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# THE PAST, PRESENT, AND FUTURE OF CANADIAN ENVIRONMENTAL LAW: A CRITICAL DIALOGUE

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## INTRODUCTION

Like the newly established Bora Laskin Faculty of Law at Lakehead University, the Lakehead Law Journal’s rather immodest ambition is to be more than just another law journal. Its ambition is to contribute to the evolution of both Canadian legal scholarship and Canadian academic scholarship more generally. To that end, not only is the Lakehead Law Journal an online, open-access publication, but its aspiration is also to situate itself on the cutting-edge of innovative developments in academic research and publishing.

The Lakehead Law Journal’s commitment to innovation in academic research and publishing is reflected in the intimately intertwined form and substance of this article, which is the first instalment of what will be a regular feature of the Journal—a simultaneously wide-ranging and in-depth substantive dialogue with one or more leading Canadian legal scholars and practitioners.<sup>1</sup>

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\* Jason MacLean: I am grateful for the invaluable research assistance of Hannah Gladstone in preparing the questions featured in this critical dialogue, and for the grant from the Law Foundation of Ontario that made Ms. Gladstone’s assistance possible. I am also indebted to Cheryl Chetkiewicz of Wildlife Conservation Society Canada for her insights regarding regional strategic environmental assessments.

† Chris Tollefson: I am grateful to the Tula Foundation and Hakai Institute for their ongoing support and would like to thank University of Victoria Environmental Law Centre articling student Georgia Lloyd-Smith for her research contributions to this article.

<sup>1</sup> This particular format—an at once accessible and in-depth substantive dialogue—was inspired by the innovative interview format featured in the online journal *Amodern* (<<http://amodern.net>>), co-founded and co-edited by Professor Scott Pound of Lakehead University.

In the critical dialogue that follows, Jason MacLean, an assistant professor at the Bora Laskin Faculty of Law at Lakehead University whose research focuses on environmental law, explores some of the most salient aspects of the past, present, and future of Canadian environmental law with two of Canada's leading environmental scholars and practitioners: Meinhard Doelle, professor of law and associate dean of research at the Schulich School of Law and director of the Marine & Environmental Law Institute at Dalhousie University;<sup>2</sup> and Chris Tollefson, professor and Hakai Chair in Environmental Law and Sustainability and executive director of the Environmental Law Centre (ELC) at the University of Victoria Faculty of Law.<sup>3</sup>

Professor Doelle specializes in environmental and energy law, with a particular focus on climate change and environmental assessment processes. He is the author of a number of books and scholarly journal articles on topics such as climate change, energy law, invasive species, strategic environmental assessments, and public participation in environmental decision-making. In addition to analyzing environmental law, Professor Doelle has played an active role in shaping it. He has been involved in the practice of environmental law in Nova Scotia since 1990, and in that capacity served as a drafter of the province's *Environment Act*. From 2000 to 2006, Professor Doelle was a non-governmental member of the Canadian delegation to the United Nations climate change negotiations. Professor Doelle also served from 2009 to 2011 on the Lower Churchill Joint Federal-Provincial Review Panel, and recently co-chaired a provincial panel on aquaculture. Professor Doelle was environmental counsel to the Atlantic Canada law firm of Stewart McKelvey LLP from 2005 to 2014.

A key focus of Professor Tollefson's scholarship and practice has been access-to-justice issues, including work on strategic lawsuits against public participation (SLAPPs) and costs in public interest litigation. He has also published on such diverse topics as environmental governance, certification, contaminated sites, cumulative effects, and trade and environmental issues. Professor Tollefson has also played a key role in shaping the practice of public interest environmental law in Canada. In the early 1990s Professor Tollefson joined the original board of Sierra Legal Defense Fund (now Ecojustice), and for a decade helped to grow that organization into Canada's leading public interest environmental law firm, including serving for a three-year term as its national president. Professor Tollefson is also a founder of Canada's first curricular environmental-law clinical program—operated under the auspices of the University of Victoria ELC—and has served as ELC's executive director since its establishment in 1994. In recent years, Professor Tollefson has returned to what he describes as his “first love” in the law—litigation. Most recently, he served as senior counsel for ELC clients on several complex files including the Northern Gateway and Trans Mountain pipeline approval hearings and related judicial reviews.

In the critical dialogue below about the past, present, and future of Canadian environmental law, we explore the five following questions:

1. What are Canada's prospects for moving toward greater ecological sustainability? And what role will environmental law play in that movement?

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<sup>2</sup> Professor Doelle's faculty biography is available at <<http://www.dal.ca/faculty/law/faculty-staff/our-faculty/meinhard-doelle.html>>.

<sup>3</sup> Professor Tollefson's faculty biography is available at <<http://www.uvic.ca/law/facultystaff/facultydirectory/tollefson.php>>.

2. What is new and what is useful about “new governance” approaches to the “superwicked” problems of climate change and environmental protection?
3. What are the principal benefits and limitations of the use of strategic environmental assessments (SEAs) and regional strategic environmental assessments (REAs) to cumulatively assess natural resource extraction projects such as Ontario’s “Ring of Fire”? And how can the use of SEAs and REAs be both encouraged and enhanced in Canada?
4. What are the present and future prospects for meaningful public participation in various fora of Canadian environmental decision-making?
5. What should the research agenda for the next ten years of Canadian environmental law scholarship look like? And what place—if any—should environmental activism and advocacy have in that agenda?

The following exchange was conducted over email between Halifax, Nova Scotia, Thunder Bay, Ontario, and Victoria, British Columbia.

## I QUESTION ONE: WHAT IS THE FUTURE OF CANADA’S UNNATURAL LAW?

In a review of David R. Boyd’s *Unnatural Law: Rethinking Canadian Environmental Law and Policy*<sup>4</sup> in 2004, one of you argued that the book “leaves it to future research to pick up on the many very useful insights to consider whether, to what extent, and exactly how the many relevant factors identified have contributed [as of 2003] to Canada’s overall failure to address individual environmental challenges effectively, and how these factors have contributed to Canada’s overall failure to move significantly toward sustainability.”<sup>5</sup>

Fast-forward to the second edition of the casebook that you edited together (published in 2013), *Environmental Law: Cases and Materials*.<sup>6</sup> In this edition’s preface, you signal that your focus is on

*the current state of and future prospects for Canadian environmental law in nine key areas: the interplay between international and domestic law; constitutional and jurisdictional issues; the common law; environmental regulatory models; compliance and enforcement issues; judicial review; environmental assessment; parks and wilderness protection; and endangered species. It then reprises the themes and issues covered in these chapters by*

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<sup>4</sup> David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003).

<sup>5</sup> Meinhard Doelle, “Book Review of *Unnatural Law: Rethinking Canadian Environmental Law and Policy*” (2004) 37:2 UBC L Rev 541 at 543. See also Andrew Green, “Norms, Institutions, and the Environment” (2007) 57:1 UTLJ 105; Hugh J Benevides, “Unnatural Law: Rethinking Canadian Environmental Law and Policy, by David R. Boyd” (2005) 43:1/2 Osgoode Hall LJ 209.

<sup>6</sup> Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials*, 2d edition (Toronto: Carswell, 2013).

means of an in-depth capstone chapter that addresses emerging developments in the rapidly evolving realm of climate change law and policy.<sup>7</sup>

Reviewing the casebook's first edition from 2009, Elaine Hughes noted that it was "positive in tone, leaving the reader with a sense that engagement with the legal process and its reform is a useful enterprise, outlining enough prescriptions for action to leave a sense that steady and ongoing legal progress is yet possible."<sup>8</sup>

All of which raises the following interrelated questions. Do you think that the second edition of your casebook retains the positive tone identified by Hughes? And what is your present understanding—through the selection of topics and materials for the second edition, and through your ongoing research projects—of Canada's prospects for moving toward sustainability?

## A. Meinhard Doelle

There have been significant changes in the four years between the first and second edition of our casebook. Federally, there has been nothing short of an assault on environmental law. Three key federal statutes—the *Canadian Environmental Assessment Act*,<sup>9</sup> the *Fisheries Act*,<sup>10</sup> and the *Navigation Protection Act*<sup>11</sup>—have been rendered ineffective from an environmental protection perspective. Just as discouraging as the substance of these changes to federal environmental law has been the manner in which they have been implemented. Legislation such as the *CEAA*, which was developed over a four-year period in a transparent and deliberative manner in the early 1990s, was amended through omnibus legislation without any meaningful public engagement or transparency. During this same time period, the need for strong environmental protection to safeguard our climate, our biodiversity, and our valuable resources has become even more pressing.

Signs of concern in Canada are not limited to legislative changes. Rather than look for opportunities to integrate economic, social, and environmental well-being, some governments in Canada seem determined to offer their unqualified support for any effort to exploit Canada's non-renewable energy and mineral resources at an accelerated rate with little regard to the social and environmental consequences. The expansion rate of oil sands developments in western Canada, and pipeline projects such as Keystone XL, Northern Gateway, and the proposed pipelines to transport oil sands product to eastern Canada are among the most prominent examples, but this issue extends well beyond these individual projects. At the same time, initial signs of the cost associated with this mindset are emerging in the form of bitumen

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<sup>7</sup> *Ibid* at v [emphasis added].

