



# Maintaining SuperNatural BC for Our Children

**Selected Law Reform Proposals**

**Edited by Calvin Sandborn**



# **Maintaining SuperNatural BC for Our Children**

## **Selected Law Reform Proposals**

Edited by Calvin Sandborn



# MAINTAINING SUPERNATURAL BC FOR OUR CHILDREN: SELECTED LAW REFORM PROPOSALS

Edited by Calvin Sandborn

November 2012

The opinions and recommendations in this report, and any errors, are those of the authors and do not necessarily reflect the view of the publishers or funders of this report.

This report is available under limited copyright protection. You may download, distribute, photocopy, cite or excerpt this document provided it is properly and fully credited and not used for commercial purposes.

Photographs may not be reproduced separately without permission.

Editing, Design and Photographs: Holly Pattison, UVic Environmental Law Centre

Cartoons: Agnes Lee and Meghan Neathway

Back Cover: Mary McNeill, former ELC law student. In Kwak'wala, the words in the image mean: "All tribes together helping each other to treat something right."

ISBN: 978-1-55058-486-8



The ELC is a non-profit organization that operates the ELC Clinic, a public interest environmental law clinic at the University of Victoria, Faculty of Law. The ELC also runs the Associates Program, which brings together lawyers across the province, referred to as ELC Associates or ELC Fellows, for continuing legal education-style meetings about current issues in public interest environmental law. The ELC is guided by a diverse and experienced Board of Directors that includes law students, lawyers, law professors and representatives of environmental, First Nations and community organizations. The ELC functions at arm's length from the University and raises its own operation and program funds. We gratefully acknowledge the Law Foundation of BC for its continued project support and the Tula Foundation that funds our core operations. For more information about the ELC and its work, see [www.elc.uvic.ca](http://www.elc.uvic.ca).

## Acknowledgments

This book would not have been possible without the contributions made by West Coast Environmental Law and Ecojustice. We want to particularly thank West Coast Environmental Law Association Executive Director Jessica Clogg and lawyers Andrew Gage, Rachel Forbes, Deborah Carlson and Josh Paterson. We are also grateful to Ecojustice Executive Director Devon Page and lawyers Karen Campbell, Sean Nixon, Morgan Blakley, Judah Harrison, Margot Venton, Randy Christensen, as well as Cait Murphy, articulated student Anna Johnston and staff Ecojustice scientist Susan Pinkus.

We are indebted to the authors and reviewers of the articles in the book: Jamie Alley, William J. Andrews, Morgan Blakley, David Boyd, Oliver Brandes, Wally Braul, George Bryce, Jennifer Cameron, Karen Campbell, Jessica Clogg, Deborah Curran, Rachel Forbes, Andrew Gage, Vincent Gogolek, Carmen Gustafson, Mark Haddock, Shi-Ling Hsu, Emma Hume, Trevor Johnson, Naomi Kovak, Matt Keen, Jacqueline Lebel, Ethan Krindle, Amanda Macdonald, Maine McEachern, Ben Parfitt, Josh Paterson, John Pennington, Erin Pritchard, Tim Quirk, Murray Rankin, Jodi Roach, Calvin Sandborn, Anneliese Sanghara, Megan Seiling, Maya Stano, Chris Tollefson and Jill Vivian.

We deeply appreciate the collaboration and input from Environment at the Edge and particularly from Bob Peart, Jim Walker, Nancy Wilkin and Vicky Husband.

We are grateful for the support of POLIS in publishing this book and for supporting outreach and distribution.

Special thanks go to UVic Environmental Law Centre legal staff Chris Tollefson, Deborah Curran, Mark Haddock and articulated students Jill Vivian, Carmen Gustafson, Ethan Krindle, Emma Hume, Marcie Zemluk and Naomi Kovak for their sterling efforts in finalizing this book.

Finally, this book would not be what it is today without the brilliant photography, desktopping, and editing efforts of ELC Administrator Holly Pattison.



**POLIS Project**  
on  
**Ecological Governance**  
University of Victoria



**Tula**  
FOUNDATION

**THE**  **LAW**  
**FOUNDATION**  
**OF BRITISH COLUMBIA**

# Contents

## A. Planning and Environmental Assessment

1. The Lesson from Fish Lake: Reform BC's *Environmental Assessment Act* ..... 12  
*By Mark Haddock, Chris Tollefson and Ethan Krindle*
2. Cumulative Effects: Regulating All Impacts on the Land ..... 16  
*By Jodi Roach*
3. Land Use Planning for Nature, Climate and Communities ..... 19  
*By Jessica Clogg*

## B. Regulating Industries

4. MINING: Mineral Tenure Reform ..... 26  
*By Emma Hume*
5. MINING: Additional Mining Reform Recommendations ..... 30  
*By Maya Stano*
6. MINING: Mining and Environmental Protection: The Failure to Inspect and Enforce  
..... 34  
*By Calvin Sandborn and Maya Stano*
7. OIL AND GAS: Reforming Oil and Gas Law ..... 37  
*By Karen Campbell and Emma Hume*
8. OIL AND GAS: It's Time to Regulate Fracking ..... 43  
*By Ben Parfitt and Tim Quirk*
9. FORESTRY: Forest Policy for the 21st Century ..... 48  
*By Jessica Clogg*

## C. Protecting Wildlife & Water

10. Protecting Species at Risk ..... 54  
*By Jacqueline Lebel*
11. Modernizing the 100-Year-Old *Water Act* ..... 58  
*By Jennifer Cameron and Deborah Curran*
12. Protecting Fish in British Columbia ..... 63  
*By Deborah Curran and Megan Seiling*
13. Privatizing Salmon Protection: The Failure of the *Riparian Areas Regulation* ..... 67  
*By Andrew Gage*
14. Run-of- River Projects and Related Issues ..... 70  
*By Josh Paterson*
15. Re-Regulating Private Septic Systems ..... 74  
*By Morgan Blakley and George Bryce*
16. The Case for a *Coastal Zone Management Act* ..... 78  
*By Jamie Alley and Calvin Sandborn*

## D. The Urban Environment

17. Implementing Regional Sustainability Strategies ..... 84  
*By Deborah Curran*
18. Protecting Natural Areas in our Communities ..... 87  
*By Calvin Sandborn*

19.	A Greenways Strategy for the 21st Century .....	<b>92</b>
	<i>By Calvin Sandborn</i>	
20.	Reinventing Rainwater Management: Designing the Green City .....	<b>95</b>
	<i>By Calvin Sandborn and Oliver Brandes</i>	
<b>E. Pollution</b>		
21.	Home Heating Oil Tanks: The Threat to Salmon and Your Wallet. ....	<b>100</b>
	<i>By Calvin Sandborn and Naomi Kovak</i>	
22.	Reforming Contaminated Sites Laws .....	<b>103</b>
	<i>By Wally Braul</i>	
<b>F. Climate Change and Energy</b>		
23.	We Need a Provincial Carbon Budget .....	<b>108</b>
	<i>By Andrew Gage</i>	
24.	In Defence of the Carbon Tax. ....	<b>111</b>
	<i>By Shi-Ling Hsu</i>	
25.	A Rational Strategy for Electricity Rates, Conservation and Intergenerational Equity .....	<b>114</b>
	<i>By William J. Andrews</i>	
26.	How to Save the World Without Hurting the Poor: An Energy Poverty Strategy .....	<b>118</b>
	<i>By Jill Vivian, Maine McEachern and Calvin Sandborn</i>	
<b>G. Ensuring Justice for Nature</b>		
27.	Access to Justice: Reforming Environmental Tribunals .....	<b>122</b>
	<i>Ethan Krindle, Mark Haddock and Calvin Sandborn</i>	
28.	Citizen Access to Courts .....	<b>126</b>
	<i>By Erin Pritchard and Calvin Sandborn</i>	
29.	Enhancing Citizen Enforcement Powers .....	<b>129</b>
	<i>By Jennifer Cameron</i>	
30.	An Environmental Bill of Rights .....	<b>133</b>
	<i>By Jennifer Cameron and Jacqueline Lebel with David Boyd</i>	
31.	Protecting Public Participation: The Need for an Anti-SLAPP Law. ....	<b>137</b>
	<i>By Carmen Gustafson</i>	
32.	The Case for a BC Environment Commissioner. ....	<b>141</b>
	<i>By Murray Rankin, QC and Anneliese Sanghara</i>	
<b>H. Key Structural Changes</b>		
33.	Reliance on Qualified Professionals in Environmental Regulations .....	<b>146</b>
	<i>By Mark Haddock</i>	
34.	Reforming Freedom of Information Law .....	<b>150</b>
	<i>By Vincent Gogolek and Murray Rankin, QC</i>	
35.	The Need to Protect Whistleblowers. ....	<b>155</b>
	<i>By Rachel Forbes and Amanda Macdonald</i>	



## Editor's Note

BC environmental laws are in urgent need of reform.

Peace Valley residents fear lethal sour gas escapes that have taken place and call for tougher regulations on the oil and gas industry. Comox Valley residents are concerned that new mines threaten their drinking water – and ask why the law leaves taxpayers with the bill for mine clean ups. Both environmentalists and forestry workers question the short-sighted laws that threaten long-term forestry jobs and the environment.

