, where a river was so badly polluted by a city sewage plant and a number of corporations that all fish life and fish food were extinguished. Riparian owners of the solum succeeded in obtaining a (delayed) injunction against the polluters.

(A short detour is necessary here to explain that Indians in Canada may be an exception to the legislated exclusion of riparian rights in the solum of rivers bordering reservations - as a great many of them do, since the Haisla were typical in their reliance on the

¹⁷³ R.S.B.C. 1979, c.214 at s.52.

¹⁷⁴ R.S.B.C. 1979, c.429 at s.2.

¹⁷⁵ *Supra*, note 149 at 537:

"...ariparian owner may be granted an injunction for mere deterioration of water quality...his riparian rights are sufficient to grant that claim".

¹⁷⁶ *Ibid.* at 539:

"Here is one of those rare points in the common law where the private litigant is able to emphasize the injury to the *environment* as an integral part of his claim" (emphasis added).

¹⁷⁷ [1953] 1 Ch. 149.

fishery for their sustenance. Those rights in the fish may be constitutionally entrenched as aboriginal rights - recall the grant of the Haisla fishing reservation as including "...their right to hunt, and fish, elsewhere as of old would remain undisturbed ". That question has been considered (though not yet decided) in another case¹⁷⁸, wherein an Indian band applied for (and got) an interim injunction to stop proposed railway construction on a river bank near a reserve. The court acknowledged that "...if they can establish this property right in the river bed of the reserve fisheries, the Indian people would have a much stronger right to seek an injunction"¹⁷⁹, and then goes on to say that "...I am convinced that there is a serious question to be tried..."¹⁸⁰. Similarly, in a dissenting judgement in another case Seaton J.A. (of the B.C. Court of Appeal) has said that "...courts might be reluctant to find that a reserve established in a particular place solely because of the fishing does not include part of the river"¹⁸¹. Thus, although the additional force of a riparian right extending to the river bed (and to the fish passing over it) has been taken from riparian owners in Canada, it may yet remain for such riparian owners as the Haisla Indians. If so, their rights are significantly strengthened, and in the context of the case study they could, because of the tainting,

¹⁷⁸ Pasco v. Canadian National Railway (1985), 69 B.C.L.R. 76, [1986] 1 C.N.L.R. 35 (S.C.). Affirmed [1986] 1 C.N.L.R. 34 (B.C.C.A.). Leave to appeal to S.C.C. refused [1986] 1 C.N.L.R. 34 (note), 64 N.R. 232 (note) (S.C.C.). [cited to C.N.L.R.].

¹⁷⁹ *Ibid.* at 38.

¹⁸⁰ *Ibid.* at 41.

¹⁸¹ A.G.B.C. v. Wale, [1991] 2 W.W.R. 568 (S.C.C.), affirming (1986), [1987] 2 W.W.R. 331, 9 B.C.L.R. (2nd) 333, [1987] 2 C.N.L.R. 36 (C.A.) [cited to W.W.R.] at 339. (S.C.C.).

show unreasonable impairment of their usufructuary right in the oolichan).

Note that for environmental purposes the nature of the remedy, and in particular the availability of injunctive relief as opposed to (or as well as) damages, is critical. Whilst injunctive relief is available for nuisance and riparian rights actions, and perhaps more so in the latter¹⁸², it is important to consider, given the discretionary nature of the remedy, whether or not it will be granted as a matter of course, or whether there will be a balancing against (often powerful) economic and/or social interests. The cases have gone in different directions in England (favouring injunctive relief whatever the surrounding circumstances) and America (favouring a balance of the equities in individual cases) -in Canada, the trend is to favour the English approach¹⁸³. There is, however, a risk that in doing so the courts will invoke reactive legislation in favour of polluters¹⁸⁴ - in the case study, for example, if a court granted the Haisla an injunction which caused the pulp mill (a major employer in Kitimat) to shut down for an extended period, the provincial legislature might well act to nullify the decision.

Thus, so far we have seen increasingly potent environmental actions as we move from

¹⁸² *Supra*, note 145 at 170.

¹⁸³ *Supra*, note 149 at 547-560.

¹⁸⁴ *Supra*, note 145 at 162:

"Ontario at least has proved extremely solicitous of polluters caught by the strictures of the common law: the injunctions ...[in three cases cited] were all dissolved by the Ontario legislature...and legislation...[three Acts cited] provide other illustrations of this solicitude".

public nuisance to private nuisance and then to riparian rights in water quality, and especially in those exceptional cases where a right to the solum of a river can be asserted. There are still a couple of other more narrow property rights which might be exploited in appropriate circumstances.

The doctrine in Rylands v. Fletcher¹⁸⁵ imposes strict liability for the isolated escape of dangerous things which a landowner accumulates on her land. The doctrine is usually distinguished from nuisance as involving single incident accidents as opposed to sustained interference with interests¹⁸⁶. For that reason it is of limited use as an environmental tool - not only because of its narrow scope (for example in requiring accumulation, escape and damage, and unnatural use of property¹⁸⁷), but also because by definition it is invoked after environmental damage has already occurred (there does not appear to be any precedent for granting injunctive relief under Rylands v. Fletcher¹⁸⁸).

Finally, there is an action in trespass available where injury is committed directly on the plaintiff 's land - as opposed to nuisance, which originates on the defendant 's land with injurious consequences to the plaintiff 's property interests i.e. nuisance which is

¹⁸⁵ (1868) L.R. 3 H.L. 330.

¹⁸⁶ *Supra*, note 149 at 525.

¹⁸⁷ *Supra*, note 145 at 119.

¹⁸⁸ *Supra*, note 149 at 536.

committed on the plaintiff 's land is in fact trespass¹⁸⁹. Trespass is actionable per se, without a requirement to show damages, and once trespass is shown the onus moves to the defendant to justify her conduct¹⁹⁰. Note again that the action would rarely be available in environmental suits as it is most unlikely that a defendant would be directly committing injury to plaintiff 's property. Of course it too is reactive to injury which has already occurred.

Moving away from nuisance and property-based remedies, the final common law category of potentially useful environmental remedy is in negligence. Although negligence and nuisance may co-exist in the same action, they are distinct and need not necessarily go together. As noted above, the key to negligence is the legal characterisation of the defendant 's conduct (did the defendant, owing a duty of care to the plaintiff, fail to do what a reasonable and prudent person would have done?), rather than the consequences of the conduct as in nuisance (was there impairment to the use and enjoyment of the plaintiff 's property interest?). Therefore, no matter how much care the defendant may have taken, thereby avoiding negligence, she may still be liable in nuisance because of the consequences of her actions. (Indeed that is often the case, and the defendant may also be complying with legislated standards - at first glance an obvious defence for the pulp mill, since it had a 'permit to pollute ', but one not that likely to succeed, not only because of significant non-compliance with the terms of the

¹⁸⁹ *Supra*, note 145 at 115.

¹⁹⁰ *Ibid.*

permit, but also because the pollution control legislation does not authorise nuisance or impairment to riparian rights). On the other hand, negligence provides a remedy for personal injury whereas private nuisance may not, or at least not unless a separate invasion of property rights can be shown¹⁹¹. In regard to the burden of proof, in negligence the plaintiff is required to prove all the elements of negligence - the existence of a duty of care, the appropriate standard of care, breach of the duty, damage and a causal relation between the breach and the damage. In nuisance, on the other hand, once the plaintiff has shown actionable conduct then the onus is on the defendant to justify her conduct¹⁹². Clearly the burden of proof in negligence is onerous, although if the circumstances support it then it is desirable to join negligence with other actions such as nuisance. As well there is no injunction option available to forestall the occurrence of environmental damage, so it is a reactive remedy whose environmental value will be as a deterrent. On the other hand, there are no restrictive standing requirements such as special damage, a property interest or a riparian interest. In the case study the Haisla might want to allege negligence, against the municipality of Kitimat for sewage pollution (though of course there would be limitations problems in that action, stemming as it did from the 1950 's and 1960 's), and against the pulp mill. However, by the time the mill commenced operations the Indian fishery had not recovered from the devastation of the city sewage problem, and so it is arguable whether or not a reasonable person would have taken it into account in planning the mill, and

¹⁹¹ *Ibid.* at 116.

¹⁹² *Ibid.* at 118.

whether or not the Haisla had suffered damage from the actions of the mill if in fact there was no fishery re-established in the interim between the city dealing with the sewage problem and the introduction of the pulp mill.

(3) Conclusions

It should be clear from the analysis why the common law has only a very limited role to play in dealing with environmental values¹⁹³. Of particular significance, and this will be dealt with in the following chapter, is the role of private property rights in the common law scheme. Given the onerous burdens of proving negligence, the difficulty of getting standing in public nuisance, and the very narrow scope of Rylands v. Fletcher and trespass, then the environmental plaintiff is left only with remedies which require property interests. As we shall see, that is no accident. The common law regime is a

¹⁹³ *Ibid.* at 171 - his excellent (if discouraging) summary is as follows:

"Where has the common law been throughout the environmental crisis? The answer seems to be 'the same place where it was throughout the industrial revolution in England... Vast areas of the English countryside were laid waste by the irresistible development of a self-adjusting market economy, the earlier stages of which had proved too much even for legislation... The requirement of a private property interest, expert witnesses, funds, time, determination and organization, all resting on individual decisions; the problems of proof; the limitations of res judicata; the fact that in Canada, one cannot sue in a representative capacity for nuisance; the possibility of a war of attrition being waged by a wealthy defendant who will deduct the legal fees from income as a business expense; and the enormous number of lawsuits which would be necessary if private citizens were to assume the responsibility for the public good from which governments have abdicated; all of these facts remove the potential of the common law" (emphasis added).

world of competing restrictions and prohibitions which reflect (and create) a society in which competition and struggle mark the pursuit of individual self-interest. The implications of that world for the environment have become painfully clear, and it should come as no surprise that the law "...environmental [common] law suit is part of a charade of existing institutions, all of which are failing us"¹⁹⁴.

Not only is private ordering through the common law part of the environmental problem, but in any event the courts remain very conservative¹⁹⁵, and tend not to respond to environmental values "...when there is little tradition by which new interests can be justified, and the required response may not be a judicially incremental one"¹⁹⁶.

4. Summary

So much for "environmental " laws. Understandably, they have been said to "...offer little more than symbolic reassurances to an apprehensive public...they offer virtually nothing to the environment "¹⁹⁷.

¹⁹⁴ *Ibid.* at 171.

¹⁹⁵ *Supra*, note 1 at 488.

¹⁹⁶ D.Tarlock, "Earth and Other Ethics: The Institutional Issues " (1988) 56 Tennessee Law Review 43 at 72.

¹⁹⁷ D.Emond, "Co-operation in Nature: A New Foundation for Environmental Law " (1984) 22 Osgoode Hall Law Journal 323 at 340.

We have seen that claim borne out in the analysis, and the evidence of the case study, in respect of environmental legislation - conceptually flawed legislation marred further by regimes of negotiated compliance with polluters themselves¹⁹⁸ and weak, sometimes almost non-existent enforcement. The result is a permit system that doesn't even regulate pollution so much as rationalize and legitimize it¹⁹⁹. The superficial reasons for that failure of will are not difficult to guess at - the state's role as facilitator (promoter of production, protector of private entitlements) swamps its restrictive role (regulator of socially disruptive market behaviour, nurturer of non-commodity values)²⁰⁰. Perhaps we have been blind to the implications of that suicidal course because of misplaced faith in technology, the vehicle that took us so far and so fast down the road to environmental degradation, and a naive faith that science could solve any problems along the way²⁰¹.

¹⁹⁸ See also *Ibid.* at 340.

¹⁹⁹ See for example *supra*, note 197 [Emond] at 340 and 342; C.Giagnocavo, H.Goldstein, "Law Reform or World Reform: The Problem of Environmental Rights " (1990) 35 McGill Law Journal 315 at 381 - the authors refer to such licensing systems as "costly legitimation projects ".

²⁰⁰ R.Stewart, "Regulations in a Liberal State: The Role of Non-commodity values " (1983) 92 Yale Law Journal 1537 at 1537; also *supra*, note 197 [Emond] at 336:

"...the propensity to maximise present benefits in this way is almost irresistible to a 'four year ' politician ".

²⁰¹ In fact technology may still prove to be more the problem than the solution - see, for example, *supra*, note 197 at 333:

"...the real impact of technology lurks ominously in the near future: mutation costs of insecticides on future generations; synergistic costs of combining two apparently harmless chemicals; and unforeseen second and third order effects of four wheel drive tractors, fertilizers and food additives ".

The failures of the common law are even easier to comprehend - it is a system of private ordering constructed, as we shall see, for the very purpose of facilitating the private exploitation of resources²⁰², and inimical to communal environmental values²⁰³. That is not so much criticism as recognition of limitations. It is simply irony that, within that view of man in society and man in nature, the common law has provided some very limited scope for protecting environmental values (including for, of all people, the Indian band of the case study to whom such views are completely foreign!) - irony because it is for the most part premised on property rights which are themselves largely the problem, and it is property rights which are being protected, not the environment. In any event, the scope and accessibility of those common law remedies is so limited that, even apart from their hostile origins, they are merely a sideshow²⁰⁴.

The case study allowed us to apply allegedly environmental law to particular circumstances. But the analysis cannot stop there - we must move beyond particularised circumstances to context in order to understanding why the legal regimes are so ineffective. There is a fabric within which both legislative and common law approaches

²⁰² See, for example, *supra*, note 145 at 128, in reference to the common law doctrine of riparian rights:

"The doctrine that water was provided by nature for the use of those who had access to it was necessitated by the Industrial Revolution. "

²⁰³ See, for example, *supra*, note 145 at 171:

"... the very structure and basis of the common law and its socio-economic philosophy of the sanctity of individual rights makes it inherently unsuitable to shape a creative response to social change "

²⁰⁴ *Supra*, note 193.

are woven, which explains their limitations in the relatively new area of environmental concerns, which explains why we have developed those particular regimes, and the values and normative assumptions which inform them. The pattern of that fabric is in significant part defined by the ideology of liberalism, the deep structure underlying both the behaviour and ideology of state-made and common law.