<sup>8</sup> Elaine L Hughes, "Book Review: Making the List: A Note on Environmental Law Educational Materials and a Review of Doelle & Tollefson's *Environmental Law: Cases and Materials*" (2010) 6:1 JSDLP 81 at 88.

<sup>9</sup> *Canadian Environmental Assessment Act*, SC 2012, c 19, s 52 [CEAA].

<sup>10</sup> *Fisheries Act*, RSC 1985, c F-14.

<sup>11</sup> *Navigation Protection Act*, RSC 1985, c N-22 (as amended; formerly the *Navigable Waters Protection Act*).

and oil train derailments,<sup>12</sup> tailings pond breaches in mining,<sup>13</sup> and repeated failures to protect endangered species that stand in the way of resource exploration.<sup>14</sup>

What is particularly disconcerting about these developments is that many are happening at the federal level of government, the level traditionally considered to be the champion of the environment, at least relative to many provinces and municipalities. What is encouraging, on the other hand, is that the abrogation of responsibility for environmental protection and sustainable development at the federal level has galvanized some provinces and municipalities to move in to fill the void. Ontario's phase-out of coal and strong support for renewable energy, Quebec's strong action on climate change,<sup>15</sup> and British Columbia's carbon tax are illustrative of this trend, as is Vancouver's effort to compete for the title of greenest city in the world.<sup>16</sup>

My home province of Nova Scotia has also taken a number of steps that are encouraging. The *Environmental Goals and Sustainable Prosperity Act*<sup>17</sup> has proven to be a valuable experiment in holding our provincial government accountable for staying the course on environmental goals, and on the integration of environmental goals with economic and social prosperity. The *EGSPA* sets an overall goal for the province of integrating economic and environmental prosperity and demonstrating continuous improvement. This overall goal is implemented through individual commitments that are measurable and time-bound. Of the 21 goals set out in the *EGSPA* when it was enacted in 2007, none have been abandoned, and most have been accomplished either on time or early. Both the *EGSPA* as a whole and its particular goals have survived two changes in government. New goals established in 2012 include a commitment to establishing a green economy strategy by the end of 2014, as well as other goals specifically designed to integrate environmental protection with economic well-being.

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<sup>12</sup> The most prominent—and tragic—example being the Lac-Mégantic derailment. See Lorne Sossin, “Runaway Train: Assessing risk in the aftermath of the Lac-Mégantic”, *The Walrus*, July/August 2014, online: <<http://thewalrus.ca/runaway-train/>>.

<sup>13</sup> Again, several examples could be cited. Perhaps the most prominent and recent example is the tailings breach at Mount Polley, British Columbia. The final report of the review panel commissioned to assess the breach is available online: <<https://www.mountpolleyreviewpanel.ca/final-report>> (accessed April 28, 2015).

<sup>14</sup> Regrettably, there are too many examples to list here. For an overview of the issue, see Doelle & Tollefson, *supra* note 6 at 9.

<sup>15</sup> See e.g. the Quebec National Assembly's unanimous resolution deploring the National Energy Board's refusal to consider the climate change impacts of oil pipeline projects as part of the Board's environmental assessment process, and directing the province's environment regulator to conduct its own climate change analysis of the proposed Energy East pipeline proposal, online: <[www.saic.gouv.qc.ca/institutionnelles\\_constitutionnelles/resolutions/2014-11-06.pdf](http://www.saic.gouv.qc.ca/institutionnelles_constitutionnelles/resolutions/2014-11-06.pdf)> (accessed April 28, 2015).

<sup>16</sup> Yet another example is the initial agreement between the provinces of Quebec and Ontario to impose a number of environmental protection conditions on TransCanada's proposed Energy East oil pipeline project in light of the NEB's steadfast refusal to assess the greenhouse gas emissions and climate change implications of oil pipeline projects. See Adrian Morrow, “Premiers Wynne and Couillard set seven criteria for Energy East”, *The Globe and Mail* (21 November 2014), online: <<http://www.theglobeandmail.com/news/politics/premiers-wynne-and-couillard-set-seven-criteria-for-energy-east/article21714915/>> (accessed December 2, 2014). Meanwhile, the province of New Brunswick tabled a moratorium on fracking in the province. See The Canadian Press, “Fracking moratorium a hot issue as N.B. set for Throne Speech today”, *The Globe and Mail* (3 December 2014), online: <<http://www.theglobeandmail.com/news/politics/new-brunswick-throne-speech/article21902741/>> (accessed December 3, 2014).

<sup>17</sup> *Environmental Goals and Sustainable Prosperity Act*, SNS 2007 c 7, as amended by SNS 2012, c 42 [EGSPA].

Whether related to the *EGSPA* experiment or not, the period from 2007 to 2014 has also shown signs of an emerging recognition of the value of regulatory rigour for the integration of economic prosperity and environmental well-being. Nova Scotia has experienced a revival of public engagement and transparency in decision-making, as evidenced by independently run public processes on a range of issues, including tidal energy, renewable energy, energy efficiency, fracking, aquaculture, and economic prosperity.

There are hopeful signs in other countries, too. Germany's *Energiewende*,<sup>18</sup> for instance, is an unprecedented experiment at a national level that has the potential to lead the way to a global paradigm shift on energy and climate change. Developments in the United States and China, while far from being firmly committed and broadly supported, have the potential to initiate a race to the top in terms of the pursuit of economic prosperity built around climate change mitigation, adaptation, and resilience.<sup>19</sup>

## B. Chris Tollefson

To answer your first question, I do think that we work pretty hard to strike the right tone in the materials we include in the casebook and in our commentaries. It is important to convey an accurate sense of the challenges, barriers, and complexities of the area without discouraging or dissuading students from pursuing environmental law careers or parking their ideals and aspirations.

As for your broader question, I think it's critical to consider and evaluate the changes we have seen in Canadian environmental law and policy just described by Meinhard, particularly at the federal level, in their proper context. I believe that the Canadian federation is at a crossroads—where we go from here will have profound implications for our future as a country. One path is to continue to make the development of oil and gas, particularly oil sands reserves, an overarching national priority. The alternative path is to seek to diversify our economy and begin seriously to plan for a transition away from fossil fuels, as Norway has done. By using a variety of policy instruments including carbon taxes and a sovereign wealth fund that ensures oil royalties are strategically reinvested in the green energy sector,

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<sup>18</sup> *Energiewende* is the German term for “energy transition.” See e.g. Diana S Powers, “Plan Outlines Low-Carbon Future for Germany”, *The New York Times* (30 November 2014), online: <<http://www.nytimes.com/2014/12/01/business/energy-environment/plan-outlines-low-carbon-future-for-germany-energy.html?mabReward=RI%3A11&action=click&pgtype=Homepage&region=CColumn&module=Recommendation&src=rechp&WT.nav=RecEngine>> (accessed December 2, 2014). See Joanna Slater, “Germany recharged: EU powerhouse goes all in on alternative energy”, *The Globe and Mail* (10 April 2015), online: <<http://www.theglobeandmail.com/report-on-business/germany-recharged-eu-powerhouse-goes-all-in-on-alternative-energy/article23886255/>> (accessed April 11, 2015).

<sup>19</sup> For example, China and the United States recently agreed on a joint plan to curb carbon emissions in an effort to combat climate change. See Mark Landler, “U.S. and China Reach Climate Accord After Months of Talks”, *The New York Times* (11 November 2014), online: <<http://www.nytimes.com/2014/11/12/world/asia/china-us-xi-obama-apec.html>> (accessed December 2, 2014).



Norway has succeeded in creating an economy that is both greener and more competitive than Canada's.<sup>20</sup>

Since 2006, however, the Harper government has demonstrated a remarkable commitment to pursuing the first path—even with the looming spectre of \$50/barrel (or lower still) oil. Its unswerving commitment to this *status quo* trajectory has had a significant impact on Canadian environmental law, as Meinhard has described. There has also been a host of other related changes, including amendments to the regimes aimed at expediting the approval of oil and gas pipelines.<sup>21</sup> And in many cases, these federal measures have been accompanied by similar changes at the provincial level.<sup>22</sup>

One consequence, in my view, of the sweeping nature of current environmental law and policy rollbacks and the unrelenting need to respond to massive new energy-related infrastructure projects is that careful, informed, and deliberate debate of alternative policy paths has languished. This is despite the fact that there is clear and mounting evidence that Canadians want to see a more balanced and less polarized national discussion around energy policy, the environment, and governmental decision-making.<sup>23</sup>

Whether and how this discussion can take place is difficult to predict. Our existing governance arrangements seem, in many ways, to be ill-suited to address this challenge. Indeed, there is a powerful sense, certainly here on the West Coast, that existing institutions and even prevailing interpretations of the constitutional division of powers are out of step with, and incapable of supporting, a constructive resolution of the conflicting perspectives that are presently crystallized in the debate over the Northern Gateway and Trans Mountain pipelines. A key element of this is the perception that these projects fail to recognize and respect, particularly in the B.C. context, the implications of Aboriginal rights and title. I think, as well,

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<sup>20</sup> Barrie McKenna, “Norway proves oil-rich nations can be both green and prosperous”, *The Globe and Mail* (9 November 2014), online: <<http://www.theglobeandmail.com/report-on-business/international-business/european-business/norway-proves-oil-rich-nations-can-be-both-green-and-prosperous/article21514455/>> (accessed January 27, 2015). For instance, Norway is ranked number three in the world on the Environmental Performance Index and has banked over \$1 trillion from oil royalties to be used for future generations. See Mitchell Anderson, “Alberta’s Crazy Oil Bender is Over”, *The Tyee* (19 January 2015), online: <<http://thetyee.ca/Opinion/2015/01/19/Alberta-Oil-Bender>> (accessed January 27, 2015).