Archaic water laws contribute to water shortages that threaten jobs and fish on Vancouver Island and elsewhere. More than 1,600 species are now “at risk” in BC – yet BC and Alberta are the only provinces without a dedicated law to protect such species. And inadequate laws on urban sprawl threaten the SuperNatural BC that attracted us here in the first place.

The stakes are high. Yet current laws have not only failed to keep pace with our booming resource industries and population growth – our laws are actually weaker than they were a few years ago. The articles in this book aim to remedy this by recommending specific changes to BC environmental laws.

This book is put forward as an educational service to inform the public, government and decision makers about solutions that have been proposed by environmental law experts. Their recommendations are presented here for public education, debate and consideration – and to trigger law reform ideas from others.

Ultimately, we hope that this book will enrich the discussion about how laws can be changed to better maintain SuperNatural British Columbia for our children.



Note that many of the articles reflect previous reports and reform recommendations from environmental law experts. We advise you to go to the original reports cited at the end of the articles in order to get more information on each topic. Other links to related information are also provided to give you more background.

We caution that the recommendations summarized are those of the authors. They are not the result of a consensus process and do not necessarily reflect the current priorities of the “environmental movement” or of the Environmental Law Centre, Ecojustice or West Coast Environmental Law.

Environmental organizations establish their own conservation and policy priorities in different venues – see Organizing for Change (<http://organizingforchange.org/>), Ecojustice (<http://www.ecojustice.ca/>), West Coast Environmental Law (<http://www.wcel.org/>) or UVic Environmental Law Centre (<http://www.elc.uvic.ca/>). Contact those groups to get more information and to discuss these and other issues.

Note that there are unceded Aboriginal title and rights across much of BC, and the recommendations in this book should be interpreted in a manner consistent with these inherent and constitutionally protected rights.

Calvin Sandborn  
Legal Director  
Environmental Law Centre





## **A. Planning and Environmental Assessment**

I SEE IMPACTS...

ENVIRONMENTAL IMPACTS

IN YOUR FUTURE!



## 1. *The Lesson from Fish Lake: Reform BC's Environmental Assessment Act*

BY MARK HADDOCK, CHRIS TOLLEFSON AND ETHAN KRINDLE

Ottawa's rejection of the first Prosperity Mine proposal in 2010 did more than just stop one ill-conceived plan to destroy Fish Lake. The decision also vividly demonstrated the problems with BC's environmental assessment law.

Indeed, the initial plan to drain Fish Lake sailed through the provincial assessment process without a hitch. Yet federal Environment Minister Jim Prentice came to the opposite conclusion and nixed the idea. Prentice noted:

*Fish Lake would be drained, and there would be the loss of all the associated wetlands and a number of streams. Really, it was the loss of the whole ecosystem...*

Prentice's decision was based on a detailed analysis done by a panel of experts appointed under the federal environmental assessment law. The Panel concluded that the Prosperity Mine would:

- Create high magnitude and irreversible effects on fish, and significant effects on grizzly bears;

- Destroy an important cultural and spiritual area of the Tsilhqot'in people; and
- Create long term impacts on the physical and mental health of the Tsilhqot'in.

This federal decision stood in marked contrast to the approach taken by BC's Environmental Assessment Office. The provincial office rejected expertise from its own Ministry of Environment and recommended approval of the project. This was consistent with the BC Office's record – it has only recommended that a project be rejected twice in its history.

Furthermore, the flawed provincial process fell far short of the promises made to First Nations in 2005 when the BC government announced its commitment to a "New Relationship."

In 2011, the BC Auditor General highlighted deep flaws in the provincial environmental assessment process. The government watchdog strongly criticized the lack of rules governing mitigation and compensation for adverse environmental effects once a project is approved; the lack of measurable and enforceable conditions in EA certificates; and lack of compliance and enforcement.

Government has responded with some minor tinkering, but it is time for a major overhaul of BC's *Environmental Assessment Act*. It is particularly important to strengthen the BC law in light of Ottawa's recent gutting of the federal *Environmental Assessment Act*. Under the new federal law, Ottawa will rely increasingly on provincial reviews – instead of conducting its own more rigorous reviews like the one that saved Fish Lake in 2010.

Without an effective federal regime, the environment will clearly be at risk if we perpetuate BC's deeply flawed system. After all, in 2010, the BC assessment actually supported the draining of Fish Lake.

The Environmental Law Centre (ELC) published a comprehensive study in 2010 on how the Act can be improved to protect places like Fish Lake and still encourage sustainable development. The study focused on ways of making the BC system more effective – and more efficient.

The ELC report concluded that our current provincial law is remarkably weak compared to many other jurisdictions. Citing precedents from other countries and provinces, the ELC report recommended the following measures:

- Adopt a "traffic light" (green/amber/red) approach that addresses big picture issues such as Aboriginal title and rights, land use planning and community suitability up front – before millions of dollars are invested in detailed engineering and feasibility studies. This would provide more certainty to industry and avoid situations like Fish Lake, where the company invested 17 years and millions of dollars in vain;
- Utilize "strategic-level" environmental assessments of overall regional development, government programs, policies and laws – instead of requiring everything be addressed by proponents at the "project-level";

## *BC's Natural environment is first class - our environmental laws should be as well.*

- Develop sustainability-based criteria for decisions on whether projects should be approved. The law should do more than set out procedural steps – it should require that a project actually meet substantive sustainability criteria;
- Spell out policies and procedures for determining the acceptability of proposed mitigation and compensation measures;
- Set out rules regarding the use of qualified experts in the environmental assessment process – and require more rigorous and objective fact-finding procedures when company experts disagree with government experts;
- Require that careful consideration be given to whether the project is needed – and what less harmful alternatives to the project may exist;
- Compel a rigorous and comprehensive assessment of *cumulative* environmental impacts of major projects;
- Enable the public to participate in assessments in a meaningful, constructive, timely fashion. This must include adequate participant funding for First Nations and community groups; and
- Ensure that measurable environmental performance conditions are placed on approved projects so that proponent promises can be monitored and enforced over time.

One of the BC government's "Five Great Goals" has been clearly articulated:

*Lead the world in sustainable environmental management, with the best air and water quality, and the best fisheries management, bar none.*

We support that goal and call on the premier to now implement it. BC's natural environment is first class – our environmental laws should be as well. The BC *Environmental Assessment Act* cries out for reform.

*Mark Haddock is a lawyer with the Environmental Law Centre and Senior Instructor at the UVic Faculty of Law.*

*Chris Tollefson is the Executive Director of the Environmental Law Centre and the Hakai Chair in Law and Sustainability at the University of Victoria, Faculty of Law.*

*Ethan Krindle is a former ELC Clinic student and ELC Executive who also articulated with the Environmental Law Centre.*

**For more information, see:**

*Environmental Assessment in British Columbia*, Environmental Law Centre. (2010) [http://www.elc.uvic.ca/publications/documents/ELC\\_EA-IN-BC\\_Nov2010.pdf](http://www.elc.uvic.ca/publications/documents/ELC_EA-IN-BC_Nov2010.pdf)

*An Audit of the Environmental Assessment Office's Oversight of Certified Projects*. Office of the Auditor General of British Columbia. (2011) <http://www.bcauditor.com/pubs/2011/report4/audit-bc-environmental-assessment-office-EAO>

*Strong Environmental Law Report Card on C-38*. West Coast Environmental Law. (2012) <http://www.wcel.org/resources/publication/strong-environmental-laws-report-card-bill-c-38>



## 2. *Cumulative Effects: Regulating All Impacts on the Land*

BY JODI ROACH

Nature is suffering a “death by a thousand cuts” because BC fails to keep track of the combined impacts of the countless different activities that take place on the same landscape. Individual mines, hydro projects, oil and gas operations, and forestry are regulated separately – but government fails to monitor and manage the *collective* effects of these activities on the natural world.

For example, the law doesn’t require environmental assessments for many types of projects, such as a single gas well or multiple seismic lines. However, a thousand such wells and seismic lines have a monumental impact on the environment – and there is no environmental assessment of that massive cumulative impact. Worse still, we fail to assess the impact of those thousand wells combined with the logging, mining and hydro development that is occurring in the same ecosystem.

Even when a formal provincial environmental assessment of a major new project is done, it often fails to rigorously address the cumulative impacts that

will result from the interaction of the project with other activities. In contrast, the federal *Environmental Assessment Act* **requires** that cumulative effects be considered in federal assessment of projects. Alberta and Yukon laws also require cumulative effects assessment. Yet BC's *Environmental Assessment Act* lags behind – it does not have mandatory requirements regarding cumulative effects.

The BC Environmental Assessment Office claims, in its 2009 *User Guide*, that it considers cumulative impacts in assessments of projects – but it is still not mandatory. Nothing in the provincial Act actually requires cumulative assessment of projects under review.