CHAPTER FOUR

THE DEEP STRUCTURE OF ENVIRONMENTAL LAW

"It is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness "

(Marx)

1. Introduction

This chapter will deal with Environmental Law from a Law and Society perspective. I will critique environmental law in its broad/macro social and political context (rather than from a micro theory of the self/personality - another unexplored area of law - except, of course, to the extent that liberalism necessarily produces a concept of the self). I will suggest that the roots of what we call the 'environmental problem ' go very deep in Western society (The Very Big Picture) and are reflected in the values and normative assumptions that we bring to our social, political and economic life (The Big Picture). The role of law is crucial in nurturing the very problems (The Many Snapshots) with which environmental values aim to deal.

I will be suggesting that what we call environmental law - what I have described in the previous chapter - is really just a shadowy mirror image of what I shall call, for want of a better term, "development " law. Development law is of course deeply grounded in

those values and normative assumptions, and therefore in our political philosophy (liberalism) and our law. What we call 'environmental ' law is similarly grounded, and as a result has proven relatively impotent in modifying the impacts of development - the case study being a concrete example of that impotence.

"Development " law is meant here to include that body of law which facilitates economic development in the modern industrial state. It may take the form of legislation, for example in statutes and regulations which set down how, and by whom, natural resources may be exploited, and who may pollute the environment and to what degree. Such law is also significant for what it omits, in form (such as failing to set meaningful standards) and in substance (such as failing to regulate in any meaningful way such aspects of "the commons " as clean air and water). Development law also includes areas of common law, such as the well-defined regime of property rights which sets out the interests and rights of property owners in such a way that, together with contract law, sets up and underwrites the market economy within which development is optimised. For example, the common law actions in private nuisance and riparian rights discussed in the previous chapter as possible environmental remedies are in fact aspects of development law, and are merely property-based constraints on the exercise of the private rights which are the very core of development law. Again, there are significant omissions, such as responsibilities (as opposed to rights) and an ethic of stewardship which informed even feudal property regimes. We will see that this development law is the legal form given to liberal economics (capitalism), which in its market-based system of private ordering

is the economic embodiment of liberal political values of individualism. Its driving force is instrumental rationality - the logical matching of means to ends - in the pursuit of allocative efficiency and wealth -maximisation.

I will suggest that environmental values are an inevitable casualty of liberal values, and that so-called environmental law in fact reflects those liberal, rather than environmental, values. That is clear from the form which environmental law takes, and the ideology which it incorporates and transmits. Western industrial democracies have not yet fully considered the meaning of those values as they affect the environment, and so we are ineffective and puzzled in our efforts.

In order to set up the critique I will first, in brief sketches, look at the "environmental problem " and its roots (The Very Big Picture), and then at the constructs of liberalism (The Big Picture) which have nurtured it and insulated it from effective action. I will then critique the role of law as it defines the way we act upon the environment, and even more important, the way we think about the environment.

2. Roots of the Environmental Problem

It is misleading to talk of *the* environmental problem, but the term is used here as a convenient shorthand descriptor for both 'macro '-environmental problems like global warming, the destruction of the ozone layer, acid rain, de-forestation and so on, and also

the myriad localised degradations which make up "micro "environmental problems, such as pollution of our beaches, urban smog, toxic waste disposal, and so on. Although there may not be a single grand design in the problem, or in the solution(s), I will suggest that there may be a grand design in the systemic causes, or deep structure, which lie at its heart, which is to say at the heart of the mode of social organisation which we in Western liberal democracies have chosen.

Environmental problems are ultimately inevitable - they are simply the result of humanity 's impact on the natural world in the course of survival, just as with any other species. It is the breadth (in terms of quantity, from population growth and increasing affluence) and intensity (from, additionally, the quality of technology-driven growth) of that impact which is variable. Whether we are now truly managers of our environment, or merely dangerous agents at large within it, our impact has reached such proportions in Western industrial societies that our very survival is threatened in the long term¹, and

¹ See for example: F.Johnson, "The Oxygen and Carbon Dioxide Balance in the Earth 's Atmosphere " in S.F.Singer, ed., *Global Effects of Environmental Pollution* (Dordrecht, Holland: Reidel, 1970) at 10; for example:

"...catastrophic problems appear to be in prospect for mankind because of the population explosion and its associated pollution explosion...However the time constant for this is sufficiently long that a destructive course may well have been followed beyond the point of no return before it is recognized "

Other authors (in the minority) question whether we are overstating our place in nature 's scheme - see, for example, A. Deen, "Book Review: One Earth, One Future: Our Changing Global Environment " 15 *Harvard Environmental Law Review* 319 at 322, quoting the opinion of the authors (C. Silver, R. DeFries, ed.) that we are merely *agents* (rather than managers) who are:

"...unlikely [to] suppress the powerful physical and chemical forces that drive the

our quality of life is compromised in the short term². Yet despite our growing awareness and sensitivity to environmental problems we still retain a high degree of tolerance for (or, more alarmingly, acceptance of) environmental degradation - witness the case study, or our continued willingness to drive cars to work, or our continuing acceptance of destructive forestry practices. There are some obvious systemic reasons for that ambivalence.

First, although pollution may be 'wrong' in some newly-awakened moral sense, it is for the most part perfectly legal, "...largely the result of otherwise legitimate and socially desirable activities carried on by respectable enterprises"³. Of course that is because pollution is for the most part a normal aspect (or 'externality') of development.

Because development is the dominant ideology, challenges to it must meet a burden of proof. Thus, a second systemic hurdle is the problem of scientific uncertainty, or inadequate information - "...we insult the environment at a faster rate than we can

earth system."

² M. Ways, "How to Think About the Environment" 81 Fortune magazine (February, 1970) 98 at 100; for example:

"Survival is not the only - and perhaps not the most impelling - motive for environmental reform...life is presently diminished, it loses point and relish and sense of direction when it is spent amidst a haphazard squalor that God never made, nature never evolved and man never intended".

³ T. Schrecker, "Political Economy of Environmental Hazards" (Ottawa: Law Reform Commission of Canada, 1984) at 71.

predict the consequences ...under these conditions surprises are virtually certain ⁴. How much pollution is 'too much '? How do we measure it? Can (and how do) we measure second and third order effects?⁵ In such areas as the criminal justice system (with its principle of presumed innocence), or within Science itself, the bias is to limiting 'false positives ' - that is, indications that a stated hypothesis is true (an accused is guilty, a new theory is correct) when in fact it is not⁶. The onus of proof, and a high one at that, is on the accuser, or the proponent of a new scientific theory. However, in an environmental challenge to the development paradigm, the burden is usually on the environmentalist, and the bias is to tolerate 'false negatives ' - that is, findings that there is insufficient evidence for a hypothesis that is, in fact, correct⁷. Lack of information, a characteristic of environmental problems which for the most part we can only know inadequately, tends to generate false negatives which are acceptable in the context of development. Of course this is increasingly true as growth is increasingly technology-driven. Examples abound - mercury poisoning, DDT 's, the oolichan tainting in the case

⁴ D.Emond, "Co-operation in Nature: A New Foundation for Environmental Law " (1984) 22 Osgoode Hall Law Journal 323 at 333.

⁵ See for example J.Yellin, "Science, Technology and Administrative Government: Institutional Designs for Environmental Decisionmaking " (1983) 92 The Yale Law Journal 1300 at 1309:

"...the difficult environmental cases often turn on evidence of actual harm that is not immediately compelling - evidence based upon complex models whose validity cannot yet be tested directly; or upon statistical tests applied at the limit of detectability, in the absence of knowledge about the biological mechanisms by which harm may be caused "

⁶ *Supra*, note 3 at 26.

⁷ *Ibid.*

study, the unwillingness by the American government to deal with acid rain, and so on. If we hold environmental values in sufficient esteem, as for example our passion to ensure that no innocent person ever be convicted of a crime, then surely the difficult burden of proof should be with the proponent/polluter. Given the stakes - the risk of rendering our planet inhospitable or even uninhabitable - surely it is better to be conservative and lose some economic opportunities that may in fact be environmentally acceptable, just as we allow accused individuals of probable guilt to go free rather than compromise an important social value.

Finally, the deck is stacked against environmental claims in the most obvious sense - that all social and political structures and organisations reflect bias, are in fact formed for the purpose of mobilising bias⁸, and in Western industrialised democracies a ruling bias is toward economic growth. Those presently wielding political and economic power (which of course are inextricably linked) can affect not just the outcome of the debate but indeed the very terms of the debate, including the issues and alternatives that will be considered. Real options can be excluded before the conflict stage is even reached, and radical alternatives will more likely be excluded so that debate is limited to those which lie more comfortably within the biases and normative assumptions of those wielding power (be they political parties, bureaucracies, business organizations, and so on)⁹. The

⁸ *Ibid.* at 3.

⁹ See, for example, *Ibid.* at 4 (quoting Schattschneider):

"...the definition of alternatives is the supreme instrument of power ...he who determines what politics is about runs the country, because *the definition of the*

entrenched power of the status quo, the development paradigm, is implicit in the analysis of deep structure in this chapter, and its ideology will be made explicit.

A dominant, if often unrecognised, aspect of our relations to nature is their single-minded anthropocentricity - our exclusive focus on the (self-defined) welfare and comfort of our own species, to the exclusion of other life forms. It is a symptom of what is sometimes referred to as shallow ecology, though it does at least acknowledge a threat to the natural world indirectly through a threat to humankind. But inevitable as it may seem to us that of course our species would be obsessed with its own self interest, that self interest was not always so destructive of nature.

The cultural roots (The Very Big Picture) of our anthropocentric view of nature have

alternatives is the choice of conflicts, and the choice of conflicts allocates power"
(emphasis added);

See also R. Unger, "Knowledge and Politics" (The Free Press, New York, 1975) at 80:
"...he who has the power to decide what a thing will be called has the power to decide what it is" (emphasis added).

Note that this power remains potent even if those subject to it feel short-changed - see, for example, R. Gordon, "New Developments in Legal Theory" in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (Rev. ed.) (New York: Pantheon Books, 1990) 413 at 418:

"Most ordinary people may well think that the system plays with a stacked deck and that the deal they got is a lousy one. Yet an ideology can still be 'hegemonic' if its practical effect is to foreclose imagination of alternative orders" (emphasis added).

been traced back to Judeo-Christian traditions¹⁰. Humans once had a world view that placed them squarely within nature - in pagan animist cultures animals, trees, rocks and so on were all part of a spirit world which man both belonged to and shared¹¹. Humans were not necessarily at the centre of that world, and they acted with respect and reverence toward it. An example closer to home can be seen in the culture of native Indians of North America¹², whose value systems are frequently contrasted with those of European origins - for example, the Hopi Indians of Arizona are described as valuing

¹⁰ For example, L. White, "The Historical Roots of Our Ecological Crisis" (1967) 155 Science 1203.

¹¹ See, for example, Ibid.:

"In Antiquity every tree, every spring, every stream, every hill had its own genius loci, its guardian spirit...before one cut a tree, mined a mountain or dammed a brook, it was important to placate the spirit in charge of that particular situation, and to keep it placated. "

See also L.Tribe, "Ways Not To Think About Plastic Trees: New Foundations For Environmental Law" (1974) 83 The Yale Law Journal 1315 at 1337:

"It was the tradition of immanence which was exemplified by the pantheistic belief that all objects and places in the natural world possessed guardian spirits demanding propitiation as security against unspeakable harm. "

That is not to say that earlier civilizations were not guilty of acts of environmental devastation - see, for example, Tucker, "Is Nature Too Good For Us?" Harper 's magazine (March, 1982) 27 at 33, referring to Greek hillsides stripped of trees in Plato 's time, resulting in erosion; extermination of many species of wild animals by ancient Egyptians and Assyrians; deforestation in Asia by Buddhist monks building temples.

¹² For example, see R.Kapashesit, M.Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill Law Journal 925 at 929-930:

"Aboriginal belief systems...include a lack of division between humans and the rest of the environment, a spiritual relationship with nature, concern about sustainability, attention to reciprocity and balance, and the idiom of respect and duty (rather than rights)...humans are seamlessly related to other animals and things ...there is never a sense of disconnectedness from the earth as its sacredness is lived consciously and completely at all times. "

"balance, holism, rhythm, harmony, flexibility, continuity, and dynamic, ongoing, vibratory form of stability ", in contrast to our values of "speed, efficiency, profit, and ongoing physical and economic expansion "¹³. Similar values are evident in the Haisla Indians in our case study, as they talk of "treating with the spirits of animals and fish", of a "sacred covenant between hunter and hunted ", of an attitude of "delicacy " toward the oolichan, and of a rigorously respectful attitude to the river itself, for example in ensuring that no offensive odours or substances be introduced for fear of offending the spirit of the fish they call 'kwexstwajaxwin ' (touchy oolichan)¹⁴. Imagine their consternation and horror when Europeans came to the valley and poured firstly raw human sewage and then industrial effluent into their river - it came as no surprise to

¹³ R.Ragsdale, "Law and Environment in Modern America and Among the Hopi Indians: A Comparison of Values " (1986) 10 Harvard Environmental Law Review 417 at 456.

Note, however, that one should not accept uncritically the romantic notion of North American Indians as model environmentalists, since their more gentle impact on the environment may have been more limited by technology than by ideology - see, for example, J. Callicott, *In Defence of the Land Ethic: Essays in Environmental Philosophy* (Albany: State University of New York Press, 1989) at 204-5, and at 194-5:

"Conservation of resources may have been, but probably was not, a consciously posited goal, neither a personal ideal nor a tribal policy ...The American Indian posture toward nature was, I suggest, neither ecological nor conservative in the modern scientific sense so much as it was moral or ethical. "

See also, C. Stone, "Should Trees Have Standing?-Toward Legal Rights for Natural Objects " (1972) 45 Southern California Law Review 450 at 494:

"...notwithstanding the vaunted 'harmony ' between the American Plains Indians and Nature, once they had equipped themselves with rifles their pursuit of the buffalo expanded to fill the technological potential. "

¹⁴ Personal communication with Kitimaat Band.

them when the oolichan responded by "making themselves inedible "¹⁵.