<sup>21</sup> Chief among these are the amendments to the *National Energy Board Act*, which are discussed below.

<sup>22</sup> The broadening of the role played by British Columbia’s Oil and Gas Commission is a case in point. The Commission was created in 2010 as a Crown Corporation through the enactment of the *Oil and Gas Commission Act* and is designed to provide “a streamlined one-stop regulatory agency.” Regulatory responsibility is delegated to the Commission through the *Oil and Gas Activities Act* and specific provisions under other pieces of legislation such as the *Forest Act*, *Heritage Conservation Act*, *Land Act*, *Environmental Management Act*, and *Water Act*. The cost of operating the Commission is funded through the application of industrial fees and levies on a cost-recovery basis. In other words, the Commission is funded, just as is the Alberta Energy Regulator (AER), by the very industry that it is supposed to oversee. For further details see <<https://www.bcogc.ca/about-us>> and <<http://www.aer.ca>>. For a brief sketch of the issues surrounding the growing role and seeming lack of independence of administrative boards and tribunals from industry in respect of environmental governance, see Jason MacLean, “No Deference Without Independence: *Ernst v Alberta (Energy Resources Conservation Board)*”, *Toronto LJ* (November, 2014), online: <[http://c.y.mcdn.com/sites/tlaonline.site-ym.com/resource/resmgr/Toronto\\_Law\\_Journal\\_2014/No\\_Deference\\_Without\\_Indepen.pdf](http://c.y.mcdn.com/sites/tlaonline.site-ym.com/resource/resmgr/Toronto_Law_Journal_2014/No_Deference_Without_Indepen.pdf)> (accessed December 5, 2014).

<sup>23</sup> G Galloway, “Ottawa needs to lead a more balanced energy debate, Canadians tell pollster,” *The Globe and Mail* (31 December 2014), online: <<http://www.theglobeandmail.com/news/politics/ottawa-needs-to-lead-a-balanced-energy-debate-canadians-tell-pollster/article22244391/>> (accessed April 28, 2015).

that many British Columbians have been dismayed by Trans Mountain's approach to the conflict on Burnaby Mountain, and by the National Energy Board's decision to nullify the City of Burnaby's local bylaws<sup>24</sup> and to reject the province's attempts to force Trans Mountain to submit an unredacted version of its emergency spills response plan in the NEB hearing record.<sup>25</sup>

I also think it is important for environmental lawyers to be aware of both the obvious and less obvious ways Canadian environmental law and policy is being remade as a result of the Harper government's agenda as well as other forces. In other words, it is important to be mindful of the linkages between such diverse phenomena as the downsizing of federal and provincial environment ministries and departments, the muzzling of scientists, new restrictions on public participation, and the rapid expansion in the role of qualified professionals.

Harper-era reforms, particularly those relating to energy project approvals, are already generating litigation that may well have a significant impact on administrative and constitutional law.<sup>26</sup> In particular, in connection with changes relating to the approval of major energy projects, the courts are likely to soon be called on to grapple with the role of executive discretion in the approval of major projects, the obligation to provide reasons, and the nature and scope of the federal government's jurisdiction to impose its will on provinces and municipalities in the "national interest." These are very much live issues in both the Northern Gateway and Trans Mountain approval processes.<sup>27</sup> In this context, it is critical for public interest environmental lawyers to think systemically about where and how to marshal their scarce resources.<sup>28</sup>

To move toward greater sustainability, we still need scholarly legal critique and law reform. But we also need to develop the capacity to engage directly in regulatory and litigation processes to provide a counterweight to industry and government. In my view, by engaging directly in these processes we can help achieve a variety of positive outcomes. A key reason why we at the UVic ELC have increasingly been working within these regulatory processes is that we want to ensure that responsible science finds its way into the legal record, and that bad science or unreliable scientific conclusions are exposed as such. We also look for cases and opportunities to establish good precedents about due process and access to justice, and for cases that offer us opportunities to champion the core values that the Supreme Court of Canada discusses in *Dunsmuir*, including justification, transparency, and accountability.<sup>29</sup>

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<sup>24</sup> V Luk, "Burnaby to appeal NEB decision granting Kinder Morgan access to city-owned land", *The Vancouver Sun* (28 October 2014), online: <<http://www.vancouversun.com/news/metro/Burnaby+appeal+decision+granting+Kinder+Morgan+access+city/10331785/story.html>> (accessed April 28, 2015).

<sup>25</sup> G Hoekstra, "Kinder Morgan wins battle to keep emergency plans secret", *The Vancouver Sun* (18 January 2015), online: <<http://www.vancouversun.com/news/Kinder+Morgan+wins+battle+keep+emergency+plans+secret/10740211/story.html>> (accessed April 28, 2015).

<sup>26</sup> The most prominent illustration of which to date is *Mikisew Cree First Nation v Governor General in Council*, 2014 FC 1244, which held that the federal government failed in its duty to consult the petitioners in advance of introducing sweeping changes to the fisheries and navigable waters legislation.

<sup>27</sup> Indeed, this is the very issue at the heart of the dispute involving the (federal) NEB and the municipality of Burnaby, British Columbia in respect of the hotly contested Trans Mountain oil pipeline project.

<sup>28</sup> For further development of this particular point, see the discussion of question four below.

<sup>29</sup> *Dunsmuir v New Brunswick*, [2008] 1 SCR 190.



All of which is to say that I think that our casebook does a credible job of providing students with a sense of the larger picture and the connections between these various developments. I hope too that it leaves them with a sense of the challenges and opportunities that await Canada's next generation of environmental lawyers.

## II QUESTION TWO: WHAT'S NEW, AND WHAT'S USEFUL, IN THE GOVERNANCE OF "SUPERWICKED" ENVIRONMENTAL PROBLEMS?

Climate change has been characterized as a "superwicked" problem, the kind of problem that seemingly defies resolution because of the "enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution."<sup>30</sup>

Among the more promising approaches to superwicked policy problems is that of "new governance." In the 2012 symposium "Conceptualizing New Governance Arrangements," one of you suggested that what might be "new" about new governance—both temporally and substantively—is

its clustering of a range of values that depart from how governments have governed in the past; values which governance proponents advocate should be deeply embedded in new governance arrangements. These values, *which are perhaps more aspirational than practiced*, include a commitment to policy learning, adaptability, and integrative solutions that transcend the traditional silos of government. Also prominently featured in new governance literature are values such as diversity, competition, and pluralism; provisionality and experimentation; transparency, deliberation and participation; and decentralization and subsidiarity.<sup>31</sup>

More specifically, you posited a three-dimensional governance model that comprises institutions, politics, and regulatory dimensions, and you then proceeded to test that model via three case studies. In the second of those case studies, on which the two of you collaborated, you analyzed forest-related climate change mitigation and adaptation initiatives at the sub-national, national, and bi-national levels to "assess the explanatory value of the three-dimensional model in a range of political and legal venues."<sup>32</sup> Your prediction was that these

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<sup>30</sup> Richard J Lazarus, "Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future" (2009) 94:5 Cornell L Rev 1153 at 1159. Classic "wicked problems," sometimes referred to as "social messes," include AIDS, health care more generally, and terrorism. See Robert E Horn & Robert P Weber, "New Tools for Resolving Wicked Problems: Mess Mapping and Resolution Mapping Processes" (2005) MacroVU(r), Inc. & Strategy Kinetics LLC.

<sup>31</sup> Chris Tollefson et al, "Symposium Overview: Conceptualizing New Governance Arrangements" (2012) 90:1 Public Administration 3 at 5 [emphasis added]. For a closely related analysis that also highlights the tension between new governance's *potential* and its *practice*, see Roderick A Macdonald & Robert Wolfe, "Canada's Third National Policy: The Epiphenomenal or the Real Constitution?" (2009) 59 UTLJ 469.

<sup>32</sup> Meinhard Doelle et al, "New Governance Arrangements at the Intersection of Climate Change and Forest Policy: Institutional, Political and Regulatory Dimensions" (2012) 90:1 Public Administration 37. The initiatives examined included the New Zealand Emissions Trading System, the Forest Carbon Standards Committee, the British Columbia Future Forest Ecosystems Initiative, and the Alaska Climate Change Strategy.

new governance arrangements would “embody informal institutions, reflect a balance of power that favours non-state actors, and deploy primarily soft law forms of regulation.”<sup>33</sup> You further hypothesized that these new governance characteristics “would seem particularly likely to emerge in the policy domains of climate change mitigation and adaptation, given the highly novel and wicked challenges they present.”<sup>34</sup>

The results of your analysis, however, interestingly and perhaps ironically suggested that the new governance arrangements in question tended “to be much more diverse, unpredictable and plain ‘messy’ than a simple ‘government to governance’ thesis would suggest.”<sup>35</sup> Not unlike, in other words, the very nature of the problems that the new governance arrangements you examined were designed to address in the first place. Indeed, you further argued that while “soft law currently predominates” within these arrangements, “this is a temporal phenomenon reflecting the relatively inchoate nature of the cases being studied.”<sup>36</sup> Finally, you argued that your analysis supported the hypothesis “that emerging governance arrangements will typically interact with extant arrangements through modalities of rivalry, complementarity and, potentially, transformation.”<sup>37</sup>

Your new governance analysis of emerging climate change and environmental protection arrangements raises a plethora of important questions, but I will confine myself to just one: Nearly three years after your initial analysis of a series of multi-level yet inchoate climate change mitigation and adaptation initiatives, what are your views on the potential as well as the limits of the new governance model as a framework for analyzing the superwicked problems of climate change and environmental protection?