As a result of growing concerns about cumulative effects, the Forest Practices Board (FPB) investigated the issue. The FPB studied the combined impacts of multiple industries on drinking water, soil and caribou habitat in the Kiskatinaw River watershed near Dawson Creek. In 2011, the FPB published their findings in a special report titled *Cumulative Effects: from Assessment towards Management*.

The FPB concluded that the cumulative effect of resource development in BC “remains largely unknown and unmanaged.” It criticized government’s failure to assess and manage cumulative effects.

The FPB went on to recommend that cumulative effects assessment be embedded in the overall land management/land use planning system. It also recommended that government set specific and measurable *objectives* for the kinds and amounts of human activities that should take place on the land; that these objectives govern decisions to grant resource development rights; and that government monitor cumulative effects to ensure the overall objectives are met.

Environmental assessment, land use planning and regulatory officials must ensure that government and industry meet cumulative effects objectives – and ensure that appropriate action is taken to rectify environmental degradation where it occurs.

There have to be limits to development in some areas. Where environmental objectives are being breached, then mandatory mitigation measures should be required – or additional development should not be approved. Such oversight is not only needed for major projects that undergo formal environmental assessments – but also for projects and activities that don't require formal environmental assessments.

The challenge we face is clear: our rich natural heritage may be lost if we fail to assess and manage cumulative effects. Indeed, when numerous disparate environmental impacts occur across an ecosystem, “the whole is far greater than the sum of its parts.” To deal with this problem, government needs to:

- Establish specific and measurable landscape objectives for the kinds and amounts of human activities that should take place on the land;
- Define specific environmental impact thresholds that must not be exceeded;

*The challenge we face is clear: our rich natural heritage may be lost if we fail to assess and manage cumulative effects.*

- Ensure that these objectives and thresholds govern decisions to grant resource development rights;
- Establish a mechanism to monitor and manage cumulative effects to ensure that objectives are met and thresholds respected; and
- Integrate proactive land use planning, environmental assessment processes and management regimes to prevent unacceptable cumulative effects.

*Jodi Roach is a lawyer focusing on research and policy; and a volunteer at the ELC Clinic.*

**For more information, see:**

*Environmental Assessment in British Columbia.* Environmental Law Centre. (2010) [http://www.elc.uvic.ca/publications/documents/ELC\\_EA-IN-BC\\_Nov2010.pdf](http://www.elc.uvic.ca/publications/documents/ELC_EA-IN-BC_Nov2010.pdf)

*Cumulative Effects: From Assessment Towards Management.* Forest Practices Board. (2011) [http://www.fpb.gov.bc.ca/SR39\\_Cumulative\\_Effects\\_From\\_Assessment\\_Towards\\_Management.pdf](http://www.fpb.gov.bc.ca/SR39_Cumulative_Effects_From_Assessment_Towards_Management.pdf)

*Provincial Land Use Planning: Which way from here?* Forest Practices Board. (2008) [http://www.fpb.gov.bc.ca/SR34\\_Provincial\\_Land\\_Use\\_Planning\\_Which\\_Way\\_From\\_Here.pdf](http://www.fpb.gov.bc.ca/SR34_Provincial_Land_Use_Planning_Which_Way_From_Here.pdf)



### ***3. Land Use Planning for Nature, Climate and Communities***

BY JESSICA CLOGG

Beginning 20 years ago, community members, stakeholders and government representatives sat down around planning tables across the province and worked out strategic land use plans that cover most of BC. Addressing large regional or sub-regional areas, each plan determined lands to be added to our protected areas system, along with resource management zones and objectives for the vast areas outside of protected areas. As an additional layer, the province's Biodiversity Strategy also provided for landscape-level planning for priority biodiversity values. The provincial government claimed, "The province of British Columbia is one of the only jurisdictions in the world that has applied this type of planning in such a systematic way in an effort to balance social, economic and environmental values."

Twenty years on, it is possible to look at the outcomes from these planning initiatives and take stock. How well are they serving us in managing the

cumulative environmental impacts of a range of resource activities, combined with climate change? Will they sustain our environment, communities and economy in the 21<sup>st</sup> century? Lessons have been learned that can help us improve our laws and policies to support resilient communities and ecosystems.

Scientific review of BC's environment suggests we have reason to be concerned. A recent, comprehensive, science-based assessment of the province's natural environment concluded: "The cumulative impacts of human activities in British Columbia are increasing and are resulting in the loss of ecosystem resilience," and "Ecosystem degradation from forestry, oil and gas development, and transportation and utility corridors has seriously impacted British Columbia's biodiversity."

The imperative of climate change has brought the question of cumulative impacts to a head: "Climate change is already significantly impacting healthy ecosystems in British Columbia, and will likely cause more dire consequences for fragmented or degraded ecosystems."

Given the dedicated efforts of so many British Columbians to strategic land use planning across the province, how can this be?

First of all, significant parts of the province have still not undergone land use planning – including the Lower Mainland, Sunshine Coast and Merritt areas. Second, the provincial government has cut its support for land use planning and instituted an operations-focused agency to "get the development permits out."

But there are also fundamental problems with BC's laws and policies that govern planning processes, and with the legal tools used to implement planning outcomes. In an ongoing research project, ForestEthics Solutions is mapping existing environmental designations for the province as a whole – the on-the-ground legacy of BC's strategic planning efforts – and West Coast Environmental Law has analyzed the resource management direction provided by these legal tools. We have discovered an array of legal and policy barriers that undermine the ability of existing management direction to achieve resilience in our ecological systems and for human communities. These include the following issues:

- For close to a decade it was provincial policy to design land use planning processes as "multi-stakeholder" negotiations without proper government-to-government engagement with First Nations. This meant both lost opportunities to benefit from Indigenous knowledge about the land and water, and uncertainty about the constitutionality of planning outcomes like the establishment of new protected areas;
- Provincial policy limited how much of the land base could be set aside from development in many planning processes. These limits were political, subjective – and, in many cases, they limited the extent to which planning outcomes reflected best available science and Indigenous knowledge;
- All but the most recent strategic land use plans failed to consider climate

*The cumulative effects of human activities and climate change are already beginning to put our natural life support systems, and the communities that depend on them, under stress.*

change in identifying management objectives – either in terms of its impacts or with respect to forest carbon management (vast stores of carbon present in forests are released into the atmosphere as greenhouse gases after logging);

- Land designations and management objectives flowing from strategic land use plans do not apply to all resource industries. In particular, mining is excluded, and there is no legal linkage between land use plans and environmental assessment. For those resource sectors to which land use plan designations and objectives do apply, BC’s laws contain a number of exemptions and loopholes that permit their effectiveness to be compromised;
- Even when land use plan objectives do apply, there is generally no legally enabled mechanism for coordinating decision making between resource agencies and between provincial and First Nations governments to ensure that the cumulative impacts of past, present and reasonably foreseeable future activities do not exceed limits established in land use plans or otherwise compromise important values; and
- Planned monitoring and updating of land use plans has rarely, if ever, occurred.

There are now a handful of government-to-government agreements between First Nations and the Crown that have pioneered more comprehensive and science/Indigenous knowledge-based land use planning – for example, in the territories of the Coastal First Nations, the Gitanyow and the Taku River Tlingit. These innovative agreements are being implemented together with new approaches to collaborative decision making and economic benefit sharing, and there is much to learn from them. However, many of the barriers identified above continue to present challenges to the effective implementation of these plans.

For example, some areas of the province are simultaneously dealing with proposals for mining, forestry, hydroelectric, oil and gas development, as well as related roads, power-lines and other infrastructure. While each form of development may be subject to regulatory approvals and, in some cases, project-specific environmental assessment, there is currently no provincial legal mechanism that requires proactive, coordinated assessment of cumulative impacts at a geographic scale beyond the footprint of an individual project – and, perhaps more importantly, no legal requirement to integrate the outcomes into decision making.

Updating our strategic land use plans can contribute to this goal, while potentially opening up new economic opportunities for rural, First Nations communities. Our research suggests a number of foundational elements that could inform such a process:

**Reinstate a land use planning mandate within the provincial government.** This could be a distinct, neutral agency with dedicated planning expertise.

**Carry out land use planning for areas of the province where it has not taken place** in a manner that is consistent with the other recommendations here.

**Build on existing plans.** In recent hearings conducted by a special legislative committee around the province, British Columbians from all walks of life spoke out resoundingly to affirm that areas currently reserved from logging to protect water, wildlife and other values should remain in place and not be re-opened. If anything, the committee was told, we should be doing more, not less, to sustain our natural life support systems in the face of climate change.

**Begin from best available scientific and Indigenous knowledge** about what it will take to sustain the ecological and societal values we care about, taking climate change into account. Invest in mapping projects to support land use decision making – to identify both areas with high conservation values for species/biodiversity and those with high potential to store carbon in natural ecosystems over the long term.

**Conduct broad-scale, proactive, regional cumulative effects assessment to inform planning efforts** that focus on valued components of ecological and human well-being. What impacts have already happened historically? Where do we stand today? What are a range of future scenarios that could achieve maximum mutually reinforcing benefits? Regional initiatives also need to be connected to provincial level strategies regarding nature and climate change.