Judeo-Christian traditions, on the other hand, included a Creation story that placed God as the creator at the centre of the natural world with humans in his image and therefore inheritors of a physical world that was there to serve human purpose¹⁶. Humans were thus separate from nature, and shared God 's transcendence over it with science and technology providing powerful tools for that dominion¹⁷. However, there was still lingering respect for nature as God 's creation, and humanity 's transcendence was in some degree divinely inspired and thereby constrained¹⁸. But as we move further away

¹⁵ *Ibid.*

¹⁶ See, for example, *supra*, note 10 at 1204:

"Man named all the animals, thus establishing his dominance over them. God planned all of this explicitly for man 's benefit and rule: no item in the physical creation had purpose save to serve man 's purposes ".

¹⁷ *Ibid.*; see also *supra*, note 11 at 1333:

"Any society whose dominant consciousness posits the radical dichotomy between God and the world, between heaven and earth...is apt to regard natural and social phenomena as entirely appropriate objects of human manipulation and will.."

¹⁸ *Supra*, note 11 at 1334; see also, for example, S. Presser, "Some Realism About Orphism or The Critical Legal Studies Movement and the New Great Chain of Being: An English Legal Academic 's Guide to the Current State of American Law " (1984-5) 79 *NorthWestern University Law Review* 869 at 892:

" 'The Great Chain of Being ' is the way that scholars describe the world-view of the Elizabethans and the medieval period. According to this description, all life on earth is inextricably linked, in fine gradations, in a divinely-sanctioned hierarchical order, descending from God, through the angels, to man and to all the lesser species ...All of terrestrial life, according to this vision, is linked and governed by 'a divine plan in which harmony, order, and degree [are] the cardinal principles '. The duty of individual men and women in this scheme was to recognize the legitimacy of the existing hierarchies and to seek to work within them for the greater glory of the community and its God. *An individual was to work to benefit him- or herself only to the extent that the community or God could*

from religion that transcendence over nature becomes less religious and more secular, until it eventually becomes instrumental rationalism - the rational matching of ends and means, no longer tinged with "divine stewardship ", but rather humanity as grand manipulator rather than sacred observer¹⁹.

That progression of our world view - from intimate connection to nature to a divinely inspired dominion over nature, and finally to a wholly secular exploitation of nature to meet our self-defined needs - is a continuum of diminishing respect and reverence for the environment. There are effectively no constraints other than our own limited tools of exploitation - at least not until now, when the ultimate constraint now becomes clear with the realisation that the planet 's ability to absorb our impacts is finite, as are its resources.

The unconstrained use of the physical environment is realised in what Hardin has called the "tragedy of the commons "²⁰. As individual, self-concerned actors we can take far greater reward from, say, the convenience of driving a car and contributing to urban pollution than from the infinitesimal personal benefit to be derived from refraining from

thereby also benefit " (emphasis added).

¹⁹ L. Tribe, "Ways Not To Think About Plastic Trees: New Foundations For Environmental Law " (1974) 83 The Yale Law Journal 1315 at 1334 and 1338.

²⁰ G.Hardin, "The Tragedy of the Commons " (1968) 162 Science 1243 at 1245: "the rational man finds that his share of the costs of the wastes he discharges into the commons is less than the costs of purifying his wastes before releasing them. Since this is true for everyone, we are locked into a system of 'fouling our own nest ', so long as we behave only as independent, rational, free enterprisers. "

doing so, as that marginal benefit from cleaner air is spread over the entire population whereas the gain from driving accrues only to us. Thus, unless we feel constrained by altruistic concerns for the collective welfare, or for future generations, or unless the state chooses to constrain us, then we will drive and pollute.

The role of individual self interest, and the role of the state in constraining it, leads us into the realm of political philosophy, and for Western industrial democracies (and particularly North America), the ruling ideology is liberalism (The Big Picture).

3. Liberalism and the Environment

(1) Classical Liberalism

We in the industrialised Western countries live in liberal democracies - the values and normative assumptions of liberalism dominate our societies²¹. Their roots are located

²¹ See for example: T.Axworthy, "Liberalism and Equality " in S.Martin, K.Mahoney, eds., *Equality and Judicial Neutrality* (Calgary: Carswell, 1987) at 43; M.Simon, "Introduction to Hegel and Legal Theory Symposium " (1989) 10 *Cardozo Law Review* 847; R.Stewart, "Regulations in a Liberal State: The Role of Non-commodity Values " (1983) 92 *Yale Law Journal* 1537; I.MacNeil, "Bureaucracy, Liberalism and Community - American Style " (1984-5) 79 *NorthWestern University Law Review* 900.

See also R.Unger, *Knowledge and Politics* (New York: The Free Press, 1975) at 8:

"...though liberal theory is only an aspect of modern philosophy, it is an aspect distinguished by both the degree of its influence and the insight it conveys into

in the classical liberalism of the eighteenth and nineteenth centuries, which by no coincidence paralleled Britain's emergence as a commercial and manufacturing power²². Broadly speaking, the liberal state has since evolved through a liberal democratic form in the nineteenth and twentieth centuries, a liberal welfare form (especially since the 1930's) and most recently through a neo-liberal form (in the 1980's)²³.

As an ordering principle for social and political life liberalism focusses on the individual citizen²⁴. If individuals are free, the theory goes, to organize and conduct their lives according to their own personal visions of the good life, their own values, their own road to optimum (maximum) utility, then society as a whole will achieve the "good".

the form of social life with which it was associated. *All other tendencies have defined themselves by contrast to it; so it offers the vantage point from which to grasp the entire condition of modern thought*" (emphasis added);

and at 118:

"Liberalism ...is also a type of consciousness that represents and prescribes a kind of social existence ...it overruns the boundaries of the realm of ideas and *lays roots in an entire form of culture and social organization ...it is a deep structure of thought*" (emphasis added).

²² S.Hall, "The State in Question" in G.McLennan, D.Held, eds., *The Idea of the Modern State* (Philadelphia: Open University Press, 1984) at 3.

²³ *Ibid.* at 4-6.

²⁴ For example, the following quote from a judgement of Deschenes C.J.S.C. in Alliance des Professeurs de Montreal v. A.G. Quebec (1983) 140 D.L.R. (3rd) (Que.S.C.) at 64-5:

"...if a group numbers one hundred persons, the one hundredth has as much right to benefit from all the privileges of a citizen as the other ninety nine. The alleged restriction of a collective right which would deprive the one hundredth member of the group of the rights guaranteed by the Charter constitutes, for this one hundredth member, a real denial of his rights. He cannot simply be counted as an accidental loss in collective operation: our concept of human beings does not accomodate such a theory".

Aggregate welfare is only the sum of individual welfares, and can be maximised only by allowing, and in fact nurturing, the individual pursuit of personal welfare. The individual is therefore the unit of supreme social welfare²⁵.

It follows that the role of the state should not be intrusive except to the extent that it can influence social and political life such as to optimise the individual 's pursuit of self-defined personal destiny. It should be neutral as to conceptions of the good - to be otherwise would be to pre-judge and thereby constrain individual striving and ultimately to sub-optimize the collective good. The state may legitimately provide certain public goods, such as defence, health care and education, and may nurture the individual pursuit of self-interest by securing certain conditions for it - a political system and an economic system, both underwritten by liberal law.

In liberal politics citizens hold certain political rights which are underwritten by the state, for example in the American Constitution and the Canadian Charter of Rights and Freedoms. Those rights include for example freedom of speech, freedom of association, freedom from certain kinds of discrimination, freedom to vote and the right to "fundamental justice " in legal relations with the state. Although there are some references to group rights (for example in language), the rights guaranteed are overwhelmingly individual rights aimed at securing the individual 's ability to participate

²⁵ T.Axworthy, "Liberalism and Equality " in S.Martin, K.Mahoney, ed., *Equality and Judicial Neutrality* (Calgary: Carswell, 1987) 43 at 44.

in the quest for personal fulfilment and thus to make his or her personal contribution to the collective good. The role of the state is therefore in theory significantly constrained. The right of citizens to vote, and therefore in theory to choose a government and define the characteristics of their preferred state, conveys legitimacy on the state. The qualifier "in theory " is used because the right (and indeed each of the rights) is formal but not substantive. (A rights analysis will be included below in the discussion of environmental rights in non-human subjects).

Liberal economics finds its form in capitalism. The role of the economy is to produce those goods and services which individuals, exercising choice as free agents, decide what they want in pursuit of their self-interest. With individual citizens exercising their free agency in personal consumption choices, and with producers responding to (though in reality also shaping) those choices, we have a market economy. Individuals will be aiming to maximise personal consumption, based on their personal vision of the good, while producers will be vying to satisfy those consumption demands in order to maximise their own utility (profit). It is a system of private ordering, based as we shall see later on liberal legalism, and characterised by criteria of allocative efficiency (producers who best satisfy consumer needs will prosper), wealth-maximisation and growth (consumers and producers will always be striving to satisfy more of their desires, real or imagined). Note that growth is an important element - the focus is on production rather than distribution, and an ever-growing economic pie arguably serves to distract citizen from (inevitable) inequalities in individual shares in the pie. The focus on growth is not one

shared by all societies²⁶, but it is one with important implications for environmental values, since they have major implications both for assumptions of continuing growth (in a world which is limited in resources and its ability to absorb impacts) and for the existing distribution of resources and wealth²⁷.

Note that those criteria of efficiency and growth have the superficial appearance of neutrality - of being value free - which as we have seen is important to the legitimacy of the state in the liberal model and may therefore justify a state role. Note also that such a model inevitably nurtures economic actors who have been characterised in terms of "acquisitive/possessive individualism"²⁸ and "hedonistic atomism"²⁹. (We should note, however, that self-interest is in significant part not self-defined. Business and state

²⁶ See, for example, *supra*, note 13 at 442, citing the alternative stable state society of the Arizona Hopi Indians.

²⁷ See, for example, E.Elliott, "Foreword: A New Style of Economic Thinking in Environmental Law" (1991) 26 Wake Forest Law Review 1 at 5:

"World wide environmental law may be the most ambitious attempt ever by human beings to use law to shift resources and alter behaviour".

See also A.Babich, "Understanding the New Era in Environmental Law" (1990) 41 South Carolina Law Review 733 at 733 (footnote 1, quoting W.Ruckelshause, former Administrator of the U.S. Environmental Protection Agency):

"...a modification is required in society comparable in scale to only two other changes: the agricultural revolution of the late Neolithic period and the Industrial Revolution of the past two centuries".

²⁸ S.Presser, "Some Realism about Ophism, or The Critical Legal Studies Movement and The New Great Chain of Being: An English Legal Academic 's Guide to the Current State of American Law" (1984-85) 79 NorthWestern University Law Review 869 at 892,899.

²⁹ I.Macneill, "Bureaucracy, Liberalism and Community - American Style" (1984-85) 79 NorthWestern University Law Review 900 at 919.

interests play a substantial role in shaping our consumption preferences and social choices, increasingly so as media become ever more important in shaping social consciousness). Our social relations are dominated by commodity exchange, as employees and consumers. The implications for environmental values, in the absence of a communal/collectivist ethic, are disquieting. We come to see the natural world through a distorting lens coloured by commodity exchange - as a source of jobs and wealth, in terms of what it can do for us, what we can get out of it. However, in the language of economists, environmental degradations are 'externalities ' which, by definition, are not factored into commodity pricing (and therefore into consumption decisions), and therefore effectively do not exist, or at least do not have economic value - they are "free " goods. The roots of that environmental perspective have to do with liberal law 's focus on private property rights.

The organizing principle of liberalism, then, is individualism. Individuals become, in their roles as political and economic actors, abstract "bundles of rights ". Those rights, it is claimed, will place them fairly at the starting line in the race to achieve personal visions of the good life. As we shall see, law creates and underwrites an economic system of private ordering within which to run the race. There is little or no role for the other polarity - collectivism. Just as we have seen humans separated within their own world view from their natural environment, moving from a relationship of intimacy to "otherness ", so do we see individuals separated from each other, even alienated, in their political and economic relations. As we shall see, if individualism does not tend to sit

well with collectivism and community in economic relations, nor is it likely to sit well with an ethic of communal responsibility toward such public commons as a clean environment - recall Hardin 's tragedy of the commons.

This brief sketch of classical liberalism is of course something of a caricature, but if liberalism 's contemporary form is somewhat modified, it is still imbued with classical liberal ideology - whether we call them ideals, fantasies, caricatures or something else, the idealized form of any kind of personal or group-held belief can continue to inform our behaviour at levels too deep for us even to be aware. They become reified (the abstract made real in the way we think of our "other relations ") and hegemonic (a dominating cultural norm). Whether they literally work (in the sense of being given substantive as well as just formal content) isn 't the point here - the point is whether or not we still believe in them, whether or not they continue to permeate our consciousness and inform our behaviour.

Bearing that in mind we must take a brief look at the reality of contemporary liberalism in Western industrial society, again with the emphasis on North America.

(2) Modern Liberalism

We do not live in societies comprised wholly of atomised, acquisitive individuals relentlessly and exclusively pursuing their self-interest. Nor are we governed by a neutral,

"hands-off " state.

There has been a shift away from 'utopian ' capitalism, which emphasises allocative efficiency and wealth maximisation, and towards 'libertarian ' capitalism, which emphasises the rights and freedoms implicit in capitalism/liberalism - that is to say, away from 'utilitarian ' liberalism, with its emphasis on maximising collective welfare/utility (the 'good ' in classical liberalism) and toward 'deontological ' (or Kantian) liberalism, emphasising qualitative virtues such as justice, fairness and equality, rather than quantitative measures of outcome³⁰. In short, a bias toward the right over the good, toward process rather than product, away from efficiency and towards equity. An example is the Canadian Charter of Rights and Freedoms, a liberal document which enshrines (formally if not substantively) various individual rights and freedoms, arguably at the cost of "efficiency " (for example in the criminal justice system).