## A. Chris Tollefson

I initially became interested in new governance arrangements and particularly in the law-creation role of civil society organizations during research for a book project about the rise of Forest Stewardship Council (FSC) certification. The book was an empirical and theoretical exploration into the FSC—one of the iconic global exemplars of new governance—written in collaboration with a political scientist and forest economist.<sup>38</sup> Out of that book came the impetus for the symposium project that was ultimately published in the journal *Public Administration*.

A key goal of the symposium was to develop a common framework for different disciplines interested in new governance arrangements (NGAs) to interact, debate, and collaborate in the analysis of NGAs. I do think that our framework, which emerged only after some pretty serious negotiations with close to a dozen symposium participants from different continents and disciplines, is a tangible step in this direction.

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<sup>33</sup> *Ibid* at 51.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*.

<sup>36</sup> Tollefson et al, *supra* note 31 at 16.

<sup>37</sup> *Ibid*. The hypothesis in question here is developed in D Trubek & L Trubek, “New Governance and Legal Regulation: Complementarity, Rivalry or Transformation” (2007) 13 Colum J Eur L 542.

<sup>38</sup> C Tollefson, F Gale & D Haley, *Setting the Standard: Governance, Regulation and the Forest Stewardship Council* (Vancouver: UBC Press, 2008).

Going into this project, as a legal scholar, I considered that a lot of the writing about NGAs outside the discipline of law portrays law in fairly simplistic terms, often as a dependent variable. In this project, I wanted to try to remedy that mischaracterization, bearing in mind the mutual benefits of rigorous, cross-disciplinary fertilization and debate. Ultimately, one of the key conclusions to emerge from the symposium was how messy and complex NGAs tend to be. The symposium also provided strong empirical fodder to dispute the view that we are in the midst of a fundamental transition from a “government”-centric model to a “governance”-centric one—while civil society and business interests are certainly taking on some government functions, the state is by no means withering away.

That said, what we are clearly seeing is an increased appetite on the part of a range of parties to engage in new governance experiments. This suggests, among other things, that the relationship between law and governance may now be more contingent and complex than in the past. I also believe that our symposium underscored the need to appreciate how powerful interests can exercise the option of exiting NGAs, in effect engaging in venue-shifting when it suits their purposes.<sup>39</sup> In short, our research tends to show that the emergence of NGAs does sometimes offer the potential for transforming or superseding traditional governmental arrangements. But more often, NGAs operate in parallel and frequently as rivals or competitors to such pre-existing arrangements.

To return to your initial question, though, it is certainly true that there are strong parallels between the “wicked problems” literature and the NGA literature. In the work we did for the symposium, while mindful of this, we did not set out to develop a model of new governance that was specifically designed to analyze or offer solutions to wicked or superwicked problems. Our main goal, really, was to develop a generic and readily usable tool for categorizing and comparing NGAs that drew on insights from law, public administration, and political science. I think we achieved this more limited goal reasonably well, although, as I said, the process of deriving the model took some serious interdisciplinary negotiations that were instructive in themselves.

## B. Meinhard Doelle

When Chris introduced me to the framework almost a decade ago, I was impressed with its ability to track some of the key governance influences I had been following for some time. My overall impression is that the framework has held up well, and has proven a useful tool for better understanding the broad range of governance approaches that are being utilized to deal

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<sup>39</sup> See e.g. *Resolute FP Canada Inc v Rainforest Alliance, Inc et al*, Court File No. CV-2014-171. In its public statement regarding Resolute’s decision to bypass the FSC’s Dispute Resolution mechanism and proceed directly with a legal action, the FSC explained that

The FSC certification system is built around a fair and transparent dispute resolution system aimed at attaining relevant, targeted, and applicable resolutions without legal proceedings. FSC Dispute Resolution is the system for managing complaints between certification bodies [e.g., Rainforest Alliance] and certificate holders [e.g., Resolute], which includes third party review, mediation and appeals procedures, designed to ensure replicable and robust certification decisions. FSC Dispute Resolution is the most applicable and comprehensive mechanism for resolving complaints that arise in the FSC certification system.

A further illustration is the collapse of the Canadian Boreal Forest Agreement. For further details, see <<http://canadianborealforestagreement.com/index.php/en/why-its-important>> (accessed August 12, 2014).

with environmental challenges. At the same time, the framework itself does not offer a recipe for the best governance approach to superwicked problems such as climate change. Rather, it is an analytical tool. It poses questions about key aspects of governance and their interconnection without prejudging the ideal governance approach to a particular problem or the conditions needed to implement such a governance approach effectively.

What makes the framework particularly useful is that it implicitly recognizes that the appropriate governance approach in response to a particular challenge will depend on the context, both in terms of the local political, institutional, and legal context within which the governance approach has to function, as well as the unique characteristics of the problem that the governance approach is seeking to address. What the application of the framework has demonstrated to me is that the design and implementation of governance approaches are generally influenced by a combination of motivations, only one of which tends to be addressing the challenge it is ostensibly designed to respond to. The tendency to protect the interests of those who have influence over the design of governance systems needs to be recognized and countered if governance approaches are to be effective.

I agree with Chris that the focus of our work on the new governance framework was not on wicked problems, but I do find it helpful in thinking about solutions. One of the lessons for superwicked problems such as climate change is that they tend to require a combination of approaches that fit the circumstances, including institutions that engage a range of actors, power sharing, and an openness to use a mix of tools. To be effective, they have to be sensitive to local circumstances and at the same time counter power imbalances and institutional and legal constraints that are part of the local circumstances. Only then can governance arrangements hope to ensure that their design and implementation stay true to the goal of responding to the challenge rather than being co-opted to serve the interests of those whose aim is to protect the status quo.

Effective governance approaches, particularly those targeting superwicked problems, need to find the right combination of the flexibility required to solve such complex problems and the transparency and public engagement needed to ensure that the solutions actually serve the greater good rather than the interests of those given privileged positions within the governance arrangements. This generally means institutions and laws that encourage power sharing and the engagement of a full range of state and non-state actors.

Superwicked problems, then, require the full and effective engagement of all the key interests that have a stake in solving the problem. Unfortunately, we seem to have a system of democracy that has not encouraged constructive engagement; rather, it has left many frustrated and jaded. This can only be resolved through a concerted effort to set up engagement forums that are empowering for everyone involved. Moreover, the process for securing this engagement has to be an ongoing process, no matter how strong the laws and institutions.

### III QUESTION THREE: HOW BEST TO ENHANCE AND ENCOURAGE THE USE OF REGIONAL STRATEGIC ENVIRONMENTAL ASSESSMENTS (REAS) IN CANADA?

In *Getting it Right in Ontario's Far North: The Need for a Regional Strategic Assessment in the Ring of Fire [Wawangajing]*,<sup>40</sup> Cheryl Chetkiewicz of Wildlife Conservation Society Canada and Anastasia M. Lintner of Ecojustice Canada argue that a regional strategic environmental assessment (REA) is required to ensure that resource development project proposals in Ontario's Far North region<sup>41</sup>—especially the mining and infrastructure proposals under consideration in respect of the so-called “Ring of Fire”<sup>42</sup>—are carried out sustainably. Chetkiewicz and Lintner further argue that a REA should be used to integrate environmental planning processes under Ontario's *Far North Act, 2010*, as well as the province's *Environmental Assessment Act*, *Clean Water Act*, and *Mining Act*.

Both of you have extensively analyzed a wide variety of forest management practices and strategic environmental assessments (SEA) across multiple jurisdictions, including the difficulties surrounding the use of SEAs. Indeed, one of you has argued that “it is still very difficult to grasp the concept of SEA, as it means different things to different people and is practiced very differently across jurisdictions.”<sup>43</sup>

Based on your understanding of the concept and various applications of SEAs and REAs both in Canada and internationally, what are the principal benefits and limitations of applying SEAs and REAs in Canada, not only in terms of instrument and regime design, but also in terms of the law and politics of sustainable resource development?

Moreover, based on your analyses to date, how can the use of SEAs and REAs be both *enhanced* and *encouraged* in Canada? This last question is especially urgent in light of the argument advanced by one of you that “[t]he complexities of regime design are, however, not the most significant challenges in strengthening SEA in Canada. The big barriers are

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<sup>40</sup> Cheryl Chetkiewicz & Anastasia M Linter, “Getting it Right in Ontario's Far North: The Need for a Regional Strategic Assessment in the Ring of Fire [Wawangajing]: A Working Paper” (2014), online: <<https://www.ecojustice.ca/wp-content/uploads/2014/08/Getting-it-Right-in-Ontarios-Far-North.pdf>> (accessed August 13, 2014).