**Ensure future land use decision making is inclusive, participatory and just.** Social choice decisions about land use should be made in a manner that is inclusive and participatory, while recognizing the distinct and constitutionally protected role of First Nations as decision makers in their territories. New institutions, independent from existing line ministries or the Environmental Assessment Office will likely be required.

**Fully integrate the outcomes from regional cumulative effects assessment and land use planning into our land management system.** To be effective, land use designations and management objectives established should apply to all resource industries and all government decisions about land and water. Our laws will require updating to ensure this occurs.

**Implement and sustain monitoring programs and practice adaptive management.** We need to know if management objectives are being met and if these are effective over time at achieving our goals. Our legal frameworks need to include triggers for action if we learn that they are not.

The situation is urgent. The cumulative effects of human activities and climate change are already beginning to put our natural life support systems, and the communities that depend on them, under stress. We must act now to give ecosystems, species and ultimately ourselves a fighting chance.

The good news is that improved management and protection of our natural environment will favour new economic opportunities and job growth potential – linked to conservation, ecosystem restoration, and climate adaptation initiatives. These are key elements of the so-called “clean economy” in our region that is anticipated to generate employment gains and revenues of \$2.3 trillion by 2020.

*Jessica Clogg is the Executive Director and Senior Counsel at West Coast Environmental Law.*

**For more information, see:**

*Provincial Land Use Planning: Which Way from Here?* Forest Practices Board. (2008) <http://www.fpb.gov.bc.ca/publications.aspx?id=3418>

*Taking Nature’s Pulse: The Status of Biodiversity in British Columbia.* Biodiversity BC. (2008) <http://www.biodiversitybc.org/EN/main/where/132.html>

*A New Climate for Conservation: Nature, Carbon and Climate Change in British Columbia.* West Coast Environmental Law. (2010) <http://wcel.org/resources/publication/new-climate-conservation-nature-carbon-and-climate-change-british-columbia-ful>

*The West Coast Clean Economy Study, Opportunities for Investment & Accelerated Job Creation.* GLOBE Advisors and the Center for Climate Strategies. (2012) <http://www.globeadvisors.ca/market-research/west-coast-clean-economy-study.aspx>





## B. Regulating Industries



## 4. *MINING: Mineral Tenure Reform*

BY EMMA HUME

Mining can cause serious and long-lasting environmental damage, and mine proposals continue to spark conflict across the province. Members of the Tahltan Nation blockaded a road to the proposed Red Chris Mine near Dease Lake, debate rages in Fanny Bay over the proposed Raven coal mine, and Ottawa rejected the initial Prosperity Mine proposal to drain Fish Lake – only to consider a second proposal in the face of intense resistance. Meanwhile, concern is escalating about the scope of proposed mining across the northwest.

Regardless of who forms the next government, the booming mining industry will likely play a central role in our economy. Therefore, BC mining laws must be reformed to put people and the environment first – to meet the needs of local communities, recognize First Nations’ rights and title and protect the environment. Mineral tenure laws must be changed to do this.

### **Reforming Mineral Tenure**

Mineral tenure laws – known as the free-entry system – determine where mining can take place. These laws create a two-zone framework that opens

the vast majority of the province, except for a few protected areas, to mineral exploration and development.

This means that private property, valuable ecological areas, First Nations' traditional territories and areas prioritized for other uses in land use plans are all open for mineral exploration and development. This system puts miners' interests before those of other land users, fails to respect First Nations' rights and title, undermines detailed strategic land use plans, and fails to protect the environment.

The free-entry system is over 100 years old and was developed at a time when mining was used to pave the way for other land uses on the "frontier." Partly because communication and administration were poor, miners were given priority rights over other land users. Since these laws were introduced, technology, the province and our thinking have changed dramatically. Our laws must reflect these changes.

*Claims can be staked on private land without the consent of the land owner, granting the claim holder the right to occupy the land for exploration and development purposes. Compensation and minimal notice are required before mining activities can occur on private property, but land owners do not actually have the right to refuse mining on their land.*

Ontario, which once had a similar system, has taken significant steps to modernize its laws. Within the last decade, prospecting in cottage country sparked outrage amongst private land owners. First Nations also actively asserted their constitutional rights. These powerful voices prompted the modernization of Ontario's mining laws.

Ontario is now reforming its legal system in the areas of mineral tenure and private property rights (including automatically withdrawing mining rights from some land); Aboriginal consultation (including outlining consultation requirements, requiring environmental rehabilitation and introducing a new system for permitting exploration activities); and mineral exploration and development. Meanwhile, that province continues to enjoy record levels of investment, and industry has been actively involved in the modernization process.

While Ontario's reforms are not perfect, BC must follow suit and begin the difficult work of re-writing its archaic mining laws. Change must address the problems created by the current free-entry system, which prioritizes mineral exploration over all other land uses in numerous ways. Most

important, reforms must flow from consultation with First Nations, industry, environmental groups, and other stakeholders.

Today, mineral claims and leases privilege the interests of miners in the early stages of mine development – by providing them with access to land before considering other important land interests. With a Free Miner Certificate, obtained for a nominal fee, individuals may explore for minerals on private and public land. The vast majority of land, except land not subject to the free entry system such as ecological reserves and parks, is open to mineral staking.

Mineral claims are staked online, on a first-come, first-served basis. Claims can be staked on private land without the consent of the land owner, granting the claim holder the right to occupy the land for exploration and development purposes. Compensation and minimal notice are required before mining activities can occur on private property, but land owners do not actually have the right to refuse mining on their land. On Crown land, similar rights apply, meaning claims can be staked in areas of cultural and economic importance to First Nations.

Once a mineral claim is staked, the claim holder has the right to convert it to a mineral lease. This offers long-term security for the right to further explore and exploit minerals. Government has no discretion to refuse to convert mineral claims to leases.

Granting these rights automatically means important considerations such as land-use plans, environmental protection and other community needs are not heard until much later in the mine development process – when significant resources have already been invested. This process also limits the ability to use land for other purposes – or set it aside for protection – without government compensating mineral rights holders for expropriation.

As a consequence, claims staked for a few hundred dollars can result in compensation claims in the millions, paid for by taxpayers. Similarly, these laws fail to provide government with the discretion needed to allow consultation with First Nations to inform where mineral claims are staked or when claims are converted into leases. This can contribute to costly litigation over Aboriginal rights and title issues, and puts into question the province's commitment to respecting constitutionally protected rights.

Reform of the *Mineral Tenure Act* and the *Mines Act* is long overdue.

## Recommendations

- Replace free entry with a discretionary licensing and permitting system that requires consideration of environmental and other interests when allocating access to mineral rights. Landowners and other interested parties should have the right to petition government to withdraw lands from mineral tenure availability;
- Legislation should establish no-go zones for mining that include land for unsettled First Nations' land claims, domestic use watersheds, private conservation lands, sensitive lands with poor environmental restoration

capability, fisheries sensitive watersheds, adequate buffers around areas of cultural and ecological importance and lands that link existing protected areas;

- Require mines to conform to the terms of land use plans and agreements with First Nations. If land use plans and agreements are not completed, any grants of mineral licenses should be made conditional on the terms of plans and agreements;
- Explicitly acknowledge Aboriginal rights and title in new legislation. New legislation should explicitly require consultation with, and consent from, First Nations before mining permits are granted and mining activities begin;
- Require consultation with, and consent from, private land owners before mining activities begin. Compensation awarded to affected landowners must be fair and allow landowners to relocate if they wish; and
- Require comprehensive environmental assessments before significant exploration activity begins.

*Emma Hume is a former ELC Clinic student who also articulated at the Environmental Law Centre.*

#### **For more information, see:**

Judah Harrison. *Too Much at Stake: The Need for Mineral Tenure Reform in BC*. Ecojustice. (2010) <http://www.ecojjustice.ca/publications/reports/too-much-at-stake/attachment>

Karen Campbell. *Undermining Our Future: How Mining's Privileged Access to Land Harms People and the Environment*. West Cost Environmental Law. (2004) <http://www.wcel.org/sites/default/files/publications/Undermining%20Our%20Future%20-%20A%20Discussion%20Paper%20on%20the%20Need%20to%20Reform%20Mineral%20Tenure%20Law%20in%20Canada.pdf>



## ***5. MINING: Additional Mining Reform Recommendations: Towards a More Balanced Framework***

BY MAYA STANO

The current BC framework governing mineral exploration, development and reclamation has a long way to go before it puts communities, constitutionally recognized First Nations' rights and title, and long-term environmental protection first. A review of current problems – and of laws adopted in other jurisdictions – highlights some minimum reforms needed to strengthen BC's mining laws to ensure a sustainable future. They are as follows:

### **Land-use Planning**

- Mineral tenure should only be granted to areas where land use plans have been developed and implemented.
- Land-use plan legislation should, at a minimum:
  - Establish no-go zones for mining that include land for unsettled First

*Given the growth of mineral exports from BC, a long-term mineral strategy is needed to ensure efficient resource development, avoidance of waste and safekeeping of sufficient mineral resources to meet the needs of future generations.*

Nations' land claims, sensitive lands with poor environmental restoration capability, adequate buffers around areas of cultural and ecological importance, and lands that link existing protected areas;

- Grant landowners and other interested parties the right to petition government to withdraw lands from the free entry system; and
- Integrate post-mine closure land use with local land use objectives.
- For development proposed on key ecological lands, amend the legislation governing issuance of mining permits to give *environmental* officials equal authority as other statutory decision makers.