As well, North American liberalism has experienced a wider identification of self *with* others, an extended identity which includes community and not just a separation of self *from* others, sometimes taking symbolically important form in social regulation³¹. We

³⁰ M.Sagoff, *The Economy of the Earth: Philosophy, Law and the Environment* " (New York: Cambridge University Press, 1988) at 18.

³¹ S. Salter, "Inherent Biases in Liberal Thought " in S. Martin, K. Mahoney, ed., *Equality and Judicial Neutrality* (Calgary: Carswell, 1987) 50 at 50; see also, for example, supra note 30 at 16-17:

"...social regulation expresses what we believe, what we are, what we stand for as a nation, not simply what we wish to buy as individuals. Social regulation

are all complex mixtures of dualities: self-interested individual to the exclusion of others, but also communally-oriented citizen identifying with others, for example as self-interested consumer/polluter, but also communally-interested citizen/environmental planner. We do band together as groups bound by associational values, and those groups can become powerful determinants of the public welfare.

Thus an important aspect of contemporary liberalism, especially American liberalism has been the shift toward a more pluralist form, or what has been called "interest group liberalism"³². Similarly, Canadian liberalism has been characterised by pressures from economic interest groups³³. That shift might be interpreted as a negative one, reducing government's role to that of an unprincipled mediator between bargaining interest groups³⁴ - certainly it is easy to interpret the standard setting process for pulp mill

reflects public values we choose collectively, and these may conflict with wants and interests we pursue individually. "

³² See, for example, T. Lowi, *The End of Liberalism: The Second Republic of the United States* (2nd ed.) (New York: Norton, 1979) at 22:

"...pluralism [was] the intellectual core of the new liberalism which would eventually replace capitalism as the public philosophy ... the new public philosophy, interest-group liberalism, is the amalgam of capitalism, statism, and pluralism. "

³³ L.Panitch, "The Role and Nature of the Canadian State " in J.Harp, J.Hofley, eds., *Structural Inequality in Canada* (Scarborough: Prentice-Hall, 1980) at 15.

³⁴ *Supra*, note 32 at 36:

"...the zeal of pluralism for the group and its belief in a natural harmony of group competition tended to break down the very ethic of government by reducing the essential conception of government to nothing more than another set of mere interest groups ",

effluent as unprincipled bargaining, and similarly the Settlement Agreement between Alcan and the two levels of government. On the other hand, the shift to pluralism might be interpreted as a positive one, with previously unrepresented interests finding voice in the political process (broadly defined) - for example, it could be argued that environmental groups (such as those opposed to commercial forestry interests in Western Canada) have had far greater impact in this pluralist model through political lobbying and media manipulation than through democratic processes (since their political agenda was and is on the radical fringe of mainstream politics). Similarly in the case study, there was a loud and (initially) effective outcry from a variety of interest groups (community groups, environmentalists, Indian bands, unions) in response to the Kemano Completion Project in the 1980 's, unlike the original Kemano project of the 1950 's. Note, however, that many collectivities are still centred on the economic self-interest of individual members (unions, for example), and also that the state is still autonomous and transcendent, with interest groups simply substituted for individuals - arguably just a more sophisticated form of liberalism, more in line with social reality, and not the kind of public interest values which underly environmental concerns³⁵.

and (at 56) in the extreme

"...the policies of interest-group liberalism are end-oriented but ultimately self-defeating. Few standards of implementation, if any, accompany delegations of power. The requirement of standards has been replaced by the requirement of contingency. "

³⁵ For example, W. Stanbury, ed., *Studies on Regulation in Canada* (Toronto: Butterworth, 1978) at 64 (quoting an American administrative law judge):

"in ... approximately 1000 cases ... *the 'pubic interest' never meant anything of interest to me beyond the materially related interests of the parties that were before me* " (emphasis added),

If the roles of liberal actors are not limited to self-serving individualism, nor is the role of the liberal state limited to mere political and economic engineering to ensure a level track for the race of individuals. Rather, the role of the state goes beyond the provision of public goods and the protection of individual entitlements (political, economic and legal rights). It promotes production through macro-economic policy favouring allocative efficiency and wealth-maximisation (even supplying many "market " goods where it is perceived to be in the public (i.e.collectivist) interest to do so, utilising state corporations in such fields as transportation and energy), and it nurtures non-commodity values (for example in actively re-distributing individual wealth through taxation and welfare state policies³⁶).

Finally, in the context of North American liberalism, it has been argued that the American (and by implication, for the same reasons, the Canadian) experience is unique in that individual rights and freedoms were never won in any revolutionary struggle against feudal traditions, but rather sprang full-grown as it were from the early political traditions of the New World³⁷. As a result, the "reality of atomistic social freedom ...

and at 71 (quoting a past member of the U.S. Federal Communications Commission):
 "...in terms of the legal and economic talent arrayed against it ...*the public interest is scarcely represented at all. The battle is not just uneven; it is seldom even drawn* " (emphasis added).

³⁶ For example, some 48% of the U.S. federal budget is devoted to direct income transfers: P.Schuk, "Regulation, Non-Market Values, and the Administrative State: A Comment on Professor Stewart " (1983) 92 Yale Law Journal 1592 at 1605.

³⁷ For example, L. Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt, Brace, 1955) at 5-6:

is instinctive to the American mind ³⁸, with an intensity not found in (say) Western Europe. In that sense, liberal ideals (or caricatures) of rugged individualism perhaps hold greater sway in North America. Combine that with the youth and geography of North America and it is not surprising that the metaphor of the individual as environmental cowboy riding rampant on a limitless frontier is slow in giving ground to that of environmental astronaut, pondering the frailties and limitations of spaceship Earth.

Thus North Americans may simply embrace classical liberal notions of individualism vis a vis each other and the relation of each to the state, whilst in fact living in a society notable for an intrusive state and a plethora of associational values³⁹. Similarly in the

"One of the central characteristics of a nonfeudal society is that it lacks a genuine revolutionary tradition ... *it has within it, as it were, a kind of self-completing mechanism, which ensures the universality of the liberal idea* " (emphasis added);

and at 22:

"...how could American liberalism flourish as it did without a frontier terrain free of Old World feudal burdens? ";

and at 306:

"It is the absence of the whole experience of social revolution which is at the heart of the whole American dilemma ".

³⁸ *Ibid.* at 62.

³⁹ See, for example, *Ibid.* at 263:

"..*liberal convictions [are] held in the face of non-liberal innovations*, best illustrated by the rugged individualism of the American farmer who is supported on all sides by the state ...It is what lies at the bottom of the belief many Americans even now have that America is a 'free enterprise ' country..." (emphasis added).

Another example appears in P. Brietzke, "Review: A Law and Economics Praxis " (1990) 25 Valparaiso University Law Review 51 at 57, referring to the City of Indianapolis:

" While City leaders regularly voice such 'down home ' values as hard work, rugged individualism, entrepreneurship, free enterprise, and private property, they

economic sphere, to take an example from the case study, Alcan has grown to be a huge multi-national company in the allegedly dog-eat-dog world of free enterprise, although in reality their success as a low-cost aluminum producer is driven by their ownership of cheap hydro-electric power, the result of grants of public resources from the governments of Quebec and British Columbia. The point is that liberalism as an ideology may still inform values and beliefs notwithstanding their contradiction in social reality - that is what reification means, and we shall see that its effects on environmental values are profound.

(3) Implications for Environmental Values

In the analysis so far I have tried to illuminate some of the influences which determine how we treat with our 'external ' environment. It is external to us in a profound sense of 'otherness ', traceable on a continuum of alienation through pagan animism, religious transcendence and secular transcendence (instrumental rationality). There are costs to that, and it is becomingly increasingly clear that a dangerously degraded environment is one such cost - liberal economics in fact literally treats that cost as an 'externality ', not to be factored into pricing and consumption decision. It is tempting to remain within the narrow paradigm of liberal economics and see that as a 'market failure ', lending itself

actually practice a 'state capitalism ' or an 'urban socialism ' of commercial real estate owned or subsidized by government and administered by central planning boards. "

to a market solution. But we must look deeper than that, at the reasons why liberalism treats environmental degradation as an 'externality '. Our ability to shape an effective collective response to environmental problems will depend on those social and political constructs within which we order our lives, including the way we live out our relations with nature. Those constructs are shaped by liberalism.

We have seen how classical liberalism posits a neutral state which underwrites certain political rights and freedoms which will allow us as individuals to pursue our own personal visions of the good - only by doing so will the public good be realised. The ideological thrust is focussed on the individual, and the community takes form only as an aggregation of individuals. It is within that paradigm that Hardin 's tragedy of the commons is played out, and environmental values, reflecting as they do collectivist interests in this and future generations, are inevitable casualties. It is difficult to say how far the reality of interest-group liberalism modifies those dynamics. If environmental groups have greater access to the political process, I suggest (and will show below) that nonetheless liberal ideology continues to permeate our environmental consciousness through liberal law. I will show that law creates and shapes liberal ideology/psychology, and continues to inform social and economic behaviour which is incompatible with, in fact destructive of, communal environmental values.

4. The Role of Law

Liberal legal relations are characterized by formal rationality and calculability, individual freedom, private property rights, freedom of contract relations, and legal universalism⁴⁰. It is through these filters that environmental values will be perceived if and when they reach the legal-political sphere.

(1) Liberal Politics

We have seen that in liberal theory individuals in the liberal state must have the freedom to pursue their own destinies, unconstrained by state privileging of any particular conceptions of the good. In order to guarantee those freedoms from state interference, certain rights and freedoms may be enshrined in a constitution, such as the Canadian Charter of Rights and Freedoms and the American constitution. Note that the protection stops there - that is, public relationships between individuals and the state are protected, private relations between individuals are not - the public/private split. For example, the state declares that all its citizens are equal under the law and are not to be discriminated against on a variety of grounds - at least not discriminated against by the state. However, private actors are free to discriminate, and do so, as they choose in their private quest for the good. The substantive inequalities of social reality are not

⁴⁰ R.Weitzer, "Law and Legal Ideology: Contributions to the Genesis and Reproduction of Capitalism " (1980) 24 Berkeley Journal of Sociology 137.

addressed by the merely formal equalities of constitutions. Thus, American blacks achieved remarkable gains in the 1960 's in terms of formal equality (civil rights), but in the real world of private and systemic discrimination, access to private goods and services, and so on (social rights) they have in fact made few gains. Another example would be North American women.

Such hollow victories highlight the "double-edged sword" nature of rights - having granted formal equality, the state may then adopt a hands-off attitude to substantive equality on the grounds that private actors, and they alone, are legitimately entitled to work out rights relations in their private lives. Of course having observed the state doing so in the public realm, private actors may feel there is no pressure to go further. That is all very much within the liberal paradigm. Thus, the state will underwrite negative political rights (it will refrain from infringing upon them) but not positive rights (it will not actively translate formal rights into social reality).

Formal legal rights are a double-edged sword in another sense. On the one hand they are powerful symbols of what is and is not O.K. in society. If we accept the state as being the formal embodiment of community, then a ringing endorsement from the state of certain individual rights and freedoms must surely represent a powerful symbol of who we are and what we believe in. On the other hand, there is a risk that such rights will not only be irrelevant in our private daily lives, but may also actually render less urgent the need to live them out. Returning to the example of American blacks, there is a

danger that non-black Americans may falsely come to see blacks as lining up at the same starting line as everyone else (because of formal political equality) in the race to actualise their personal good, and yet still finishing "behind " (because of substantive inequality), thus confirming some kind of intrinsic "inferiority ", about which nothing can or should be done because political and legal rights have already been granted. So it is that liberal values are reified - formally endorsed by the state, granted universally in the name of individual freedom, even practiced in some limited way by some organs of the state (such as the courts), and invoked to defuse the social reality which gives the lie to them. Thus the floor of formal rights may become the ceiling of substantive rights.

That rights critique must be applied to any consideration of environmental rights, two forms of which have been suggested. One possibility is the inclusion of a right in all citizens to a clean/liveable/healthful environment, perhaps as part of a social charter. The potential problems are enormous, and are characteristic of the environmental problem itself - for example, the evidentiary problem of defining just what a "healthy environment " is. If some environmental degradation is inevitable from our mere presence, then how much is too much? That is not to say that the problems are insoluble - for example, as we have already seen, a reverse onus of proof requiring that polluters and resource developers demonstrate that their activities would *not* cause environmental harm would go a long way toward dealing with them, or at least locate the abundance of caution (tolerance of false negatives) in its proper (development) domain. Thus, development interests would have to demonstrate that their activities would (or do) not

detract from citizen 's rights to a healthful environment, and no doubt some desirable and environmentally sound activities might fail to meet the test - unfortunate, but no important values come free. In the case study Alcan failed, despite their best efforts, to show citizens that the Kemano Completion Project was environmentally sound, and failed even to convince Fisheries officials that proposed flow regimes in the Nechako river were adequate. Alcan may or may not have been right, but the tragedy is that development interests were allowed to prevail, leaving the tolerance of false negatives in the environment camp, and not incidentally removing the legitimacy for which Alcan once strove and ultimately lost.

A second environmental-rights possibility would be the granting of rights to non-human subjects, such as rivers, mountains, lakes and trees. For example, such rights would permit intervention by the Nechako river salmon threatened by the Alcan dam, or by the Kitimat river oolichan tainted by the pulp mill. (The oolichan example is a more doubtful action given that the tainting apparently renders their flesh inedible though it may not injure them - arguably not a bad thing for the oolichan! On the other hand, a lawsuit could be brought on behalf of the river itself, the primary victim of industrial discharges). Though the idea sounds radical, even bizarre, it has been given serious treatment by respected academics⁴¹and a Justice of the U.S. Supreme Court⁴². The

⁴¹ See, for example, *supra*, note 11; see also C.Stone, "Should Trees Have Standing? Toward Legal Rights for Natural Objects " (1972) 45 Southern California Law Review 450.