<sup>41</sup> This region is defined in Ontario's *Far North Act, 2010*, as covering 452,000 km<sup>2</sup>, an area nearly half of Ontario and as large as France. According to Chetkiewicz & Linter, Ontario's Far North is a globally significant forested landscape containing the world's largest continuous area of boreal forest free from industrial development, and, together with its peatlands, comprises the world's single greatest storehouse of carbon. Equally important, Ontario's Far North is also the current and ancestral home of the peoples of the Nishnawbe Aski Nation, whose relationship with the land provides the basis for their worldview, spiritual and cultural values, and legal rights. See Chetkiewicz & Lintner, *Getting it Right in Ontario's Far North*, *supra* note 40 at 1. Disclosure: Professor Doelle both contributed to and reviewed *Getting it Right in Ontario's Far North*.

<sup>42</sup> For an introduction to the area and its economic potential, see Ontario Business Report, “Ring of Fire lights up Northern Ontario's mining industry”, available online: <<https://www.mri.gov.on.ca/obr/?p=1529>> (accessed August 15, 2014).

<sup>43</sup> Meinhard Doelle, “Role of Environmental Assessments in Energy Governance: A Case Study of Tidal Energy in Nova Scotia's Bay of Fundy” (2009) 27 J of Energy & Natural Resources Law 112 at 127. See also Chris Tollefson et al, *supra* note 38.

the continuing hesitance of governments to open up their strategic decision-making and the engrained habit of treating assessment as an approval hoop rather than a route to better decisions.”<sup>44</sup>

## A. Meinhard Doelle

As a starting point, I would argue that there is a need for clarity about the concepts of SEA and REA. I am involved in a research project that is trying to do just that. We have identified three types of environmental assessments. At one end of the spectrum are project EAs (PEAs). At the other end of the spectrum are assessments that are primarily limited in scope to trying to understand the interaction between human activities and the natural world through their spatial boundaries. We refer to those as REAs. REAs are therefore comprehensive assessments of current and potential future human activities in a given area generally carried out in the context of integrated planning. The third category of EA is what we call SEAs. Their key attribute is that they are more focused than a REA, in that they have constraints on their scope other than the spatial boundaries being studied. Often, a SEA will focus on a particular type of activity, or be inspired by a new understanding of how specific activities interact with the natural world.

To be effective, PEAs and SEAs should be nested within the context of previously conducted REAs. REAs would be carried out in all areas of significant existing activity, or expected future activity. REAs could take many forms, such as regional planning processes carried out by provinces and municipalities. A SEA would be carried out in the context of an existing REA when there are significant new developments or changes in understanding of the interaction between human activities and the natural world. SEAs could also take many forms and be initiated by any level of government. PEAs would be carried out for proposed activities within the context set by REAs as updated by SEAs. A legislative framework would be critical to ensure each process met the appropriate standards in terms of transparency, public engagement, and substantive rigour. Legislation would also be essential to clarify how the three types of processes would link to each other and to other decision-making processes at various levels of government.

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<sup>44</sup> See e.g. Robert B Gibson et al, “Strengthening Strategic Environmental Assessments in Canada: An Evaluation of Three Basic Options” (2010) *J Env L & Prac* 175 at 210-211. See also Meinhard Doelle et al, “Using Strategic Environmental Assessments to Guide Oil and Gas Exploration Decisions: Applying Lessons Learned from Atlantic Canada to the Beaufort Sea” (2013) 22:1 *RECIEL* 103 (arguing that “[a] well-designed SEA is the most effective and efficient tool available to ensure an appropriate policy context for development, the proper consideration of alternatives and to provide the necessary basis for cumulative effects assessments at the project level. SEAs can also be critical tools in engaging those potentially affected by development to work toward a common vision. Ultimately, it is important that governments take decisions as to whether to grant oil and gas rights in a particular area rather than simply following industry’s lead. Governments need to make those decisions on an informed basis in the long-term best interest of society.”); Meinhard Doelle, “The Role of EA in Achieving a Sustainable Energy Future in Canada: A Case Study of the Lower Churchill Panel Review” (2013) 25 *J ENG L & Prac* 113 at 133-134 (arguing that “federal EA in Canada has moved in the opposite direction, making the implementation of the recommendations in this article more difficult for the time being. Under CEAA 1995, important steps forward were possible without legislative changes. Under CEAA 2012, the full implementation of the changes recommended in this article will require significant legislative amendments”). See also Meinhard Doelle, “The Implications of the SCC Red Chris Decision for EAs in Canada” (2010) 20 *J Env L & Prac* 161.



One could think about the design of REAs, SEAs, and PEAs in light of the new governance framework discussed above. Applying the language from that analytic framework, I would advocate for REAs and SEAs that are polycentric in that they engage a full range of state and non-state actors. I would advocate for formal institutional requirements, but flexibility in regard to which institutions would qualify and how to make them work in the context of the particular region and the issues they are designed to address. The outcome of REAs and SEAs would ideally be a combination of hard law and soft law measures carefully designed through a public and transparent process to fit the particular context in which they operate.

Progress toward a more effective use of REAs and SEAs will not be easy. Effective implementation will require a significant shift in how governments engage with the public and with each other in their decision-making. One possible way forward may be to gain experience in areas that are less controversial. Jurisdictions such as Nova Scotia have experimented with SEAs with some success.<sup>45</sup> Efforts at what I would consider REAs, however, have been less successful in Nova Scotia.<sup>46</sup>

I see SEAs as a potentially critical tool in addressing some of the points raised under question two above. If properly designed, SEAs can bring people together to problem-solve around superwicked problems such as climate change. But to make SEAs work, governments have to be willing to use them to engage the interested public in decision-making and in shaping a common vision for the future that takes into account the ecological imperatives we are facing.

## B. Chris Tollefson

There is an urgent need for region-based impact assessment and planning in both northwestern and northeastern British Columbia. This urgent need is driven by rapid industrial development pressures in that region, including (1) the dramatic expansion of the gas extraction industry and fracking in northeastern British Columbia; (2) the construction of pipelines; (3) proposals for the siting of natural gas liquefaction (LNG) facilities; and (4) the construction of port facilities for the shipping of oil and natural gas to the international market.

In light of all this ongoing and proposed development, we must conduct proper cumulative effects analysis on a regional scale in order to better understand the potential adverse impacts of this industrial pressure. Governments are often nervous of, and only pay lip service to, the concept of regional cumulative effects assessment because, if taken seriously, such assessment may have enormous implications for environmental and natural resource decision-making.

In fact, back in August 2014, the UVic ELC and the Northwest Institute for Bioregional Research submitted a 60-page request to both the federal and B.C. ministers of environment asking for both levels of government to jointly conduct a strategic economic and environmental

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<sup>45</sup> Examples in Nova Scotia include public engagement processes run by independent panels on a range of issues, including tidal energy, renewable energy, energy efficiency, aquaculture, and shale gas development.

<sup>46</sup> See e.g. Eastern Scotian Shelf Integrated Management (ESSIM) process, online: <<http://www.dfo-mpo.gc.ca/oceans/publications/essim-giepne-eng.asp>> (accessed April 28, 2015).

assessment for the liquefied natural gas development in British Columbia.<sup>47</sup> So far, neither level of government has proceeded with conducting such an assessment.

I agree with Meinhard that what is needed is a legislative framework with clear mandates, proper administrative oversight of industry, and meaningful citizen participation. At the provincial level here in British Columbia, and to some extent at the federal level as well, environmental assessments have been hampered by a lack of clarity and rigour in how we think about and describe cumulative effects and area-based planning. We also have largely left issues of cumulative effects and area-based planning to negotiations and policy. Just recently, the Canadian Environmental Assessment Agency released a guidance document that sets out the general requirements and approach to considering cumulative environmental effects under CEAA 2012.<sup>48</sup>

It is clear to me that the current approach has failed, and that we need now to look to harnessing law to ensure that rigorous strategic and region-based environmental assessments are conducted. This will require a strong commitment on the part of the parties involved as well as key legislative changes described by Meinhard above.

#### IV QUESTION FOUR: WHAT ARE THE PROSPECTS FOR MEANINGFUL PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING IN CANADA?

In 2002, one of you reflected on the role that citizens and citizen organizations play in the development and interpretation of public law, both in administrative and judicial processes, and in doing so you focused on the following provocative question: “whether it is appropriate for such [citizen] groups to pursue their ‘agendas’ through recourse to the courts and tribunals.”<sup>49</sup> More specifically, you assessed “how effectively environmental organizations have advanced what might, for the present purposes, be referred to as an environmental ‘agenda.’”<sup>50</sup>

Your conclusion in 2002 was striking, and seems all the more so when revisited in 2015:

There can be little doubt that the enhanced role that citizens and citizen groups are playing in judicial and administrative settings challenges us to reflect not only on the implications of this phenomenon in terms of the rules and procedures that have traditionally governed these fora, but also on broader questions of democratic governance. The citizen participation phenomenon is not one that courts and tribunals should resist, nor have they done so. On the contrary, they have, I submit, made significant strides towards accommodating

<sup>47</sup> The request is available online: <<http://www.elc.uvic.ca/press/2013-SEEA.html>> (accessed April 28, 2015).