### Environmental Assessment

- Environmental assessments should be required for all mines – regardless of size or production capacity.
- Proponents should be prohibited from justifying activities that impair, pollute or destroy the environment on the basis of economic considerations alone.
- The following considerations should be mandatory in all environmental assessments:
  - Potential impacts of early mine abandonment;
  - Cumulative impacts of adjacent, or hydraulically connected, mines; and
  - Contingency plans for unpredicted impacts, including extreme events caused by climate change.
- Clear legal standards within the environmental assessment framework should be established to:
  - Determine what adverse effects are “significant”; and
  - Determine what information should be considered and described for each alternative, and reasons for eliminating alternatives.
- Environmental assessment reports should include non-technical summaries to promote public engagement and involvement in the review process.
- Follow-up programs, including on-site investigations to assess the implementation of environmental assessment obligations, should be mandatory.

### Mine Permits

- Mine permitting legislation should, at a minimum:
  - Specify mandatory content for permit applications (including application

fees to adequately cover government review costs);

- Include minimum considerations – such as principles of sustainability – for decision makers to take into account when reviewing new permit applications and applications to amend or renew existing permits; and
- Promote an integrated permit system so that all permits conditions (including associated effects) for mine operations are considered concurrently by the decision maker.

### Tailings Ponds

- Legislation on tailings management should be improved by:
  - Prohibiting the design of mines requiring long-term water treatment – thereby eliminating the option of converting natural lakes into tailing impoundments; and
  - Requiring adequate security for full reclamation of tailings impoundments.

### Orphaned and Abandoned Mines

- Legislation to manage and remediate orphaned and abandoned mines should, at a minimum:
  - Require operating mines to pay into an orphaned/abandoned mine clean-up fund;
  - Include provisions that encourage re-development of orphaned and abandoned mines; and
  - Co-ordinate orphaned and abandoned mine clean-up with land use planning.

### Mining Inspections

- Minimum legal requirements for mine inspections should, at a minimum:
  - Ensure individuals conducting mine inspections are independent (i.e., not former mine employees or individuals with financial interests in the mine or mining company);
  - Require adequate site inspections during early mining phases, including mine construction;
  - Establish minimum mine inspection frequencies throughout mine life; and
  - Mandate fees to adequately cover government inspection costs.
- The public should be empowered to request investigations of alleged violations of laws and regulations at mines.
- Legally established monitoring committees – comprising members of local communities and First Nations – should ensure mines comply with commitments made in response to public concerns.

### Enforcement

- Existing laws must be enforced. Legal provisions should be put in place to ensure enforcement is adequately funded.

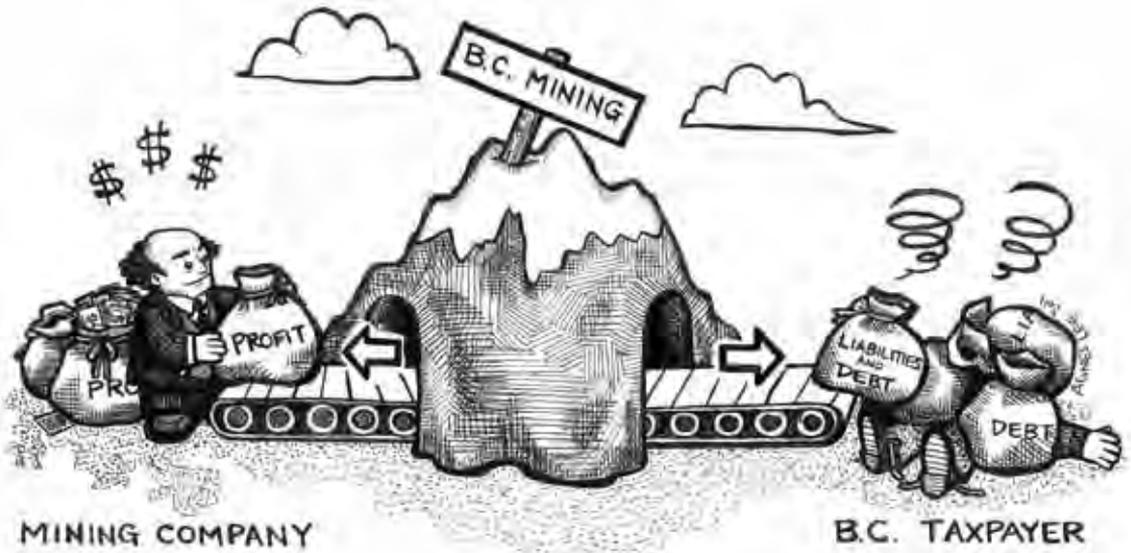
### Limiting Mining Minister's Discretion

- Discretion is an important tool in regulatory decision making, particularly for site-specific mining activities that require a flexible and creative approach. However, a balance between flexibility, consistency and environmental protection has yet to be achieved. Minimum requirements should be specified so that basic legal obligations are not unnecessarily left open to negotiation between government and the mining industry.

### Long-term Provincial Mineral Strategy

- Given the growth of mineral exports from BC, a long-term mineral strategy is needed to ensure efficient resource development, avoidance of waste and safekeeping of sufficient mineral resources to meet the needs of future generations. Without a long-term mineral strategy, intact stocks of non-renewable resources to ensure the mineral self-sufficiency of future generations of British Columbians will not be achieved. This strategy should be supported by legal provisions that mandate, at a minimum, require:
  - Mandatory contributions by miners to a research and development fund;
  - Promotion of local value-added manufacturing using mineral ore; and
  - Government procurement policies that give preference to locally manufactured goods made from locally mined metals and minerals.

*Maya Stano, LL.M, P. Eng., is a former ELC Clinic student with technical experience and expertise in mining issues.*



## 6. *MINING: Mining and Environmental Protection: The Failure to Inspect and Enforce*

BY CALVIN SANDBORN AND MAYA STANO

Reasonable people can disagree on the merits of particular mine projects. But most British Columbians would be shocked to discover just how weak our mine regulatory system has become. There is an urgent need to reform this environmental protection regime.

A 2011 Environmental Law Centre study found:

- The legal rules set out in Environmental Assessment certificates are often actually drafted by the mining company, can be vague and unenforceable, and are not monitored over the life of the mine;
- The number of government mine inspections in 2008 dropped to half of what it was in 2001;
- Similarly, the number of provincial staff dedicated to mine reclamation issues has dropped by more than 50%;

- Since 1998, Ministry of Environment (MOE) staff have been reduced by more than 25%;
- From 2006 until 2010, MOE took only six enforcement actions for coal and metal mine violations. Five of those penalties amounted to less than \$600 each; and
- The province's chief inspector of mines failed to file the legally required 2009 and 2010 annual reports on enforcement and other issues – and cited lack of staff as a reason.

This ramshackle enforcement regime is not good enough for an industry that can create environmental and financial catastrophes. Acid mine drainage can release toxins for centuries. Taxpayers paid \$69 million to clean up the Britannia mine that killed Britannia Creek and affected millions of salmon in the Squamish estuary.

After the Mount Washington mine destroyed the Tsolum River fishery, taxpayers paid \$6 million to restore the river. It can get far worse – taxpayers paid \$436 million to clean up the Yukon's Faro Mine and \$399 million to clean up the Giant Mine in the Northwest Territories.

Yet the system to ensure that companies pay for their own mess is broken. In 2003, the province's Auditor General pointed out that financial security being taken under the *Mines Act* is inadequate to remediate the known mines sites in BC where contamination exists.

Some action has been taken since then, but not enough. In 2010, the government's public accounts acknowledged almost \$600 million in net liability for BC mines and oil/gas and energy sites. Yet tens of millions of that amount remains unsecured. Some BC mines have posted security for less than \$5 million – when a water treatment system alone can cost over \$25 million. A recent review of the financial security at the Equity Silver Mine highlights the difficulty in estimating the full long-term water treatment costs. In the past 10 years, the amount of lime (used for treatment) and how long that amount needs to be used have steadily increased. This increase translates into increased costs – a heavy liability that should be borne by industry, not by taxpayers.

Lack of security is a problem for such a volatile industry. It leaves taxpayers at risk to pay for massive cleanups – or to not pay, and endure serious environmental damage. Current law also allows the calculation of security amounts to be kept confidential; thereby limiting transparency and the public's ability to review the numbers. Security rules must be revamped and strengthened to ensure that companies, not taxpayers, ultimately clean up their own mess.

In addition, the BC regime needs to be reformed to provide compensation for victims of mine pollution. Under the current system, if a mine pollutes and then goes broke, neighbours and others (such as shellfish growers, fishers, and tourism operators) are likely out of luck – and out of pocket.