⁴² Justice Douglas dissent in Sierra Club v. Morton 405 U.S. 727 (1972).

concept sounds like a kind of legally constructed return to pagan animism, in the hope that we will once again be joined in some kind of long lost symbiotic relationship with nature. It is rendered less bizarre when we consider how naturally we accept the idea of rights in all sorts of other non-human entities, most notably corporations. Although it is surely significant that they, unlike nature, are creations of our own human will for our own self-interested purposes, and indeed they are a key instrument of the development paradigm, there is at least ample precedent for such legal constructions. A major criticism of the "rights in nature " concept is that it is still very much an artificial human construct, imparting human relations to nature rather than importing nature 's relations to humans - still on the continuum of our domination of, and alienation from, the natural world⁴³. Similarly, there is little indication of any willingness to acknowledge rights in future generations to an undiminished environment (the issue of intergenerational equity)⁴⁴.

Both of these environmental rights options are subject to the critique that formal rights, restricted to the political realm, have historically tended to emasculate the real issue of

⁴³ See, for example, A.Hutchinson, "A Poetic Champion Composes: Unger (Not) on Ecology and Women " (1990) 40 University of Toronto Law Journal 271 at 291:

"even those traditionalists who have rebelled against ...economistic number-crunching have succumbed to the temptation to extend rights discourse to the environment. This is an imperialistic move that arises more from a concern for humanistic morality than from a concern for progress towards ecological soundness ".

⁴⁴ For example, the reluctance of courts to recognize rights in the human foetus might be interpreted as a symptom, although it may not be reasonable to remove that issue from its context of women 's rights in the abortion debate.

substantive rights, or social reality. Liberal politics tends to be just that - politics. Whether or not such rights would on balance serve a positive purpose in changing social consciousness, or a negative purpose in defusing critical debate and suffocating social action, is impossible to say. But there is a good deal of evidence that social realities do not track political ideals - recall the examples of American blacks and North American women.

Another criticism is that the rights approach still, inevitably in a liberal state, focusses on individuals and not on community. Environmental values suggest communal values, or collective self-regarding, in the context of present community but even more in respect of future community - not the individual here and now, but the community now and in the future; and not the community writ small in interest-group liberalism, but community writ large in widely shared values. (We have already seen how rights assigned to property owners are upheld over community interests, whilst the motivation for interest groups like unions, lobby groups and so on is usually the individual interests - commonly economic - of their individual members). I am suggesting that environmental values are in fundamental contradiction to liberal political values so deep-rooted that even in the unlikely event that environmental values were to be entrenched as constitutional rights, either in humans or in nature, or both, the "environmental " problem, like the "black " problem or the "women 's" problem or the "poor " problem, would persist and perhaps even worsen as the perceived urgency diminished.

What is that social reality which is so deep-rooted, and from what seeds does it grow? The answer lies in the economic relations which dominate social reality - the product of instrumental rationality unconstrained by religious transcendence or the immanence of pagan animism.

(2) Liberal Economics

The role of law is highly visible in giving form to, and in turn forming, liberal political values like equality rights, freedom of speech and of association, and so on. But our lives are actualised in the social realm, particularly in economic relations, where the role of law is both less visible and more potent.

Liberal individualism is acted out in the economic realm through capitalism - a system of private ordering and free enterprise. Just as we are free to vote, free to follow our choice of religion, free to think and believe what we want, so must we be free to enter into the economic relations we desire, and be protected in the enjoyment of the fruits of those relations. Although the state has a role - for example in correcting market failures and in regulating undesirable outcomes and egregious abuses - on the whole private actors are relatively free to work out their own destinies, free that is from the state, though not from each other.

Again, certain basic rights are enshrined in law, or more correctly are created by law. The common law defines and protects our right to possess and use those things which are "ours", to the exclusion of others (that is to say, of community)⁴⁵. Similarly it defines the nature of our interest - for example, our interest in land not only includes a right exercisable against all other persons to occupy, use and sell, but also to rent it out, grant easements over it, grant a profit a prendre over its fruits, and so on. Note that these are rights - there is no language of responsibility, accountability or stewardship, except so far as we impinge on the *property* rights of others. For example, a riparian property owner may not pollute a river, not because of any intrinsic value in the river itself, or out of any sense of stewardship or responsibility to future generations of river users, or to nature itself, but because it is an infringement on the *property* rights of downstream riparian owners⁴⁶. The common law historically restricts its remedies to other property owners (except, as we have seen, for narrow and difficult-to-achieve remedies in public nuisance and negligence), and not, for example, to the public or to

⁴⁵ See for example J.Searle, "Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine " (1990) 41 South Carolina Law Review 897 at 913:

"Historically, private property owners were buttressed by nineteenth century laissez faire ideals of ownership and enjoyed unfettered freedom within the domains of their parcels of property. Traditionally sacrosanct property rights, including the right to exclude, were aptly described as the right of the property 's 'commander ' 'to look any man in the eye and tell him to go to hell '. Private ownership also included the right to manage the property and direct the manner in which resources were to be used and exploited ".

⁴⁶ *Ibid.*:

"The development of the law of nuisance marked the beginning of curbs on the rights of owners: the property owner was free to do whatever he wished, so long as neighbouring *owners* were not disturbed " (emphasis added).

concerned citizens who might treasure the river in itself. The river, in other words, is a commons within which no enforceable rights reside - they can only reside in humans, and only particular humans at that, that is those who own property, and at that it must be waterfront property! Examples abound, ironically even in the context of what are often taken to be useful 'environmental' cases.

The classic English case of Pride of Derby v. British Celanese Ltd.⁴⁷ is a typical example of this ideology in action. A river was so badly polluted - by a factory, a municipal sewage treatment plant, and a state electricity authority - that all fish life and fish food had been extinguished. The defendant polluters were industrial and state enterprises, the plaintiffs were riparian owners (an English peer and a fishing club) on the river, and the action was successfully brought in Private Nuisance to enforce riparian property rights in fish. Despite the environmental devastation that had occurred, and notwithstanding the collective interests of the townspeople of Derby (and future generations) in a clean river inhabitable by fish, the action could only be brought by private individuals relying on private property rights. In fact Evershed M.R. was at pains to point this out⁴⁸. Similar earlier cases had established the sanctity of property rights

⁴⁷ [1953] 1 Ch. 149 (C.A.)

⁴⁸ *Ibid.* at 180:

"...this case cannot by any proper sense of language be called an action obliquely directed to commanding a local authority to perform a *public duty* ... [the plaintiffs] are not ratepayers of Derby who complain of the insufficiency of the drainage of the city; their complaint is the converse, namely, that this city is so drained that their *property* outside it is damaged" (emphasis added).

in the face of community interests, sometimes in the strongest language⁴⁹.

A Canadian example of private property rights trumping community values, again ironically in the context of what appears to be an 'environmental' action, can be seen in the case of Gauthier v. Naneff⁵⁰. A club, together with the town of Sudbury, planned a speed-boat regatta on a local lake in aid of charity. Riparian owners of lakefront property successfully sued for an injunction on the grounds of nuisance, in particular for the reasonable apprehension of diminished water quality. The financial implications for the defendants were held to be irrelevant, as was the degree of impairment of the right⁵¹. Because of the outcome, and because of a reference by the court to the

⁴⁹ See, for example, Attorney General v. Birmingham (1858) 4 K & J 528 (Ch.), 70 E.R. 220:

"...in the case of an individual claiming certain private rights, and seeking to have those rights protected against an infraction of the law, *the question is simply whether he has those rights...its a matter of almost absolute indifference whether the decision will affect a population of 250,000, or a single individual carrying on a manufactory for his own benefit...I am not sitting here as a committee for public safety, armed with power to prevent what, it is said, will be a great injury not to Birmingham only but to the whole of England...the question whether the town of Birmingham is concerned, or whether...the defendants are carrying on these operations for their own profit, is one which is entirely beside the purpose to argue in this court* " (emphasis added).

⁵⁰ [1971] 1 O.R. 97, 14 D.L.R. (3rd) 513 (H.C.) [cited to D.L.R.].

⁵¹ *Ibid.* at 519:

"It is trite law that economic necessities of the defendants are irrelevant...*the most honourable of intentions alone at no time can justify the expropriation of common law rights of riparian owners...it must be emphasised that the significance of such impairment is not a factor in view of her rights as a riparian proprietor* " (emphasis added).

relevance of present concerns for pollution⁵², the case is often referred to as a favourable precedent for the use of common law to protect environmental values⁵³. It is nothing of the sort - like the earlier English cases it is in reality a ringing endorsement of private property rights at the expense of the public interest, the same public interest which is at the heart of genuine environmental values⁵⁴. Such a claim might have more credibility if the action had succeeded (or even been brought) in public nuisance, on the grounds of public concerns for environmental values, but who other than property

⁵² *Ibid.* at 517:

"I deem it appropriate to interpret the word 'unreasonable' in the light of present day knowledge of and concern for pollution problems, at this moment in time, as they apply to the particular circumstances of the water supply of Lake Ramsay and the varied demands made thereon".

⁵³ See, for example, P.S.Elder, "Environmental Protection Through the Common Law" (1973) 12 *Western Ontario Law Review* 107 at 170:

"For policy reasons, environmentalists heartily approve ...[because] the judge showed an awareness of the public concern for pollution problems, and banning motor boat races has symbolic significance far beyond the possibility of gas and oil slicks...it is to be hoped that the case will be followed in future litigation".

See also J.McLaren, "The Common Law Nuisance Actions and the Environmental Battle -Well-Tempered Swords or Broken Reeds?" (1972) 10 *Osgoode Hall Law Journal* 505 at 531.

⁵⁴ *Supra*, note 50 at 519:

"It is unfortunate that in the circumstances of this case the rights of a riparian land proprietor come into conflict with the laudable objectives of a charitable pursuit formulated and prosecuted with sincerity by the defendants...Nonetheless the most honourable of intentions alone at no time can justify the expropriation of common law rights of riparian owners".

See also, for example, *Stephens v. Village of Richmond Hill* [1955] O.R. 806, [1955] 4 D.L.R. 572. Affirmed with a variation as to damages [1956] O.R. 88, 1 D.L.R. (2nd) 569 (C.A.) [cited to O.R.] at 813:

"Neither those who govern our affairs, their appointed advisors, nor those retained to build great works for society's benefit, may act so as to abrogate the slightest right of the individual, save within the law".

owners could have attained standing? - and of course that is the point. Such cases may indirectly serve environmental values, and it would be interesting to apply the ratio of Gauthier to the case study in respect of the pulp mill pollution, or of Pride of Derby in respect of the original pollution by raw municipal sewage, but to pretend that they hold out some hope for common law solutions to the environmental problem is ludicrous - they are an affirmation of the problem itself, of liberal law confirming the sanctity of private ordering⁵⁵. There is no reason to think that individuals calculating their private advantages under a system of private ordering will somehow arrive collectively at an environmentally desirable result. Rather than applaud these cases for their trivial contribution to 'environmental' law, we should be recognise how eloquently they speak to the system of development law that rejects communal interest and spawns the environmental problem. They are in fact part of the curtain which conceals the true nature of 'environmental' law. Indeed, as if further evidence were needed, the state has sometimes intervened to overturn court rulings which made the mistake of going too far in using property rights to indirectly benefit the environment⁵⁶ - an example of the

⁵⁵ For example H. Street, *The Law of Torts* (4th ed.) (London: Butterworths, 1968) at 229:

"a sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter, *but because it prevents them taking their ease in their gardens*" (emphasis added).

⁵⁶ *Supra*, note 47 at 162:

"...if a court becomes overly enthusiastic about protecting the environment, it would seem pretty clear that judicial extremism will quickly be corrected by legislation. Ontario at least has proved extremely solicitous of polluters caught by the strictures of the common law...".

hegemony of development law.

Thus, development law sits squarely and securely, indeed is rooted, in this system of private ordering through common law private property rights. However, that is only a first step - the next step is to underwrite economic relations *between* private actors through the law of contract. Courts will go to great lengths to enforce any contract which has at least a semblance of being the product of private relations freely entered into - again drawing the line at egregious abuses, but making that line difficult to reach by, for example, not enquiring into the adequacy of consideration. Courts will enforce universal rules of freedom of contract without looking closely at how the parties are really situated. Thus, although the state will reach down to regulate private *economic* relations, once again it stops at formal rules and will not require substantive justice. Universalism permits (requires) the state to treat individual economic actors in the game of commodity exchange as formal equals, just as it does for political rights⁵⁷. Therefore universalism provides the rationale for the state not looking behind the legal facade to the inequalities of real economic relations - inequality need not be addressed because it is assumed not to exist. Note that such rules serve to protect only parties to a contract, and not adversely affected outsiders. The criterion is efficiency (presumed to be the outcome of unhindered market transactions between parties with direct economic

⁵⁷ In fact it has been argued that the mask of legal universalism, which conceals social inequalities in weighing political rights, actually derives *from* the inequalities of commodity exchange which capitalism conceals - see for example S.Gavignan, "Law, Gender and Ideology " in A.Bayefsky, ed., *Legal Theory Meets Legal Practice* (Edmonton: Academic Printing and Publishing, 1988) 283 at 289 (quoting Pashukanis).

interests) rather than equity - the focus is obviously on the narrow economic expectations of the parties rather than on broader communal consequences (including, of course, environment).