<sup>48</sup> The document is available online: <<https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=1DA9E048-1>> (accessed April 28, 2015).

<sup>49</sup> Chris Tollefson, “Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation” (2002) 51 UNBLJ 175 at 175. See also Chris Tollefson, “Costs in Public Interest Litigation Revisited” (2012) 39 Adv Q197; Michaelin Scott & Chris Tollefson, “Strategic Lawsuits Against Public Participation: The British Columbia Experience” (2010) RECIEL 45; Chris Tollefson, “Costs and the Public Interest Litigant: Okanagan Indian Band and Beyond” (2006) 19 Can J Admin L & Prac 39; and Chris Tollefson *et al.*, “Towards a Public Interest Costs Jurisprudence” (2004) 83 Can Bar Rev.

<sup>50</sup> Tollefson, *supra* note 49 at 175.

public interest advocates in processes and under rules that were developed for different purposes in different times. The progress courts and tribunals have made on this front suggests that they are keenly aware of the multitude of public benefits that flow from citizen engagement in judicial and administrative processes. Their continuing commitment to democratizing access to justice is, and will remain, a key measure and determinant of the health of our democracy.<sup>51</sup>

In a widely circulated and discussed op-ed published in *The New York Times* in 2013, Canadian political scientist Thomas Homer-Dixon argued that “Canada is beginning to exhibit the economic and political characteristics of a petro-state.”<sup>52</sup> But even more alarming, Homer-Dixon continued, “is the way the tar sands industry is undermining Canadian democracy. By suggesting anyone who questions the industry is unpatriotic, tar sands interest groups have made the industry the third rail of Canadian politics.”<sup>53</sup>

A year later, author Jacques Leslie observed in another op-ed published in *The New York Times*—provocatively entitled “Is Canada Tarring Itself?”—that from “2008 to 2012, oil industry representatives registered 2,733 communications with [Canadian] government officials, a number dwarfing those of other industries. The oil industry used these communications to recommend changes in legislation to facilitate tar sands and pipeline development. In the vast majority of instances, the government followed through.”<sup>54</sup> Leslie further observed that “Canada’s National Energy Board, an ostensibly independent regulatory agency, coordinated with the nation’s intelligence system, police and oil companies to spy on environmentalists. And Canada’s tax-collecting agency recently introduced rigorous audits of at least seven prominent environmental groups, diverting the groups’ already strained resources from anti-tar-sands activities.”<sup>55</sup>

Notably, there have also been legislative, administrative, and judicial developments auguring the discouragement of public participation in environmental decision-making and self-governance in Canada. Foremost of these, perhaps, is the 2012 amendment to the *National Energy Board Act* adding section 55.2, which provides as follows:

#### **Representations**

55.2 On an application for a certificate, the Board shall consider the representations of any person who, in the Board’s opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information

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<sup>51</sup> *Ibid* at 195.

<sup>52</sup> Thomas Homer-Dixon, “The Tar Sands Disaster”, *The New York Times* (31 March 2013), online: <<http://www.nytimes.com/2013/04/01/opinion/the-tar-sands-disaster.html>> (accessed August 14, 2014).

<sup>53</sup> *Ibid*. See more generally Naomi Oreskes & Erik M Conway, *The Collapse of Western Civilization: A View from the Future* (New York: Columbia University Press, 2014) at 54-55 (coining the term “carbon-combustion complex” as the “interlinked fossil fuel extraction, refinement, and combustion industries, financiers, and government ‘regulatory’ agencies that enabled and defended destabilization of the world’s climate in the name of employment, growth, and prosperity.”).

<sup>54</sup> Jacques Leslie, “Is Canada Tarring Itself?”, *The New York Times* (30 March 2014), online: <<http://www.nytimes.com/2014/03/31/opinion/is-canada-tarring-itself.html>> (accessed August 14, 2014).

<sup>55</sup> *Ibid*.

or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.<sup>56</sup>

As alleged in an application for judicial review of the NEB's Hearing Order in respect of Enbridge Pipelines Inc.'s proposed Line 9B oil pipeline reversal project, the applicants argued that section 55.2 of the *National Energy Board Act* chills public participation in the NEB's public administrative processes and thus unjustifiably infringes Canadians' freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.<sup>57</sup>

The applicants and the intervener in the Enbridge Line 9B judicial review further argued that the NEB's decision that it will "not consider the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline"<sup>58</sup> amounts to an unconstitutional content-based restriction of NEB hearing participants' freedom of expression.

To cite another example very much in the same vein, one of you observed in 2010 that the Supreme Court of Canada's decision in *Red Chris*<sup>59</sup> was a "missed opportunity to deal with a number of EA and environmental law issues raised." "Most surprising," you further observed,

the absence of any meaningful discussion of the critical role the public plays in the EA process. There is no mention of international law principles or public participation. There is no discussion of the mutual learning opportunity EA provides through the active engagement of proponents, members of the public, and government decision makers. The absence of this broader discussion is particularly surprising given that intervenors were granted standing to comment on these issues. The central role of the RA's [Risk Assessment's] failure to consult with the public prior to the scoping decision makes this omission even more perplexing.<sup>60</sup>

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<sup>56</sup> *National Energy Board Act*, RSC 1985, c N-7, as amended by the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.

<sup>57</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See the Notice of Application in respect of *Forest Ethics Advocacy Association and Donna Sinclair v The National Energy Board et al*, Federal Court of Appeal Court File No. A-273-13. Disclosure: Professor MacLean served as legal counsel of record for the Council of Canadians—Thunder Bay Chapter, an intervener in the proceeding. Substantially similar challenges to the NEB's new participation rules and regulations are presently in various stages of development. See *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245.

<sup>58</sup> National Energy Board Hearing Order OH-002-2013 (19 February 2013), online: <[https://docs.neb-one.gc.ca/lleng/llisapi.dll/fetch/2000/90464/90552/92263/790736/890819/918701/918444/A3%2D1\\_%2D\\_Hearing\\_Order\\_OH%2D002%2D2013\\_%2D\\_A3F4W7.pdf?nodeid=918357&vernum=-2](https://docs.neb-one.gc.ca/lleng/llisapi.dll/fetch/2000/90464/90552/92263/790736/890819/918701/918444/A3%2D1_%2D_Hearing_Order_OH%2D002%2D2013_%2D_A3F4W7.pdf?nodeid=918357&vernum=-2)> (accessed August 14, 2014).

<sup>59</sup> *Mining Watch Canada v Canada (Fisheries and Oceans)*, [2010] 1 SCR 6 [*Red Chris*].

<sup>60</sup> Doelle, "The Implications of the SCC Red Chris Decision", *supra* note 44 at 171. For an analysis—albeit in a different formal context—of Canada's responses to citizen submissions under the North American Agreement on Environmental Cooperation (NAAEC) that is *arguably* suggestive of the institutional discouragement of public participation in environmental governance, see Chris Tollefson & Anthony Ho, "Understanding Canada's Responses to Citizen Submissions under the NAAEC" (2013) 7 *Golden Gate U Env LJ* 55.

In light of these and other related developments, what is your view of the present and future prospects for meaningful public participation in various fora of Canadian environmental decision-making?

## A. Chris Tollefson

Access to justice in environmental decision-making has been a central interest of mine from the time I started teaching law, shortly after Meinhard and I finished grad school together. For me, one of the most interesting facets of environmental law as a discipline is the broad array of challenges and questions it presents for the *design* of administrative and judicial decision-making processes. My interest in these design issues has led me to think about, write on, and litigate cases raising a cluster of interrelated issues, including pre-hearing issues (standing rules, the availability of injunctive relief, document disclosure), hearing issues (admissibility of evidence, qualification of experts, witness examination), and post-hearing matters (nature and scope of the duty to give reasons, costs liability issues).

In my view, a key feature of the challenge in public interest environmental litigation in the judicial realm is to demonstrate how the procedural rules governing private interest litigation do not always promote, and sometimes thwart, access to justice. This is particularly true in the law of costs and injunctive relief. Paradoxically, in the realm of tribunal hearings, often the challenge for access to justice is to encourage a more rigorous application of the rules than would apply in the judicial realm, particularly as they relate to pre-hearing disclosure rights, cross-examination, and the obligation of decision-makers to engage with the evidence and provide reasons.

On all fronts, there is much work to do. Public interest environmental lawyers should be ready to argue about due process issues as rigorously as they are invariably ready to argue the substantive “environmental-values” issues their cases present. At the UVic ELC, we also see great value in working hard on the ground floor of regulatory cases with a view to creating a compelling evidentiary and procedural record that can sometimes have a positive influence on the initial decision or recommendation, and at the very least ensure that there are some viable grounds for a subsequent judicial review.

Doing battle on the terrain of the rule of law and due process not only is worthwhile on its own, but it is also a way of connecting with concerns that judges and tribunal members will typically share. The strongest public interest environmental law cases are ones that resonate with judges or tribunal members at multiple levels. This means that environmental lawyers need to develop their cases with multiple goals in mind, including (1) identifying a key environmental value that is at stake (without portraying the case as being just about that value), (2) adducing compelling science (not just critiquing uncertainty or flaws in an industry proponent’s or government’s case), and (3) rigorously showing why your argument advances or is consistent with the rule of law and due process.