Government should require the mining industry to fund a program to protect

*We need to ensure that mining provides long-term benefits to communities – and also protects the ecosystems we depend on.*

such innocent third parties. The provincial and federal governments have both endorsed the polluter-pays principle. Now they need to actually implement it.

A mining boom is sweeping the province. But before any more mines are approved, there needs to be comprehensive law reform. We need to ensure that mining provides long-term benefits to communities – and also protects the ecosystems we depend on.

At a minimum, we need to enact laws to provide the highest level of environmental protection; ensure government has enough staff to actually enforce those laws; and ensure that companies – not taxpayers and Mother Nature – pay for the environmental and financial damage caused by a mine.

We must act to protect the wild salmon and trout, eagles and bears. We must act to protect our pristine streams and sparkling lakes. Finally, we must act to protect mine neighbours, the provincial treasury and taxpayers.

*Calvin Sandborn is Legal Director for the UVic Environmental Law Centre with technical experience and expertise in mining issues.*

*Maya Stano, LL.M, P. Eng., is a former ELC Clinic student.*

**For more information, see:**

Maya Stano. *The Raven Mine: A Regulatory & Fiscal Black Hole? A look at environmental enforcement & securities at mines in BC.* Environmental Law Centre Clinic. (2011) [http://www.elc.uvic.ca/publications/documents/2010-02-03-RavenMine-RegulatoryandFiscalBlackHole\\_Stano.pdf](http://www.elc.uvic.ca/publications/documents/2010-02-03-RavenMine-RegulatoryandFiscalBlackHole_Stano.pdf)



## 7. *OIL AND GAS: Reforming Oil and Gas Law*

BY KAREN CAMPBELL AND EMMA HUME

Oil and gas must be balanced with people and environment

---

In recent years, the oil and gas industry has changed the face of northeast British Columbia. The industry has brought great wealth but at a profound cost to this beautiful area. Residents are extremely concerned about air pollution, water pollution, and health risks. The boom in fracking for natural gas has led to at least one serious accident that heightened those concerns.

Yet many regulations are vague or permissive, monitoring and enforcement is inadequate, and fines have been laughably small. The regulator, the Oil and Gas Commission, is seen as unduly influenced by industry and lacking sufficient concern for public health or the environment. Landowners have not had the ability to protect themselves from industrial activity on their own lands.

Development has proceeded *ad hoc*, without limits on cumulative impacts – and without an overall vision for what British Columbians want the region to look like in the end. Furthermore, there has not been a strategy to recapture and set aside for the future a portion of the money made from liquidating our non-renewable riches.

Even as our reliance on natural gas has increased, adjustments to the regulatory regime have facilitated further development – while environmental issues, health issues and landowner concerns remain largely unaddressed.

Implementing the following six recommendations would help strengthen environment and health standards and help ensure a greater balance between the development interests of companies and the concerns of landowners. While individually each recommendation would be an improvement; combined, these measures could significantly reduce the impacts of this type of industrial activity while maximizing benefits to British Columbians.

**First, British Columbia should implement cumulative impact management. The government should establish binding cumulative impact thresholds in BC’s oil and gas areas, and budget activity between various uses of the landscape to be conducted within those thresholds.**

The overall impact of the oil and gas industry is much greater than a single project would ever suggest. For example, in 2004, BC had enough seismic lines – five-metre-wide swaths of land cleared for oil and gas exploration – to cross Canada 20 times. The industry is eating into the timber supply of forest companies, into critical habitat for wildlife and into productive farm and ranch land. BC has no system to adequately manage for the cumulative impacts of multiple uses of the landscape.

A system is needed to plan and manage for the impacts of multiple industries on the same land base over time. Years of forestry, mining, oil and gas drilling, and associated infrastructure stresses ecosystems and affects the land base. Cumulative impact management and planning is a response to this challenge and can ensure that future impacts are better understood before further environmental harm occurs. Maximum impact thresholds must be established for resource extraction, other human uses, and ecological requirements for lands and wildlife – allocating acceptable levels of activity so that overall impacts on the land do not exceed these thresholds.

**Second, create an independent health and pollution body to research, strengthen, and enforce pollution and health rules in BC relating to oil and gas activity, and to address the health impacts associated with oil and gas development.**

Health impacts from oil and gas development, particularly from accidents, are a serious problem and tend to not be as well understood outside of northeast British Columbia. For example, highly poisonous “sour” gas wells can be

drilled as close as 100 metres to a house, exposing the occupants to risks of health impacts from blowouts and low level exposure. In 2009, a sour gas leak near Pouce Coupe spewed 30,000 cubic metres of toxic gas into the air, forcing 15 people to flee their homes, killing a horse, and raising concerns about the adequacy of safety mechanisms in place. Residents and workers alike share concerns about safety and the long-term health effects of chemical exposure.

Oil and gas production results in a range of other toxic releases, many of which are not well understood or regulated. Steady small emissions from the industry also add up to create serious local and regional air quality issues. A 2010 study found emissions of nitrogen oxide, sulphur oxide and volatile organic compounds to be double what government reported. The reality is that many upstream oil and gas emissions aren't adequately regulated, resulting in under reporting and an underestimation of the risks emissions pose to health.

The province has responded to these concerns with promises to develop an air quality monitoring program in the northeast, but much more is needed to address the source of the problem. An independent body that is tasked with researching, strengthening and enforcing pollution and health rules would be a start. This body should have the sole mandate to protect the health of British Columbians based on research it conducts into health effects of oil and gas activity. The body must have the authority to implement measures to better protect the health of those most affected.

**Third, monitoring and enforcement staff should be restored to pre-2001 levels. Increases in staff should be indexed to wells drilled; meaningful fines for infractions should be implemented; and oversight roles to agencies other than the Oil and Gas Commission should be restored.**

When the Oil and Gas Commission was first established in the late 1990s, it was designed as an independent regulator, with a specific mandate to regulate oil and gas activities in the province. Yet over the past decade, a series of changes have broadened its mandate to include oversight related to environmental laws, use of agricultural land, and water withdrawals by industry – areas which were once in the purview of other responsible ministries. At the same time, the independence of the Commission has been compromised by linking its accountability to the Ministry of Energy and Mines, meaning that the government can influence the operational activities of its once independent regulator.

This problem is compounded by the fact that even BC's weak oil and gas laws are not being enforced. A series of different reviews and audits have found systemic problems with enforcement. A joint agency audit (conducted by provincial ministries and the federal Department of Fisheries and Oceans) found 20% of activities disregarded the law or posed an immediate threat to the environment. In the past, over 60% of Oil and Gas Commission field inspections have identified infractions. A 2010 report by the BC Auditor General found that the Oil and Gas Commission's compliance rates and record

## *BC has no system to adequately manage for the cumulative impacts of multiple uses of the landscape.*

keeping were problematic and lacked transparency. These shortcomings are agency wide and must change.

Once again, agencies other than the Oil and Gas Commission play a role in ensuring compliance with environmental and other standards. Agencies taking on this role must be adequately staffed. A 2009 review by West Coast Environmental Law found that the Ministry of Environment had the lowest level of environmental convictions in 20 years, largely because of extensive budget cutbacks and reduced staging levels.

### **Fourth, place a moratorium on hydraulic fracturing until the impacts on groundwater and aquifers are fully assessed, and until laws are passed to ensure that water resources are adequately protected from toxic chemicals.**

Hydraulic fracturing or “fracking” has been the primary means of extracting natural gas in British Columbia for almost a decade, despite increasing public concern about the impacts. No environmental assessments are conducted of any fracking activity, and authorizations are routinely granted with minimal review. This occurs regularly, despite the fact that the Oil and Gas Commission has firmly established a link between fracking and seismic activity, and has cautioned companies against shoddy practices where companies frack wells in close proximity, resulting in subsurface gas leaks.

The risks of fracking are well known and documented. Use of chemicals, issues with disposing of millions of litres of flowback water, and the unknown impacts of explosions on water tables and aquifers underground are just some of the issues. And while the geology in British Columbia may – or may not – reduce some risks, a precautionary approach would dictate that these issues be understood and analyzed in advance of fracking activity. Implementation of these six recommendations will also address the challenges associated with fracking.

Some jurisdictions have established moratoriums on this controversial drilling technique until the full impacts on water contamination are known and laws are put in place to ensure water is adequately protected. BC, too, needs a moratorium on fracking until we understand and manage these water risks responsibly.

### **Fifth, give landowners and locals the power to say no to oil and gas development that may adversely affect them; at a minimum, provide meaningful consultation on oil and gas activities for landowners and locals before approvals are granted.**

Oil and gas companies can drill on private property without the owner's consent. Multiple well pads and pipelines on a ranch or farmland make it difficult for locals to use and enjoy land the way they would like to. These infringements have intensified for many landowners with the advent of hydraulic fracturing – where fracking activities take place around the clock for extended periods of time and dozens of wells can be drilled off a single pad at a well site.

In BC, when landowners and companies do not agree on the terms of surface access, the Surface Rights Board can be asked to make a ruling. It may specify terms of entry, including the amount of rent or compensation owned to a landowner. The Board has no authority to deny entry to a company, merely to determine conditions of access.