Thus, liberal economics works through private law to protect those things which we use to attain our ends (property law), and to underwrite our bargaining as we pursue them (contract law). The role of the state, defined here to include the courts, is much more intrusive than it is in the political realm. Here the state *will* reach down into the private sphere to regulate, if not equity, then at least efficiency. These universal rules of property and commodity exchange are not confined to economic relations between the state and the private sector, they are also underwritten by the state *within* the private sector. In that sense development law is entrenched and pervasive in a way to which the law of political rights (victims of the public-private split) can only aspire⁵⁸. It is not that

⁵⁸ See for example B.Mensch, "Freedom of Contract as Ideology" in J.Swan, B.Reiter, eds., *Contracts: Cases, Notes and Materials* (4th. edit.) (Toronto: Emond Montgomery, 1991) 606 at 606-7:

"Since ownership is a function of legal entitlement, every bargain ...is a function of the legal order - including legal decisions about whether or to what extent bargained-for advantages should be protected as rights. It is therefore wrong to dissociate private bargaining from legal decision-making: The results of the former are a function of the latter. This conclusion *dissolves the theoretical distinctions between public and private spheres...the assumption that the state was not implicated in the outcomes of free market bargaining was never true...the problem of contradiction undercuts the conclusion that legal doctrine mirrored reality and progressively served its needs. The legal myth was too obviously only an ideological myth. If the free contract ideal seemed to accurately reflect life under capitalism, that is surely in large part attributable to the power of the ideology, rather than to the accuracy of the reflected image*" (emphasis added).

the state will assert itself in, say, taking private property for itself (on the contrary it is constitutionally forbidden to do so without just compensation), or re-writing private contracts (in fact courts are notoriously loathe to do so); rather it will force private actors to play the development game in the interests of liberal economics (capitalism) irrespective of individual outcomes (equity). For example, without regard to the fairness of the outcome (equity), or to the respective bargaining power of the parties, courts will enforce contracts that meet at least certain minimum universal criteria - for example, offer and acceptance, some minimal level of agreement on contract terms, the presence (though not adequacy) of consideration, absence of fraud or blatant coercion or duress (though mere 'commercial pressure' is, significantly, not sufficient to qualify as duress⁵⁹), and so on. The state will even, at least in theory, intervene to curb anti-competitive practices between private actors in the interests of ensuring fair starting positions in the economic race. Recall that it will not force private actors to play the liberal political game - they are free for example to discriminate as they wish, to use any and all systemic advantages of race, sex, inheritance, and so on, thus making a mockery of fair starting positions in the race for the good. Private economic actors, however, are less free from state enforcement of liberal economic rules⁶⁰. Surely that is testament

⁵⁹ See, for example, G.Treitel, *The Law of Contract* " (8th. edit.) (London: Stevens, 1991) at 364.

⁶⁰ See, for example, I.Macneil, "Whither Contracts " in J.Swan, B.Reiter, *Contracts: Cases, Notes and Materials* (4th. edit.) (Toronto: Emond Montgomery, 1991) 863 at 868: "...market goals themselves constitute social control and manipulation ... the contracts of its citizens are far too valuable and important in a market society for the society to refrain from using them affirmatively for its own purposes. "

to the commitment to development law, and what clearer expression could the state give of its belief in the proposition that the aggregate collective good arises in some organic way out of the private arrangements of individual *economic* actors (acquisitive individuals). Of course there is still a curtain of deception even in liberal economic relations, since those minimal rules which the state will enforce are not sufficient to provide meaningful content to 'free enterprise' - just as in private relations, business interests will vary dramatically in their ability to compete successfully, there being obvious advantages in size, political influence, access to public goods, and so on. But it is interesting that there are ground rules and enforcement in some degree, whereas no matter how egregiously you discriminate against me in my social relations I have no recourse. Clearly the role of the state is not neutral in exchange relations, but rather is part of an ideology in which development law is central.

Note that only those property (or services) which are privately owned - that is, which give rise to recognisable, privately assertable legal rights - are within the law's domain; those not so privileged are not. The commons - air, water, trees, minerals, those parts of the "natural" world not yet the subject of private rights - are excluded from the protections of any such regime except to the extent that private individual actors succeed in laying claim to them, for example through a tree farm licence, mineral claim or outright purchase. Such parts of the commons so removed become part of the private legal ordering of development law and therefore subject to the exigencies of market efficiency, but not principles of equity. Thus, when the water rights in the Nechako river

watershed were originally handed over to Alcan, they acquired a legal dimension in Alcan 's hands, including a legal right to exploit them. When they were a public resource there was no right to exploit them, that came with the creation of a private legal interest. Similarly at that point they acquired an economic value - the value of a future stream of economic returns from their exploitation as hydro-electric power. Until then, as a public resource, they had little or no value as they did not represent any legal or economic worth. Thus, "things " only acquire social value when invested with private legal rights. It is a classic example of law 's role - until something (or someone) has been made the subject of law it has no legal dimension and cannot be the subject of any assertable legal right. For all practical purposes it is without value, and we can therefore feel free to impinge on it, whether it be a river, the air, or the right to practice one 's chosen religion. In a very real sense it does not exist, to any practical purpose, unless and until law deems it to exist.

In the act of so deeming, law adds a new dimension of meaning, not just legal meaning but also meaning in the sense of how it is thought about, valued, respected and defended. Law reifies, and in doing so it defines the way in which we treat with each other and with nature. Legal reality translates into social reality. Thus, as we will see, development law *legitimises* development, but 'environmental ' law, because it is rooted in development law and not in environment, does not legitimise environment - rather, it serves to further legitimise development by seeming to address some of what have come to be seen as undesirable, not to say self-destructive, environmental effects.

We have seen how the state declares formal political rights but draws the line at the private sphere, and declares economic rights but goes further and intrudes into the private sphere (formally if not substantively), but it is interesting to see the response of the state when its role comes into conflict with private ordering. The evidence from the case study is that the liberal state is, predictably, unwilling to assert itself in those situations, and especially so in environmental matters where development law is still very much the dominant ideology.

For example, when the Canadian government was held by the courts to be subject, in a compulsory rather than discretionary way, to its own Environmental Assessment and Review Process (EARP) Guidelines, it found itself the subject of legal action by opposing interest groups suing for proper environmental assessments of, for example, dams⁶¹. As we saw earlier, one such dam was the controversial Alcan Kemano project from the case study - when challenged in the courts the federal government immediately passed a special Order-In-Council exempting the project from its own guidelines in order to allow Alcan to proceed.

Another more general example is the regulation of pulp mill effluent into British

⁶¹ See, for example, the Rafferty/Alameda dam project (Canadian Wildlife Federation v. Canada (Minister of the Environment), *supra*, note 105 of chapter III), and the Oldman River dam project (Friends of the Oldman River Society v. Canada (Minister of Transport), *supra*, note 108 of chapter III).

Columbia rivers⁶², whereby the regulatory regimes of both levels of government attempt to constrain the polluting behaviour of a major industry. As we have seen from the case study, emission standards were set in closed-door meetings with the polluters themselves⁶³, and in any case are simply not enforced⁶⁴. The major pieces of environmental legislation by both levels of government have been effectively meaningless in regulating one of the major polluters in British Columbia (or perhaps more importantly, one of the major economic players and employers in British Columbia). It is a clear example of environmental law as a weak version of development law, of law reifying development (by creating the illusion that it is controlled in its environmental impacts and therefore 'legitimate ') rather than environment. It is the kind of legislative regime which has resulted in the dismissal of environmental regulation as "costly legitimization projects"⁶⁵, "licences and permits to pollute [which] rationalize pollution ...licensing pollution to legitimize it"⁶⁶, and "...little more than symbolic reassurance to an apprehensive public ...they offer virtually nothing for the environment"⁶⁷.

⁶² Under the complementary regimes of the federal Fisheries Act and the provincial Waste Management Act.

⁶³ M. Rankin, P.Finkle, "The Enforcement of Environmental Law: Taking the Environment Seriously " (1983) 17 U.B.C. Law Review 35 at 39.

⁶⁴ M. Rankin, "Comment - Enforcing the Waste Management Act " (May, 1989) 14 West Coast Environmental Law Foundation Newsletter (No.3) at 16.

⁶⁵ C.Giagnocavo, H.Goldstein, "Law Reform or World Reform: The Problem of Environmental Rights " (1990) 35 McGill Law Journal 315 at 350.

⁶⁶ *Supra*, note 4 at 342.

⁶⁷ *Ibid.* at 340.

The thesis then is that the state goes to great lengths to nurture liberal economics, not as participant and beneficiary (though in a fiscal and political sense it is often those too) but as social planner, umpire and enforcer, in both the public and private realms. In liberal politics, on the other hand, the state stops short at formal rights in the public realm. That is not surprising, since to enforce substantive political rights would require the state to intrude in the private realm of substantive economic rights, or to promote equity at the expense of (traditionally defined) efficiency. In other words, without some measure of equity in the economic realm political rights have little content. That is the contradiction within liberalism - some (Marxists, for example) would call it a fatal contradiction which conceals something less pleasant behind liberal rhetoric.

It was not the purpose of this paper to undertake a general critique of the contradictions of liberalism, but rather to examine the implications of liberalism for environmental values and to critique the role of law - that is to answer the question "is liberalism hostile to environmental values...by what means does liberal law create and nurture a world view which is hostile to the environment? " It may be, however, that the liberal contradiction of 'efficiency versus equity' - whereby liberal economic values of allocative efficiency preclude (distributional) equity, but the absence of equity in turn precludes meaningful political rights - is part of the problem, since environmental values tend to follow equity rather than efficiency (at least as defined in terms of short term economic wealth maximisation). To put the question in terms of the public-private split, liberalism favours the private economic sphere (witness the earlier argument that liberal

law intrudes to enforce liberal economics but not liberal political rights) whereas environmental values tend to fall within the public sphere (communal rights and responsibilities, communal resources - the commons, intergenerational equity).

(3) Law as Ideology⁶⁸

The sanctity of private property was not a concept which sprang spontaneously from the felt needs of the English populace. For example, the doctrine of riparian rights developed in the nineteenth century in order to service industrial interests⁶⁹, not because of any mysterious, innate quality of property ownership - that came *after* the

⁶⁸ A good definition of 'ideology' can be found in *supra*, note 57 at 285:

"Ideologies may be defined as 'systems or currents of generally accepted ideas about society and its character, about rights and responsibilities, law, morality, religion and politics and numerous other matters [which] provide certainty and security, the basis of beliefs and guides for conduct'...it appears to be 'common sense', obvious and natural ...it provides a basic structure of perceptions and beliefs ...[which] tends to assert its own completeness and timeliness ...[the] claim to completeness and self-sufficiency is maintained by emotional commitments which may justify selective consideration of empirical evidence".

⁶⁹ For a brief history, see *supra*, note 53 at 127-8:

"The doctrine that water was provided by nature for the use of those who had access to it was necessitated by the Industrial Revolution";

and at 170:

"The common law doctrines, even in their full rigour, must always have appeared irrelevant to the masses toiling in the urban slums of industrial England. The genteel doctrines, *developed to protect landed gentry and early water powered mills involved in the grain and wool trades*, may have assisted some landowners to maintain the bucolic nature of their estates, but one familiar with industrial England could point out the fantastic wastelands created..." (emphasis added).

rights were created by law. Law did not sanctify property because there was something 'holy' about it, rather it became holy *because* law sanctified it. Nuisance law did not spring up from any desire to protect the public from the property owner's unfettered exploitation of his property, rather it was a protection for neighbouring *property* owners in the enjoyment of their own property⁷⁰. Lest we underrate the significance of law as ideology, we would do well to remember that the foundations of today's development law were being laid in eighteenth century England at a time when the influence of religion was waning, whilst the ideological role of law was becoming central - perhaps even *the* "central legitimizing ideology"⁷¹.

We have seen how legal constructs like property and contract law appear to create a system of private ordering, one might think, as the legal expression of the desire of private actors for a dependable regime of private economic relations and free markets - that is, law as handmaiden to social reality. But law is not so much handmaiden to social reality as it is *creator* of social reality. It is not so much linear social stimulus-legal response as rather a process which is circular/dialectic. By defining and enforcing private legal rights in property, and by underwriting private contracts, law creates a system of exchange relations which we call a market system, although what we like to think of as free bargaining is in fact based on coercion (the legal right to withhold what

⁷⁰ *Supra*, note 45 at 913.

⁷¹ E.P.Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon, 1975) at 263.

is owned) - every bargain is in fact a function of the legal order. The legal constructs take on a life of their own, and come to seem "natural ", "common sense ", even "God-given ". Thus the courts ' passion for enforcing contracts without regard to the adequacy of consideration becomes, in popular parlance, "a deal 's a deal ", irrespective of the fairness of the outcome (even though in our private, non-legal relations most of us might find such a principle abhorrent). In the private economic realm equity is not a serious legal value once private actors have presumably made their own equitable judgements before entering into contractual relations - and even that presumption is questionable when the parties are not (as is frequently the case) of equal bargaining power, possessed of equivalent knowledge, and so on. Efficiency on the other hand is very much a serious value, in fact *the* serious value, for in efficient markets lie the development law values of growth, wealth-maximisation, allocative efficiency, and so on - values and normative assumptions which are effectively beyond challenge as desirable social ends. (How they became so is another story - no doubt the discipline of Economics has its own processes of reification.)

The form of law which creates and nurtures this economic system is not accidental - individuals, in their roles as economic actors, are the unerring focus. Property rights are held only by individuals (whether human or corporate), contractual rights, benefits and penalties are enforceable only between those individuals who were originally privy to them. The object of all these rights is private property, pre-defined as that which law has deemed to be the subject of legally created and enforceable interests. Community, and

public property (commons), are excluded and thereby diminished, effectively rendered invisible.