A final note of caution. I think it is important to think strategically about what kind of arguments best advance your client’s interest and public interest jurisprudence generally. It is not always a good idea to swing for the home run; sometimes the goal should just be to get on base.

## B. Meinhard Doelle

Public participation in environmental decision-making is clearly under threat at the federal level of government in Canada. Organizations created by previous governments to encourage public participation in such decision-making, such as the Canadian Environmental Network and the Regulatory Advisory Committee to the federal minister of the environment, have either been dismantled or cut off from funding, and are no longer utilized for engagement purposes. The federal government has almost completely stopped any engagement with civil society in the development of environmental law and policy.

Changes to the *CEAA*, through a combination of legislative and policy reforms, appear carefully crafted to diminish the influence of independent panels and thereby the influence of the public on federal decision-making. By limiting the scope of federal EAs, and by eliminating the recommendations on whether the project should proceed, it has become easier for governments to ignore panel recommendations without being accountable to the public in any meaningful way.

Provincially, however, the situation is different. The province of Nova Scotia, for instance, has been involved in an interesting experiment to enhance and improve public involvement in environmental decision-making. The Nova Scotia government has, proactively and without legislative requirement, set up a number of independent panels over the past decade to engage the interested public in policy discussions on key sustainability issues, including renewable energy, energy efficiency, tidal energy, Nova Scotia's economic future, fracking, and aquaculture. The results of these independently-run public engagement processes include a binding legal commitment to produce 40% of the province's energy from renewable energy sources by the year 2020, an independent energy-efficiency agency funded by electricity ratepayers, and a tidal-energy industry that enjoys social acceptance (*i.e.*, "social licence") in Nova Scotia. Some of these processes are too recent for us to be able to judge their impact as of this writing, but early indications are that they have all had a significant impact on the legal and policy direction of the provincial government. An interesting aspect of these developments in Nova Scotia is that they have occurred under three different provincial governments, including, respectively, a Conservative government, a New Democratic government, and the current Liberal government.<sup>61</sup>

More generally, to be effective, public engagement rights and processes need to be enshrined in legislation to a much larger extent than is currently the case. Consistency and legal clarity are critical to the effectiveness of public engagement and transparency. It is also critically important that members of the public make the effort to engage in such decision-making processes. One way to achieve this consistency would be through a public engagement bill of rights that would set clear rules for public engagement. Such a bill of rights would have the potential to rebuild trust in public engagement processes and to re-establish the willingness of a larger segment of the population to engage in such initiatives consistently and constructively.

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<sup>61</sup> For further details, see Nova Scotia Department of Energy, *Renewable Electricity Plan: A path to good jobs, stable prices, and a cleaner environment* (April 2010), online: <<http://energy.novascotia.ca/sites/default/files/renewable-electricity-plan.pdf>> (accessed December 4, 2014).



## V QUESTION FIVE: WHAT'S NEXT IN CANADIAN ENVIRONMENTAL LAW SCHOLARSHIP?

A survey of the research interests and representative publications of environmental law scholars working in Canada today yields an impressively rich and diverse field of inquiry. At the same time, it is something of an unruly, anarchic field seemingly wanting for an overarching and organizing agenda. To be sure, there is much to be said in favour of intellectual pluralism, and environmental law scholarship—as well as legal scholarship more generally—often tends to follow current developments in law, policy, and practice. As the most recent call for submissions issued by the new editors<sup>62</sup> of the *Journal of Environmental Law and Practice* aptly puts it, “[t]here appears to be no shortage of environmental issues deserving further analysis and discussion, from the Lac-Mégantic disaster and the Northern Gateway project to the recent Mount Polley tailings breach, as well as significant developments in related areas of law, such as Aboriginal law (e.g., the recent Supreme Court of Canada decision in *Williams v. British Columbia*).”<sup>63</sup>

At the same time, however, in light of the superwicked nature of climate change and other environmental protection problems, environmental law scholarship might do well to establish an overarching and organizing research agenda. Such calls have been made in closely related fields. Sarah Cornell and her colleagues, for example, have called for the development of an integrated and transdisciplinary social ecology focused on fostering sustainability through an “intelligent pluralism.”<sup>64</sup>

If you could establish an agenda for Canadian environmental law research for the next ten years, what would it look like? What form of “intelligent pluralism”—i.e., intelligent because it is organized without being monothetic—would you propose?

Finally, on a closely related note, some environment scholars argue against advocating in favour of particular policies,<sup>65</sup> while others view policy advocacy as a natural extension of, and moral obligation flowing from, their research.<sup>66</sup> What role—if any—would environmental activism play in your research agenda for Canadian environmental law?

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<sup>62</sup> Of which Meinhard Doelle is one, along with professors Sharon Mascher and Martin Olszynski of the University of Calgary Faculty of Law.

<sup>63</sup> *Journal of Environmental Law and Practice*, Call for Submissions, August 9, 2014, available online: <<https://jelp.ca>> (accessed August 14, 2014).

<sup>64</sup> Sarah Cornell et al, “Developing a systematic ‘science of the past’ to create our future” (2010) 20 *Global Environmental Change* 426 at 427.

<sup>65</sup> See e.g. Tasmin Edwards, “Climate scientists must not advocate particular policies: I became a climate scientist because I care about the environment, but we have a moral obligation to be impartial”, *The Guardian*, (31 July 2013), online: <<http://www.theguardian.com/science/political-science/2013/jul/31/climate-scientists-policies>> (accessed August 14, 2014).

<sup>66</sup> See Wendy J Palen et al, “Consider the global impacts of oil pipelines” (2014) 510 *Nature* 465 at 466 (arguing that “[a]s scientists spanning diverse disciplines, we urge North American leaders to take a step back: no new oil-sands projects should move forward unless developments are consistent with national and international commitments to reducing carbon pollution. Anything less demonstrates flawed policies and failed leadership. With such high stakes, our nations and the world cannot afford a series of ad hoc, fragmented decisions”); and Stuart Kirsch, *Mining Capitalism: The Relationship Between Corporations and their Critics* (Oakland: University of California Press, 2014).

## A. Chris Tollefson

This is a critical and demanding time for environmental law scholarship. In terms of specific priorities for environmental law scholarship I would argue that two, in particular, stand out. The first is that we need more scholars who can critically assess environmental law jurisprudence from a hands-on and practical perspective. The second is that Canadian environmental law scholarship needs to continue to work to promote theory and interdisciplinary collaboration.

When I say that there is a need for more hands-on and practical environmental law scholarship, it's important to emphasize that there are already a number of Canadian environmental law professors who take this task seriously whether through blogs or by publishing in the *Journal of Environmental Law and Practice* (JELP) or in other legal periodicals. Moreover, many great contributions are being made by young and newly emerging law professors and practitioners.<sup>67</sup> Still, in my view, more is needed. There remains a dearth of black-letter environmental law scholarship that analyzes and critiques how courts and tribunals grapple both with substantive environmental law concepts (cumulative effects, the precautionary principle, and so forth) as well as due process concerns (standing, reasons for decision, disclosure, *etc.*).

This kind of scholarship lends enormous assistance to the practising bar, and hopefully will translate into opportunities for the next generation of environmental law scholars to get their hands dirty by advising clients, and developing and litigating cases. There are also untapped opportunities for environmental law scholars to become more involved in policy development and in the adjudication of environmental cases. This cross-fertilization between the worlds of academe and legal practice is sorely needed. One tangible way that this is happening already is through the work of environmental law clinics like those at the UVic ELC, the University of Ottawa, and more recently the University of Calgary.<sup>68</sup>

In a clinical setting, often the lawyer has no choice but to advocate for particular policy outcomes or positions—particularly where bound by a duty to represent the best interests of the client. As a practical matter, however, at the UVic ELC we tend to adopt a division of labour with our clients that gives them primary responsibility for taking public positions; our job is to provide legal support for these positions and to represent them before tribunals and in court. I have never been enamoured of characterizing our legal work as “environmental activism.” Perhaps a better term, which is gaining increasing currency, is “engaged scholarship,”

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<sup>67</sup> For example, every semester, I enjoy teaching from Professor Lynda Collins' article on causation in toxic torts that has a prominent place in our casebook. There are a growing number of promising young environmental law scholars on the scene including Sarah Morales, Jocelyn Stacey (both of whom are published in the December 2014 issue of JELP) and Martin Olszynski who has a very strong paper on judicial review and environmental assessment forthcoming in *Dalhousie Law Journal*.

<sup>68</sup> Much more modestly but nonetheless in the same vein, students who participate in the second-year course in environmental law at Lakehead University's Bora Laskin Faculty of Law have the opportunity of assisting on various public interest environmental law cases for ENGO clients, including thus far a motion seeking leave to intervene before the Supreme Court of Canada in *ForestEthics Advocacy Association's* proposed appeal regarding the Trans Mountain oil pipeline approval process (Supreme Court of Canada File No. 36353), and a motion before the National Energy Board requesting that the Board reconsider its steadfast refusal to date to consider the climate change implications of proposed energy projects.

which I think nicely evokes the synergies that can arise when academics and communities explore ways to work together.<sup>69</sup>

I would also argue that Canadian environmental law scholarship should not neglect the challenge of being more theory-based and interdisciplinary. Law scholars should seek to engage with disciplines outside of the intellectual architecture of law. Rod McDonald epitomized this progressive outward-looking approach to legal scholarship; another legal scholar whose work I tremendously respect in this vein is Michael Trebilcock. Law scholars should also look for ways to *import into* legal scholarship insights from science and other disciplines in the spirit not only of disciplinary comparativism but also to enhance the rigour with which law grapples with technology and science.