The situation for local residents is worse, as residents may not always have the same notice opportunities or information as landowners. This situation is compounded by the fact that mishaps are not infrequent, and there have been documented problems with the adequacy of emergency response procedures. The rights afforded to individuals who live in oil and gas producing parts of the province are not on par with those of companies, and the playing field must be levelled.

**Sixth, end subsidies and royalty breaks to the oil and gas industry, and direct 25% of oil and gas revenues into a BC “heritage” fund to support a just transition to sustainable industries.**

BC gives extensive tax and royalty credits to the highly profitable oil and gas industry. And, unlike Alberta, Alaska, and even Chad, BC has not recognized that fossil fuel revenues are finite and has failed to set some aside for the future.

Subsidies are political, and by subsidizing this profitable industry, BC is subsidizing global warming while short-changing the public. Further, BC puts all of its oil and gas revenues into current spending. Other jurisdictions recognize the finite nature of fossil fuel revenues and have set them aside for the future or to facilitate sustainable economies.

Strong measures must be taken to move our economy away from fossil fuel dependence while diversifying into new job-creating industries like renewable energy infrastructure. Subsidies to the oil and gas industry must be eliminated and a royalty investment fund that receives at least 25% of oil and gas royalties each year must be established.

*Karen Campbell is an Ecojustice lawyer who specializes in oil and gas issues. She is also an ELC Associate.*

*Emma Hume is a former ELC Clinic student who also articulated at the Environmental Law Centre.*

**Note** that the recommendations above are based upon reforms originally recommended by a number of organizations in a 2004 report coordinated by West Coast Environmental Law: *Oil and Gas in British Columbia: 10 Steps to Responsible Development* [www.wcel.org/sites/default/files/publications/Oil%20and%20Gas%20in%20British%20Columbia.pdf](http://www.wcel.org/sites/default/files/publications/Oil%20and%20Gas%20in%20British%20Columbia.pdf)

**For more information, see:**

Environmental Law Centre and Tim Thielmann. *Request for a Public Health Act Inquiry to Investigate Whether Current Regulation of Oil and Gas Development Adequately Protects Public Health*. (February 2, 2011 Letter to Minister of Health Services) [http://www.elc.uvic.ca/documents/11%2002%2002%20Ltr%20to%20Hansen%20re%20Inquiry%20\(final%20and%20SIGNED\).pdf](http://www.elc.uvic.ca/documents/11%2002%2002%20Ltr%20to%20Hansen%20re%20Inquiry%20(final%20and%20SIGNED).pdf)

Tim Thielmann. *New Oil and Gas Activities Act and Regulations Overlook Public Health*. (October 12, 2010 Letter to Minister of Energy, Mines and Petroleum Resources, Minister of Health Services and British Columbia Oil and Gas Commission) <http://www.elc.uvic.ca/documents/Appendix%20A%20and%20B.pdf>

*Oil and Gas Reform*. The Environmental Law Centre Clinic. (2012) <http://www.elc.uvic.ca/publications/documents/2011-03-12-Oil-and-Gas-Reform.pdf>

The chapters on [Environmental Assessment](#), [Land Use Planning](#), [Cumulative Effects](#), [Fracking](#), and [Mining](#) in this publication.



## 8. OIL AND GAS: It's Time to Regulate Fracking

BY BEN PARFITT AND TIM QUIRK

On a bench of land not far to the east of the giant Williston Reservoir lies the agricultural enclave of Beryl Prairie. Located on the western fringes of northeast British Columbia's sprawling Peace River region, local houses and farms are separated by large hayfields where grazing buffalo and cattle feed.

Beryl Prairie is now at the epicenter of what some call the "shale gale," an apt descriptor of the rapid transformation now underway in BC's natural gas industry – a transformation that will, if left unchecked, have profound implications for residents both in and well outside the region.

Gales are characterized by high winds and lots of rain. The shale gale has parallels in that it blew in with breathtaking speed, and is – and increasingly will be – associated with lots of water, although definitely not in the form of rain.

As the farmers of Beryl Prairie will tell you, the key to unlocking BC's natural gas resources riches is now inextricably bound up in the use of water. They

saw this firsthand in the drought in the summer of 2010, as convoys of trucks ran night and day, seven days a week delivering water that had been piped out of the nearby Peace, Halfway and Graham rivers or from Williston Reservoir to an expanding network of gas well pads to the north of their homes.

The water – along with chemicals and fine-grained sand – was then pressure-pumped deep underground in a process called hydraulic fracturing or “fracking,” a stimulation method that has proven key to extracting gas from deeply buried shale rock formations because shale rock is tightly bound and does not release its trapped gas easily. By fracturing the underground rock, pathways are opened that allow the trapped gas to be released.

Now those same families have an even better understanding of what the gas industry’s seemingly unquenchable thirst for water means. In the summer of 2011, following back-to-back provincial government approvals, two companies – Talisman Energy and Canbriam Energy – each received permission to pull 10,000 cubic metres of water per day out of Williston Reservoir, the ultimate source of much of BC’s hydroelectric power. A deep trench has now been dug across Beryl Prairie so that the equivalent of eight Olympic swimming pools worth of water per day can be pumped through freshly laid pipes to the mushrooming fracking fields to the north of the farming community.

The Talisman and Canbriam water licences have 20-year terms and virtually guarantee access to a combined 7.3 million cubic metres or 2,920 Olympic swimming pools of water per year. Both were issued in the absence of anything even remotely approaching a public consultation process and are the first of dozens of such licences to be approved.

The sheer volume of water coming into play is one concern. But there are equally important and linked concerns relating to the pressure pumping of all that water. The first is that fracking can pose serious public health and safety risks. In the winter of 2009, for instance, a build-up of frack sand in a gas well pipe led to the pipe rupturing and the uncontrolled release of natural gas laced with deadly levels of hydrogen sulphide. Residents in the tiny community of Pouce Coupe were lucky to have not been poisoned and possibly killed that night, an event which gave rise to their call for the BC government to launch an inquiry under the provincial *Health Act* – a request facilitated by legal research conducted by the Environmental Law Clinic at the University of Victoria.

Another big concern with the shale gale is that it will likely lead to such rapid increases in BC’s greenhouse gas emissions that it will be virtually impossible for the province to meet its own mandated GHG emissions reductions by 2020.

On June 21, 2012, BC Premier Christy Clark announced that BC would re-classify natural gas as “clean energy.” This reversal of climate policy effectively signaled the government’s intention to abandon the provincial climate action plan. BC’s climate action plan predicted that provincial natural gas production would top out around 30 billion cubic metres per year. Since then, total production estimates have increased. To make matters worse, the natural gas

found in one of BC's main fields, the Horn River Basin, contains between two and five times as much carbon as BC's conventional natural gas fields. What this means is skyrocketing CO<sub>2</sub> production in the face of BC's commitment to an 80% *reduction* by 2050.

Amidst predictions of a North American shortage of natural gas in 2008, prices reached a high of \$13 per 1,000 m<sup>3</sup>. Since then, the fracking revolution has led to a massive glut in the market and collapse in the price. Since 2008, prices have remained below six dollars. As of July 2012, the spot price for 1,000 m<sup>3</sup> of natural gas floats around three dollars and 50 cents. Despite the market collapse, BC continues to plough ahead with subsidies, tax breaks and further development.

*In a province well acquainted with boom and bust resource cycles, we should expect prudent management of our valuable resources. Instead, our natural resources are being given away at rock bottom prices.*

In 2011, residents in northeastern BC inquired about natural gas and hydrogen sulfide emergency response plans. Among other unbelievable revelations, residents were advised that in the event of an emergency they may be forced to stay indoors and seal their windows and doors. Plastic sheeting and duct tape was the suggested method.

Like all non-renewable resources, BC's natural gas supply can only be used once. In a province well acquainted with boom and bust resource cycles, we should expect prudent management of our valuable resources. Instead, our natural resources are being given away at rock bottom prices. Worse still, we're allowing larger and larger drill projects to go ahead despite the complete lack of adequate emergency response plans, water use plans, and coherent economic development planning.

As the shale gale continues to blow, it's time for concrete steps by the provincial government to better protect the public interest. A reasonable starting point would be these immediate reforms:

- Set clear limits on combined water withdrawals on individual water bodies, beyond which members of the public must be consulted before any approvals are issued;
- Require officials with a primary environmental mandate to take the lead role in regulating water withdrawals;
- Require provincial health officers to sign off on any gas development proposals where there are reasonable prospects of public health and safety risks;
- Require the provincial government to immediately post plans with

timelines for how it will meet its legally mandated greenhouse gas emissions reduction targets, including reductions in the rapidly expanding gas sector. In this regard we also need to ask some hard questions about the 55% of BC's gas that is currently being exported to fuel Alberta's tar sands;

- Remove tax subsidies and royalty breaks for the natural gas industry; and
- Place a moratorium on any further development within 800 metres of residents, schools or public infrastructure until a complete overhaul of industry's emergency response policies and plans is complete.

When real gales are forecast in coastal BC, weather alerts are issued to protect boaters and allow communities time to prepare. As the shale gas blows in, we need commensurate action by our government. Without it, public water resources, human health and safety and our climate are all at clear risk.