Inevitably it is in those terms that we *think* of the world around us - those things (and people) in which are vested legally defined and enforceable interests, and those that are not so privileged, the "other " which is simply out there but without significant value content. Along with legal interests goes an attitude of respect for those interests, a certain way of treating with them, and with the object within which they are vested. Conversely, we don 't think of ourselves individually as having legal right or entitlement to, say, an unimpaired vista of distant mountains, or the continued existence of some near-extinct species threatened by industrial development, because we have no *legal* interest in those things - though ironically we do in a sense have a collective ownership interest through the state, but that is not a legally assertable interest (with perhaps the limited exception of the American public trust doctrine ⁷²) by citizens because it is not a *private* interest! Nor do our children, or their unborn children, have such an interest. Recall again the case study example of pulp mill effluent in the Kitimat river (and recall too that the case study was not specially selected for any especially outrageous facts, but was randomly selected in the sense of being one that the author happened to be part of): here is a wild northern river now sullied annually for more than 20 years by some 65,000 cubic metres of brown, foaming effluent (including scores of chemicals) whose effects on river ecology are for the most part unknown (except of course for tainting of the flesh

⁷² See, for example, *supra*, note 45.

of its most populous guest, the oolichan), all this next door to an aboriginal people who had lived there and revered and depended on the river since time immemorial (and who, incidentally, had their own rule-driven environmental attitudes ⁷³), not to mention a nearby township of 12,000 non-aboriginal people, and yet there is no outcry and no legal redress should there be one - except one which might be asserted by the Haisla, grounded in, of all things, arcane notions of private property rights even more foreign to them than they were to the masses of nineteenth century industrial England from whence they came. The other prospect for some environmental protection - regulation by the state - was as we have seen little more than a charade of standards set behind closed doors with the polluter, a regime of negotiated compliance which is even then not honoured, and not enforced. What an appalling prospect, and what a mockery it is to call it 'environmental ' law! I am suggesting that because individual interests and private property reign supreme, and do so largely because of their being enshrined by law in social consciousness, we do not value and treat with those public things (commons) as meticulously we do with, say, our neighbour 's private land or car. Such is the influence of liberalism, and liberal law, on our perceptions not only of self vis a vis others, but of

⁷³ For example, see M. Wilson, "Wings of the Eagle " in C. Plant, J. Plant, eds., *Turtle Talk: Voices for a Sustainable Future* (Lillooet, B.C.: New Society, 1990) (available at U.B.C. Fine Arts Library Special Collection) at 76: in answer to a question as to how the Gitskan Wet 'suwet 'en people made respect for other life concrete in their society, the author replies:

"It 's made concrete through the rules. People have asked what is our law. We called them rules because we have no outside control; we used inner control. We didn 't have judges or lawyers or supreme courts or anything like that. So the people had to know themselves in order to control themselves. Individuals were under strict self-control and, collectively, this controlled the whole society ".

self vis a vis environment.

Yet when a private individual, such as a forest company, obtains a legal right to cut down trees on those mountains, we 'automatically' respect that right notwithstanding that thousands of us are diminished by the exercise of the right, and notwithstanding that an endangered species might be pushed closer to extinction by the resulting loss of habitat. Similarly when a pulp mill is granted a legal right to pollute a river, or an aluminum company is granted a legal right to dam and reverse a watershed. Development law is supreme, environmental values are the subject of mild regret, because we have set it up that way. Our response seems natural/inevitable/practical/etc., and we forget or ignore that it is all a social construct borne out of a particular history, and that other societies (and our own) have seen those relationships differently in different historical contexts⁷⁴.

Thus law distorts reality, or rather creates its own reality⁷⁵, and acts upon and changes

⁷⁴ For example, see R.Kapashesit, M.Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill Law Journal 925 at 929:

"...Aboriginal environmental belief systems ...include a lack of division between humans and the rest of the environment, a spiritual relationship with nature, concern about sustainability, attention to reciprocity and balance, and the idiom of respect and duty (rather than rights)."

⁷⁵ See, for example, C.Husson, "Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law" (1986) 95 The Yale Law Journal 969 at 981:

"...[law] is used to bring about a certain organization, and is thereafter validated as a *standard* according to the order it itself has defined ...by its articulation it is accepted the real, the objective, because the articulation itself has delineated

our values and behaviour, in highly structured ways that don 't just reflect but actually create and enforce a particular ideology. If we don 't have a *legal* interest, and if communal but unsecured rights don 't count, then we are rendered helpless and perhaps even blind. That is the power of development law - it defines social reality for us, and structures the way we think about it, and of course one aspect of our social reality is our relationship with the natural world. It is still within development law ideology that the environmental struggle is being waged. Just as liberal law shapes our social relations as between individual humans, so does it shape our environmental relations between humans (individually and collectively) and nature.

Industry, government and the media characterise the struggle as 'environment versus development '. It has become one of those dualisms which cause us to think of one of the pair in terms of the other. However, as in all such dualisms (such as rational/irrational, active/passive, male/female) there is an implicit hierarchy⁷⁶. Thus,

and restricted the reality according to which the view is evaluated. "

⁷⁶ See, for example, F.Olsen, "The Sex of Law " in D.Kairys, ed., *The Politics Of Law: A Progressive Critique* (Rev. ed.) (New York: Pantheon Books, 1990) 453:

"Since the rise of classical liberal thought ...most of us have structured our thinking around a complex series of dualisms, or opposing pairs ...these dualistic pairs divide things into contrasting spheres or polar opposites ...the terms of the dualism are not equal, but are thought to constitute a hierarchy. "

See also P. Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights " (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 401 at footnote 81 (quoting Brockman):

"The emptiness behind the binary opposition is the emptiness behind the equation $0 = 0$. *One thing is opposed to another thing in a two-fold opposition*

'development ' implies jobs, growth, prosperity and so on, whilst 'environment ' suggests the opposite, the absence of those desirable things, and thereby acquires strongly negative connotations. (Imagine the more positive connotations of 'environment ' if the dualism was, for example, environment/exploitation). Remember that issues (such as the environment) are presented to us, as individuals, judges, legislators, policy makers, and so on in a certain way which reflects a particular social/political context, and implicitly suggests remedies within that same context ('science/technology will provide an answer ', 'wait for certain scientific proof ', 'don 't jeopardize jobs ', and so on). Thus, environmental problems are presented to us in the context of liberal development ideology. Recall, for example, that when Alcan was attempting to win community support for its Kemano Completion Project it did so by promising to build an aluminum smelter near the town most affected, bringing jobs and prosperity. Later, when the need for public support evaporated with the collusion of the provincial and federal governments in sidestepping an environmental (and public) review, the promise of a smelter was quietly dropped. The pulp mill tainting of oolichan awaits establishment of certainty of cause and effect. Similarly, development interests can subvert such environmental issues as long-term viability of forestry practices with a simple veiled threat to jobs. That suggests another aspect of private property rights - because they are rights to *exclude* others, then if the property in question is something which is needed or relied upon by others then those others will be *dependent* on the

incapable of accomodating marginalities, third forces, or syntheses" (emphasis added).

property right, for example for jobs and income. However, when loss of jobs through the increasing capitalisation of production processes (for example in the forestry industry) is raised, development interests will point to the criterion of efficiency, the need to remain "competitive ". When environmental interests point to the threatened loss of a resource, or to the inherently valuable richness of the natural environment, to us and to future generations, the message loses its urgency because future generations have no assertable legal interest in the resource, and especially not in the environment - even the present generation lacks that! When parties with no legal interest block a logging road, the party with a legal interest can obtain an injunction on the grounds of "illegal " impediment to their interest - always the issue comes down to "legal interests ", and those interests are always constructed and asserted in the language of the development law paradigm i.e. property interests held by individuals (usually corporate), justified by wealth-maximisation, allocative efficiency, and jobs. Even the environmentalist 's response is often couched in the same terms - loss of alternative jobs in tourism, alternative but equally profitable and job-creating logging practices, more job-creating value added, and so on.

By juxtaposing "environment " with its polar opposite "development ", the entrenched paradigm, we pre-determine the outcome by defining one (environment) in terms of the other (development). Not only is it an uneven struggle, but by characterising environmental values in terms of their negative impact on (and their polar opposition to) development, we devalue the real meaning of environment and divert the discourse

back to the development paradigm. Thus in the latest mainstream environmental catchphrase 'sustainable development', 'sustainable' is merely a qualifier for 'development'. An example of how this development ideology permeates even our environmental initiatives can be seen in a document published by the federal Fisheries department themselves⁷⁷ -recall that the Fisheries Act was, and remains, one of the major legislative instruments for dealing with degradation of fish habitat, and therefore water pollution. In what is presumably supposed to be a progressive model of contemporary, environmentally sound policy initiatives, the federal government itself outlines the department's new management policy in language that is rife with anthropocentric development ideology. The department's goal is "to *increase the social and economic benefits* derived by Canadians from *productive* fish habitats and the fisheries resource", and more broadly "the management of *human use* of the biosphere, so that it may yield the greatest environmentally sustainable *economic benefit to mankind*"⁷⁸. The concern is with projects which may cause environmental degradation, "thereby potentially undermining the *economic, employment and other benefits* that flow from Canada's fisheries resource"⁷⁹. Specific goals relate, for example, to the production of "fish *suitable for human consumption*"⁸⁰ (though apparently not native Indian consumption), and to the rehabilitation of habitat "in selected areas *where*

⁷⁷ "Policy For The Management Of Fish Habitat" (Ottawa: Department of Fisheries and Oceans, 1986).

⁷⁸ *Ibid.* at 7.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.* at 11.

economic or social benefits can be achieved ⁸¹. When allegedly environmental values are couched in such terms it is not difficult to appreciate the profound influence of development ideology even on what should be its weakest ground - environmental values within the domain of the state (allegedly representing the public interest) itself!

Thus, so-called "environmental " laws are just heaps of sawdust without genuine environmental values to give them form and strength. They are in reality characterised not by the qualifier 'environmental ' but by the substantive ideology which "law" reflects and creates. They are aimed at (though do not achieve) regulation of the excesses of development, at smoothing out its rough edges - they are not about environment but about rendering, or keeping, development legitimate. Environmental law, as a legitimising tool for development, does not go to the causes of environmental degradation because those causes lie, as we have seen, in development law itself. Rather than question the ideology itself we simply tinker, and even then ineffectually, with some of its unpleasant symptoms. It is not positive environmental law but mildly negative development law, and even then often without meaningful standards and means of enforcement. It takes a form which *conceals* the exploitative nature of environmental relations within development law by pretending to deal with its failures. It is in fact the opposite of an authentic and principled connection with nature.

The real danger is that alluded to in the earlier rights analysis. It is called

⁸¹ *Ibid.* at 12.

'environmental ' law, and so may serve to create the illusion that that is what it is, thus defusing the issue and sidetracking it into the mainstream development paradigm. Real environmental values are left untouched and unconsidered - just as political rights for American blacks left their social reality relatively untouched - and worse yet, less likely to be touched - and just as the same prospect looms for women⁸². Recall Lord Acton 's dictum that small reforms are the enemy of great reforms. Thus 'environmental ' law will be reified, and the illusion of the ideal posing as reality may not be exposed, at least not in time to avoid irreparable, even catastrophic, damage.

There is a kind of insanity to all this. It is quite understandable that we would have difficulty in embracing environmental values in the face of short-term, substantial dislocation in our lives - after all, we only live in the short-term, and it takes a considerable leap of faith to voluntarily give up something we have in return for some unquantifiable, unrecognized and perhaps unfelt (as being outside the dominant paradigm) goodness about a less degraded environment. After all, that is the essence of the development paradigm - that we take meaning and value from that which we presently produce and consume for our individual benefit. And we can hardly forget the extraordinary success of liberal economics in largely solving the production (though not

⁸² See, for example, D. Greschner, "Judicial Approaches to Equality and Critical Legal Studies " in S. Martin, K. Mahoney, eds., *Equality and Judicial Neutrality* (Calgary: Carswell, 1987) 59 at 64:

"liberal legalism 's devices of legal reasoning and formal equality, by hiding the hierarchy and oppression characterizing liberal society, efficaciously forestall revolutionary change. *People do not see what really 'is', and what they do see they are led to believe is all right*" (emphasis added).

the distribution) problem. The argument is not that liberalism (and in particular liberal economics) is bad or evil, but that it is at this time profoundly inappropriate. The evidence is vast and growing that the paradigm has become suicidal - natural resources are finite, and environmental degradation is beginning to threaten not just our quality of life but our very physical existence. The Haisla themselves are a powerful metaphor, being transformed as they have in less than a century from a relatively affluent, stable-state society sustained by constantly renewed natural resources (which also informed a rich cultural and social life) to one with diminished environmental quality (a polluted river of inedible oolichan, a polluted fiord of inedible shellfish, huge transmission towers intruding on their traditional village, their magnificent old growth valley forest - perhaps the last of its kind on the planet - threatened by logging), and now dependent on resource industries like forestry (whose practices in British Columbia are notorious for their environmental devastation and disdain for sustainability) and aluminum production (whose energy needs and extraction of non-renewable bauxite are both environmentally destructive and ultimately finite). Their experience is simply an accelerated form of our own.

The big lie of environmental law then is that, as it is presently structured and practiced, it does not challenge the development paradigm but rather reflects it. That is because it is still within the ideological grip of liberalism - still deeply rooted in classical liberal notions of private ordering and normative assumptions about wealth-maximisation, allocative efficiency and growth. The common law structure of private property and

contract still informs our economic behaviour and is effectively untouched by legislative regimes serving the same ideology. At a practical level, overlapping personnel in industry, government and the legal profession⁸³ insure powerful status quo interests. That is hardly surprising as environmental values threaten a re-distribution of wealth that would be nothing short of revolutionary⁸⁴.

5. Summary

I have tried to show that the development law paradigm continues to dominate our economic behaviour, to define the values and normative assumptions which infuse our social life. Environmental law has been constructed, not as an alternative paradigm, but within that paradigm. Environmentalists cannot even express their world view in legal language because of the way liberal law is constructed. Therefore although they can

⁸³ See, for example, *supra*, note 33 at 13 - a Canadian study found that "...atotal of 39.4% of the current economic elite members either were themselves or had close kin in the state system" (emphasis added).