## B. Meinhard Doelle

I agree with Chris that we need both practical scholarship and new theoretical perspectives. In my view there is room and a need for a range of approaches to environmental law research, including law reform or advocacy-oriented research. I think environmental law research needs to be diverse (foundational, doctrinal, focused on law reform), but in my view it particularly needs to be interdisciplinary, and we should encourage it to be solution-oriented. In terms of priorities for environmental law research, the needs are many. I would highlight the following two.

First, environmental law research needs to develop more clear goals for environmental law, and to achieve this, it has to rethink or at least significantly refine the meaning of sustainable development. For example, the difference between needs and wants in the concept of sustainable development should be clearly articulated. The focus on the integration of environmental protection with social and economic prosperity, rather than merely balancing needs, must be more firmly prioritized. The importance of the preservation and enhancement of resilience for sustainable development also needs to be more clearly articulated. In short, we need much more clearly articulated goals for environmental law. Environmental law can no longer afford to be just about preventing the most harmful effects of human activities; it must also increasingly focus on encouraging the most integrated solutions to our environmental, social, and economic needs.

Second, environmental law research needs to find effective ways to engage a broad range of state and non-state actors in decision-making; we need to design governance approaches with a clear recognition of existing barriers and the goal of overcoming those barriers to good decision-making that currently exist. In many cases, this means explicitly shifting the existing balance of power, and engaging and supporting the active and meaningful voice of those who have been disengaged and disempowered.

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<sup>69</sup> For some perspectives on the meaning and implications of engaged scholarship for legal education, see “Towards Engaged Scholarship” (2013) 33:3 Pace L Rev, online: <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1837&context=plr>> (accessed April 28, 2015).

## CONCLUSION

In *The Utopia of Rules*,<sup>70</sup> U.S. anthropologist David Graeber examines the collapse of the distinction between public and private ordering and the concomitant continuity—nay, the concomitant *growth*—of administrative, bureaucratic governance structures and processes propping up corporations and markets. Graeber gives the example of the maze of rules governing something as simple and taken-for-granted as personal bank accounts:

The regulations behind such rules were almost certainly composed by aides to legislators on some congressional banking committee along with lobbyists and attorneys employed by the banks themselves, in a process greased by generous contributions from the banks to those very legislators. The same story is behind credit ratings, insurance premiums, mortgage applications, and even the process of buying an airline ticket. The vast majority of the paperwork we do exists in just this sort of in-between zone: though ostensibly private, it adheres to a legal framework and mode of enforcement that is shaped entirely by a government that works closely with private concerns to ensure that the results will guarantee a certain rate of private profit.<sup>71</sup>

At the same time, of course, there are growing concerns (as Graeber alludes to above) that our ostensibly *public* rules and regulations are shaped substantially by special (private) interests. Whether we call this “corruption” or “regulatory capture,” we tend to bracket if not outright ignore these concerns when we interpret statutes and propose law reforms.<sup>72</sup> To adapt Professor Doelle’s apt argument above, we tend *not* “to design governance approaches with a clear recognition of existing barriers and the goal of overcoming those barriers to good decision-making that currently exist.” All too often, we analyze laws and regulations at once superficially and artificially, thereby failing to adequately account for their actual origins.<sup>73</sup> As a result, we find ourselves caught in a kind of Catch-22, whereby the political barriers necessitating law reform in the first place tend to render our proposed reforms politically

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<sup>70</sup> David Graeber, *The Utopia of Rules* (New York: Melville House, 2015).

<sup>71</sup> *Ibid* at 5–16. Of course, one of the primary purposes of a liberal state is to provide the legal infrastructure that makes private ordering possible in the first place. For an argument that this public-private relationship is not necessarily anti-democratic, see Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2013).

<sup>72</sup> For a brief and exploratory account of the growing concerns over the lack of administrative independence in Canadian environmental law, see MacLean, “No Deference Without Independence,” *supra* note 22; see also Jason MacLean, “Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture” (201) *J Env L & Prac* (in press).

<sup>73</sup> A remarkable example of this failure can be found in the account that the renowned U.S. law professor Cass Sunstein gives of his tenure as the director of the U.S. Office of Information and Regulatory Affairs (OIRA) under the Obama administration, a federal agency responsible for conducting cost-benefit analyses of proposed rules and regulations. As Sunstein recounts, “[o]n the rare occasions when members of my staff pointed out the views of interest groups, I responded (I hope with humor, but also with a point), ‘That’s sewer talk. Get your mind out of the gutter.’” See Cass Sunstein, *Simpler: The Future of Government* (New York: Simon & Schuster, 2013) at 5. As Robert Kuttner observes in an incisive review of Sunstein’s account, Sunstein’s narrative is “either naïve or disingenuous.” See Robert Kuttner, “Obama’s Obama: The Contradictions of Cass Sunstein,” *Harper’s*, (December 2014) at 90.

impossible to implement.<sup>74</sup> Or, as Graeber pointedly observes, “[a]s whole societies have come to represent themselves as giant credentialized meritocracies, rather than as systems of predatory extraction, we bustle about, trying to curry favor by pretending we actually believe it to be true.”<sup>75</sup>

How do we break this vicious cycle? As professors Doelle and Tollefson’s answers above amply suggest, environmental lawyers need to be even more creative. Not coincidentally, the theme of *JELP*’s fifth biennial conference is “Après ... le Déluge: Future Directions for Environmental Law and Policy,” and one of the key aims of the conference was to “explore *new approaches* to federal environmental issues such as environmental assessments, fisheries, climate change, toxic substances, *etc.*”<sup>76</sup>

What this also suggests is the parallel—and urgent—need for judicial creativity and courage. As professors Doelle and Tollefson argue in their casebook *Environmental Law* regarding the domestic application of the precautionary principle, for example, “whether the principle can be rendered justiciable ... depends heavily on the creativity and initiative of lawyers and courts alike.”<sup>77</sup> Environmental lawyers must, moreover, urge and persuade courts that creative concepts like the precautionary principle and other dimensions of extant law—say, section 7 of the *Canadian Charter of Rights and Freedoms* and section 35 of the *Constitution Act, 1982*—add value to courts’ adjudication of environmental law issues<sup>78</sup> and are “consistent with their competence and jurisdiction to supervise administrative action.”<sup>79</sup>

Indeed, in the face of both legislative retreat and regulatory capture, the time has come, not for judicial abstinence, but for greater judicial activism in Canadian environmental law. Meanwhile, one of the foremost tasks of Canadian environmental lawyers and scholars will

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<sup>74</sup> In respect of law reforms designed to counter and regulate the outsize and anti-democratic influence of lobbyists on the U.S. Congress, Robert G. Kaiser neatly sums up this paradox by noting that “to pass such reforms would upend the culture that has evolved in modern times, the culture that has served today’s incumbent politicians well.... In recent times incumbents have been reelected at rates without historical precedent. The avid supporters of real reform on Capitol Hill are few, the cynics many.” See Robert G. Kaiser, *So Much Damn Money: The Triumph of Lobbying and the Corrosion of American Government* (New York: Knopf, 2009) at 358. For an historical analysis of this problem, see Zephyr Teachout, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United* (Cambridge: Harvard University Press, 2014). See also Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* (New York: Twelve, 2011). For a more practical approach, see Lawrence Lessig, *The USA is Lesterland* (licensed CC-BY-NC, 2014).

<sup>75</sup> Graeber, *supra* note 70 at 28.

<sup>76</sup> June 5–6, 2015 [emphasis added]. See <<http://www.jelp.ca>> for further conference details (accessed April 28, 2015).

<sup>77</sup> Doelle & Tollefson, eds, *supra* note 6 at 35. The original source of this excerpt from Doelle and Tollefson’s casebook is itself a prime example of the kind of creative advocacy environmental lawyers must undertake, see Chris Tollefson, “A Precautionary Tale: Trials and Tribulations of the Precautionary Principle” (paper delivered at the Environment in the Courtroom: A Symposium for Judges and Court Practitioners, University of Calgary, March 2012).

<sup>78</sup> For a modest, preliminary attempt to sketch this connection, see Jason MacLean, “Throwing the Precautionary Principle to the Wind? Determining the Constitutionality of Ontario’s Green Energy Act in *Dixon v Director, Ministry of the Environment*”, 2015, Toronto LJ, online: <<http://archive.constantcontact.com/fs158/1107293291635/archive/1119832853882.html>> (accessed April 28, 2015).

<sup>79</sup> Doelle & Tollefson, eds, *supra* note 6 at 39.

be to devise effective ways to escape the extractive industries' hold of government officials and regulators whose responsibility is to protect the environment in the public interest.<sup>80</sup>

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<sup>80</sup> For an overview of the issue of regulatory capture in the U.S. context, including proposals aimed at preventing capture, see Daniel Carpenter & David A Moss, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge University Press, 2014). For an analysis of the Canadian context, see MacLean, *supra* note 72.