⁸⁴ See, for example, E.Elliott, "Foreword: A New Style of Economic Thinking in Environmental Law" (1991) 26 Wake Forest Law Review 1 at 5:

"World wide environmental law may be the most ambitious attempt ever by human beings to use law to shift resources and alter behaviour";

A.Babich, "Understanding the New Era in Environmental Law" (1990) 41 South Carolina Law Review 733 (at footnote 1), quoting W.Ruckelshause (former Administrator of the U.S. Environmental Protection Agency):

"...a modification [is required] in society comparable in scale to only two other changes: the agricultural revolution of the late Neolithic period and the Industrial Revolution of the past two centuries".

demand that acute environmental degradation be addressed, they cannot demand the re-thinking of the development law paradigm since its legitimacy is pre-supposed - just as American blacks cannot demand the elimination of social conditions that promote racism, and tenants cannot demand the dismantling of private property relations which foster exploitation by landlords⁸⁵.

The development paradigm is rooted in liberal law - defined by it, created by it, and legitimised by it. Its strongest expression is found in the common law regime of private ordering based on private property and contractual relationships. That model is informed at a deeper level by a particular cultural view of environment (The Very Big Picture) that has moved from pagan animism through divinely inspired transcendence to secular transcendence (instrumental rationality) - a continuum of increasing alienation from the natural world and increasingly unconstrained exploitation of it.

Liberal economics (capitalism) and law define the ideology and form of that world view

⁸⁵ P.Gabel, P.Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law " (1982-3) 11 New York University Review of Law and Social Change 369 at 372.

Liberalism does, however, have its defenders, some of whom would say that it is an appropriate but simply as yet unrealised ideal - see, for example, C. West, "CLS and a Liberal Critic " (1988) 97 The Yale Law Journal 757 at 769:

"There is simply no intellectually acceptable, morally preferable, and practically realisable left social vision and program that does not take liberalism as a starting point to rethink, revise and reform it in a creative manner ...liberalism is not so much a culprit ...but rather an incomplete historical project imeded by powerful economic interests (especially corporate interests), and culturally circumscribed institutional structures...".

(The Big Picture), which takes as its starting point individual private legal interests and all but ignores communal and environmental values, leading to the myriad of environmental degradations large and small (The Many Snapshots) which collectively, and with synergy, make up the 'environmental problem '. It defines us as acquisitive individuals in the here and now, not as community now or in the future. The changing face of liberalism in the industrial democracies does not significantly modify those values - the common law still reflects classical liberal notions of acquisitive, self-interested individuals defined by their property interests and contractual relations, and the cutting edge of mainstream environmentalism is still '*sustainable development* '.

Without law to construct the ideology, adjudicate its conflicts and actualise its practice in the way we think and behave, we could not have achieved our marvellous efficiency at turning the environment to our self-defined purpose. The good news then is that the paradigm and the ideology are artificial constructs which we have created and are therefore capable of transforming, especially now with powerful media tools at our disposal in the global village. If the common law system of private ordering was historically contingent on the Industrial Revolution, surely a new regime, historically contingent on awakening environmental awareness, is both appropriate and possible. The bad news is that, in contradiction to our perceptions and rhetoric, there is really little indication of that happening. There is certainly an increasing social awareness of environmental issues, but it is not yet finding expression in law, as it ultimately must in order to be validated/legitimised. Environmental law is still fatally constrained by

development law ideology, with its priorities of wealth maximisation and allocative efficiency⁸⁶. Just as formal equality in liberal politics serves to legitimate social inequality, so does environmental law legitimate development.

I have attempted to show the futility of shallow ecology - of merely tinkering with the more egregious symptoms of development law whilst still clinging to the classical liberal faith that "...if well structured markets can convert the dross of private interest into the gold of collective welfare, then institutions of public governance may be capable of similar alchemy"⁸⁷. If we accept the first part of that statement as liberal gospel, then I have tried to show in this analysis that the second part is, as a matter of course, in contradiction to the first, at least in the context of genuine environmental values - the legal form of liberal economics that makes the first part possible *contradicts* environmental values, and institutions of public governance can't have it both ways!

I have tried to show how, in 'development law', 'law' itself is instrumental and not just passive in 'development'. Liberal private law is played out in the tragedy of the

⁸⁶ For example, R. Northey, "Conflicting Principles of Canadian Environmental Reform: Trubeck and Habermas v. Law and Economics and the Law Reform Commission" (1987-8) 11 Dalhousie Law Journal 639 at 651:

"The capitalist criteria for efficiency in the technological control of nature have become government criteria in the technological control of society. Today, *efficiency is entrenched in both our relation to nature and our relation to each other*" (emphasis added).

⁸⁷ R. Stewart, "Regulations in a Liberal State: The Role of Non-commodity Values" (1983) 92 Yale Law Journal 1537 at 1587.

commons; legislative law, fatally flawed in both design and execution, lacking principles, purpose and standards, is ineffective in constraining environmental degradation. Environmental law is not a bright light shone on the environment, but rather is the shadow of development law. If 'environmental law' is to mean what it says, then 'law' will have to be instrumental in an environmental paradigm, not just a paradigm in which 'environment' (sustainable) is merely a modifier for 'development'.

The seeking for a new, appropriate environmental paradigm, a new environmentally-based political theory, is reflected in much of the environmental law literature, and characterised by frequent coupling with communal values, for example:

- "man-in-society, not man-the-individual ...the legal core of community becomes not individual rights, as in liberal theory, but communal duties ...duty, reciprocity, and belonging..."⁸⁸;

- "respect, obligation and co-operation...self-interest and the homocentric want-oriented perspective [must] give way to a theory of the natural order and our place in it"⁸⁹;

⁸⁸ *Supra*, note 29 at 934, 936-937 (expressing concerns with respect to bureaucracy that also resonate in the communally oriented concern for the environment).

⁸⁹ *Supra*, note 4 at 348.

- "shared or public values, which may express not our wants and preferences as individuals but our identity, character and aspirations as a community"⁹⁰;
- "rightness rather than rights ...a [need] to deal with the roots of our environmental crisis rather than with its rotting fruit"⁹¹;
- "a sense of reverence ...harmony ...rootedness in history ...connectedness with the future"⁹².

No doubt authentic environmental values lie at the end of that road, and that is surely the way to go. But we in the industrialised democracies live in secular liberal states - certain consequences flow from that, and certain options do not. The dilemma is that even if we can realistically aspire to that environmental state of grace in the long term, we must first survive the short term, within this liberal state which in many ways has so admirably met so many of our needs, at least those first-order material needs that are solved through production. Perhaps that is the real problem - that de-emphasising production (efficiency) may well mean re-emphasising distribution (equity), of public

⁹⁰ S. San Juan, Book Review of *The Economy of the Earth: Philosophy, Law and the Environment* by M. Sagoff (1991) 15 Harvard Law Review 307.

⁹¹ *Supra*, note 65 at 371, 376.

⁹² *Supra*, note 4 at 331 (quoting Tribe).

resources but therefore also of private wealth⁹³ - the unavoidable dilemma of liberalism which environmental values inevitably expose and challenge. Whatever else it may pretend, the liberal state is not 'neutral', and most not certainly not in the domain of development law⁹⁴. Nor should it be neutral - indeed how could it be when the values and normative assumptions of our social life are anything but neutral (of course in no small measure as a result of state 's partiality to a particular way of life)⁹⁵.

It has been said that "the environmental question for modern political theorists is

⁹³ See, for example, *supra*, note 13 at 436:

"Politicians are likely to support continued economic expansion so that the literal reality of a bigger pie masks the inequality of the size of the slices, and so that the system is not forced to confront the violent distributional pressures that would likely accompany a zero-sum situation with a static or shrinking pie."

⁹⁴ See, for example, C. West, "The Role of Law in Progressive Politics" in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (Rev. ed.) (New York: Pantheon Books, 1990) 468 at 468-9:

"...the sacred cow of American liberalism - namely, economic growth achieved by corporate priorities - is neither examined nor interrogated."

⁹⁵ See, for example, R. Beiner, "What 's the Matter with Liberalism?" in A. Hutchinson, L. Green, eds., *Law and the Community: The End of Individualism* (Toronto: Carswell, 1989) at 43:

"...there is a distinctive liberal way of life ...a way of life based on progress, growth, and technological dynamism";

and at 44:

"It does no good for the liberal to say that the liberal state is neutral between the diverse life choices of individuals. Is it neutral about continued growth and higher productivity? Is it neutral about scientific progress? Is it neutral about the market as a means of maximising consumer choices?";

and at 47:

"Liberal neutralism is therefore a mirage. It is hard to see why the state is constrained to be neutral (whatever that might mean) if social life as a whole is and must be, however much denied by liberals, strongly partial towards a particular way of life."

whether the imperatives of environmentalism are compatible with liberal democracy ⁹⁶. I have simply tried as a first step to expose the lie of 'environmental ' law in the liberal state, whose continuing emphasis on acquisitive individualism is profoundly at odds with the sensitivity to other that is implicit in environment and community. If "the law 's great purpose is to justify and align the exercise of public force with public ends ⁹⁷, then so-called 'environmental ' law is failing us -it has been just another project in the ongoing legitimation of development law. That is why environmental law failed the Haisla and their polluted fishery, and why Alcan 's project was allowed to proceed without scrutiny.

⁹⁶ D. Tarlock, "Earth and Other Ethics: The Institutional Issues " (1988) 56 Tennessee Law Review 43 at 75.

⁹⁷ *Supra*, note 87 at 1574.

CHAPTER FIVE

POSTSCRIPT

"Law is a practical science. It does not ordinarily dwell on fundamental questions about the social, political and economic functions of the legal order. Satisfied with implicit working assumptions about these matters, legal thought moves rapidly to more tractable questions. But when law's solutions to social problems fail to satisfy it becomes necessary to examine the basic theory from which they derive".¹

This thesis aspires to be a deconstruction of environmental law, and not a prescription for its ills. If all is social construct, and the analysis of deep structure (liberalism) was meant to demonstrate this for environmental (development) law, then the mechanics of social change by which social constructs are built are the next obvious area of enquiry, but are beyond the scope of this paper. But the mere acknowledgement of that social constructedness is of course a positive starting point, since what was constructed can be deconstructed and reconstructed. What are the prospects?

On the one hand they are dim. As a species we cannot take great pride in our collective social vision. Given, for example, our continued propensity to make war and our continuing tolerance of social misery, oppression, starvation and death in a world of

¹ D. Trubeck, "Toward a Social Theory of Law: An essay on the study of Law and Development " (1982) 82 Yale Law Journal 1.

relative plenty ('the production problem is largely solved, it is now a distribution problem'), it takes a considerable leap of faith to see ourselves as progressing on a continuum of enlightened social behaviour. In particular we have already permitted irreversible environmental destruction at unknown cost to ourselves and our children, and in at least the last generation have done so knowingly.

On the other hand, the symptoms of that environmental degradation may be the catalyst in providing a motivation more reliable (to put it cynically) than social enlightenment - that is to say, the irrepressible motivation of self-interest. Though we may still be prone to view the environmental problem through rose coloured glasses tinted by a lingering faith in technology, and though we may care inadequately about others and our children, the brutal reality is that the problems are now coming home to us individually in the here and now.² There is increasingly strong *motivation* for real change in our environmental relations.

Further, there are powerful *means*. In the global village of the late twentieth century, with powerful media available to reconfigure our social constructs speedily and thoroughly, the reconstruction of our relations with the environment is perhaps not impossible even in the near term. Lesser examples spring to mind in our quickly changing attitudes toward cigarette smoking, consumption of alcohol and driving, and

² The example that springs to mind is a personal one - as a middle-aged, white Australian male the writer is a member of the most vulnerable class on the planet for skin cancer, due largely to degradation of the ozone layer.

promotion of 'desirable ' lifestyles and even body types. Furthermore, there appears to be a growing wave of public sentiment toward the environment upon which such manipulation of social attitudes might build (and of course the media in turn must take some credit for the growth and speed of that wave). If the preceding analysis is at all valid it seems reasonable to conclude that 'top down ', 'command and control ' models are unlikely to succeed, informed as they are by irreconcilable conflicts in economic reality and political philosophy (liberalism). Ultimately the concrete particularity of individual behaviour and social expectations must drive the reconstruction. Since it is all social construct then that is possible, and with motive (the threat to self-interest in the here and now) growing, and with the means available (media), perhaps anything is possible.

The risks of social change in our environmental relations based on self-interest, rather than a principled and authentic concern for nature itself and ourselves as part of it, are perhaps obvious but should be noted. We may simply misjudge in attempting to strike the balance implicit in (say) 'sustainable development ' (or whatever catch-phrase will replace it). Certainly the values and normative assumptions of liberal economics (capitalism) suggest that we will probably cut it as close as we can, and imperfect knowledge (not to mention the wilful blindness we have already demonstrated) suggests that we may simply make wrong estimates that will have catastrophic consequences. In a similar vein, we may simply come incrementally to tolerate and accept the unacceptable, and lose our sight of what is and may still be lost. Finally, we may be

simply so stupid, blind and arrogant as to not see and not care.

There simply is no answer, and if there is no God either and no inherent reason why this species should survive, then we can only take solace from the flexibility and adaptability of social constructedness, and not be deceived by such lies as 'environmental law'. If 'lie' seems too strong a word, then look at it this way:

"...all of us should keep in mind what I think is the most lovely moment in *Don Quixote*. When asked by a mocking Duke if he actually believes in the real existence of his lady Dulcinea, the Don replies:

'This is not one of those cases where you can prove a thing conclusively. I have not begotten or given birth to my lady, although I contemplate her as she needs must be ...'.

One can understand the impulse, and be touched by the attempt, but the world is never as it needs must be. If it ever seems so, it is not the thing illuminated one is seeing, but the light."³

The light of environmental law is guided by liberal economics and law, and it illuminates development, not environment.

³ A. Leff, "Commentary: Economic Analysis of Law: Some Realism about Nominalism " (1974) 60 Virginia Law Review 451 at 482.

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