### Note:

In addition to the above, government should consider regulatory reform to address other problems related to fracking, including:

- Lack of groundwater mapping and prioritization of groundwater areas;
- Need to identify “no-go” zones to protect groundwater, nearby water bodies, etc.;
- The need for land use planning to identify sensitive areas that should be avoided;
- Need to require treatment and proper disposal of all toxic wastewater;
- Inadequate treatment of hazardous waste;
- Inadequate rules and government testing/regulation of well integrity – the need to require “green completion” of all wells;
- Inadequate bonding of wells;
- Lack of appropriate and sustainability-based taxation of shale gas; and
- Inadequate referrals to First Nations.

*Ben Parfitt is a BC journalist who has specialized in covering natural resource issues.*

*Tim Quirk was an ELC Clinic student.*

### For more information, see:

*Hydraulic Fracturing 101.* Earthworks. [http://test.earthworksaction.org/index.php/issues/detail/hydraulic\\_fracturing\\_101#.UKPIHYc0WSo](http://test.earthworksaction.org/index.php/issues/detail/hydraulic_fracturing_101#.UKPIHYc0WSo)

*Oil and Gas in British Columbia: 10 Steps to Responsible Oil and Gas Development.* West Coast Environmental Law. <http://wcel.org/sites/default/>

[files/publications/Oil%20and%20Gas%20in%20British%20Columbia%20-%2010%20Steps%20to%20Responsible%20Development%20\(2-page%20brochure\).pdf](#)

*Oil and Gas Commission gets failing grade for water regulation.* West Coast Environmental Law. (2010) <http://wcel.org/resources/environmental-law-alert/oil-and-gas-commission-gets-failing-grade-water-regulation>

Tria Donaldson. "BC Falling Behind on Regulating Fracking." *www.straight.com*. (2011) <http://www.straight.com/article-464341/vancouver/tria-donaldson-bc-falling-behind-regulating-naturalgas-fracking>



## 9. *FORESTRY: Forest Policy for the 21st Century*

BY JESSICA CLOGG

This spring, the BC Legislature appointed a Special Committee on Timber Supply to consider options for addressing timber shortfalls in areas ravaged by the mountain pine beetle epidemic.

The current crisis in our forests challenges each of us to pause and consider what type of forest policy will best support the future we want for BC. What is the right direction in a province where our identity is so closely linked to our vast forests, salmon rivers and diverse species? Where some of our forests may hold their greatest future value as storehouses of living carbon and the source of critical ecosystem services like flood control and clean water in the face of climate change? Where First Nations are increasingly retaking their rightful role in decision making about their ancestral lands? Where communities are tired of decades of important decisions affecting their lives being made in corporate boardrooms far from home?

Regrettably, the options the Timber Supply Committee were asked to consider

– from strengthening corporate timber rights to logging in areas reserved for biodiversity, wildlife and scenic values – were simply a super-charged version of the status quo. This is a status quo where BC’s forestry laws are, at their root, focused on maximizing the production of timber, and where environmental regulation continues to be seen as “red tape” constraining the rights of licensees.

Laws regulating forest practices, first introduced in 1995, never altered the fundamental timber production focus of BC forest management. This can be observed in the continued dominance of clearcut logging (96% of harvesting today) and the dramatically elevated allowable annual cut in recent years to facilitate “salvage” logging of mountain pine beetle affected areas.

In 2004, the *Forest and Range Practices Act* (FRPA) stripped the Forest

*Forestry laws that have been principally oriented towards timber extraction have come at a cost to the natural life support systems provided by our forests – a cost which is becoming increasingly acute as a result of climate change.*

Service of its stewardship mandate and placed key decision making in the hands of industry. FRPA objectives for environmental and other non-timber values are too vague to be meaningful – and may only be implemented to the extent that they do not “unduly reduc[e] the supply of timber from British Columbia’s forests.” Much-reduced planning requirements have left the public in the dark when it comes to operational forest plans. Cutblock plans no longer require government approval – this turned the clock back decades in terms of agency oversight of the forest industry.

Forestry laws that have been principally oriented towards timber extraction have come at a cost to the natural life support systems provided by our forests – a cost which is becoming increasingly acute as a result of climate change. While the so-called “social contract” that required companies to operate processing facilities as a condition of access to timber supply is long gone – a victim of a wave of deregulation of the forest sector in 2002 and 2003 – the rights held by timber companies have become even more secure.

For decades, the government’s own timber supply analysis has forecast that, over the long run, harvest levels that can be sustained from second-growth forests in BC will be much lower than current harvest levels (which include logging our legacy of old growth forests). Yet BC has continued to careen towards this point as if the party would never end. But now climate change – with the resulting beetle epidemic – has acted like a fast forward button. Rapid harvesting of beetle-affected areas has brought us to a Lorax-type moment where industry now sets its sights on logging the small percentage

of lands reserved for conservation of old growth forest, wildlife habitat and similar values.

The proposal to log these areas – one option considered by the Special Committee – is a watershed moment for British Columbia. If we do not pause now to consider the implications of the course we are on, our options for the future, and those of our children, may be irreparably harmed. As we stand at this crossroads we do not need the Lorax to tell us that clearcutting the last remnants of forest reserved for non-timber values only takes us further down a path of no return.

Instead it is time for us to face the hard questions and take the future in our hands as British Columbians. There are no shortage of smart, well-researched and well-supported proposals for reform, from blue ribbon panel and commission reports, to citizen initiatives like the Healthy Forests Healthy Communities Initiative and the *Forest Solutions for Sustainable Communities Act*, proposed by a broad-based coalition a decade ago. There are consistent themes to these proposals over time, and we'd be wise to listen.

### **Get to the root of the problem**

We need to tackle tenure reform – the laws that give large companies control over most of our forests. For example, the proposed *Forest Solutions for Sustainable Communities Act* called for redistribution of a majority of logging rights at the lowest taxpayer cost in order to create a new social contract in BC's forests and to provide greater opportunities for First Nations, communities and local jobs. Furthermore, in the 21<sup>st</sup> century, it is time to begin thinking more holistically about the resources and services provided by our forests. We need to ensure that our laws regarding logging rights and forest management keep pace with new economic opportunities, for example from carbon markets, and give due priority to the key ecological services provided by nature, particularly in the face of climate change.

### **Manage for resilient forests and resilient communities**

We need to create, implement, and enforce laws about forest management that best safeguard the long-term health of BC's forest ecosystems from the cumulative effects of past, present and future resource development and climate change. For example, the *Forest Solutions for Sustainable Communities Act* proposed legislating a "public trust for sustainability," affirming that the provincial government holds our forests in trust for current and future generations subject to the constitutionally protected rights of First Nations. It proposed entrenching important environmental rights in statute – including a right to clean water, to clean air, and to ecological integrity – requiring government to give effect to these rights, and providing mechanisms for citizens to directly enforce them. No less important are effective public monitoring, planning and enforcement. To this end, one recent proposal calls for a more independent office of the Chief Forester to oversee the well-being of our forests.

## New mechanisms for local self-determination and community benefit

Over the years, the benefits of forestry on “public” lands have been slipping away from local communities, while First Nations have rarely benefited. Reform proposals range from vastly expanding area-based First Nations and community tenures, to introducing new models of regional/local decision making and the creation of open, transparent regional log markets located as locally as possible to where timber is harvested. The ban on the export of raw logs in Part 10 of the *Forest Act* needs to be honoured or strengthened.

## Improve provisions for environmental stewardship, sustainability and accountability

Management objectives for valuable components of the environment need to be based on best available science and Indigenous knowledge, take climate change into account and be legally established – rather than leaving so much to industry discretion. In turn, logging plans that give effect to these objectives need to have meaningful content so the public and governments, including First Nations governments, can tell what’s going on. Agencies need to be vested with the authority to approve and reject forestry plans, consistent with sound resource stewardship objectives. Accountability mechanisms should be available to businesses and citizens affected by logging, through more inclusive planning opportunities and appeal to the Forest Appeals Commission or other tribunal. Forest practices standards on private land need to be revisited to properly protect the public interest in water, fish, endangered species and other non-private environmental values.

BC has a forestry law system that is stuck in the last century, and it is time for change. The economic model it was designed to sustain is no longer serving BC communities. By way of contrast, a recent report from the Pacific Coast Collaborative, whose members include the province of British Columbia, and the states of California, Oregon and Washington, recently reported that the “clean economy” in the region is “the single most important global opportunity on the medium-term horizon with revenues expected to reach \$2.3 trillion by 2020.” “Environmental protection and resource management” is flagged as one of three key sectors of the “clean economy” that stand out for their job growth potential. The report finds that “*emerging opportunities for employment gains in this sector “are linked directly to conservation, ecosystem restoration, and climate adaptation initiatives”* [emphasis added].

These conclusions suggest that enabling forest jobs for our children will mean rethinking a system of forestry laws that put timber extraction first – and getting serious about planning for more diverse community economic and business opportunities from forest lands that can be sustained over the long term.

The challenges faced by communities in mountain-pine-beetle-affected areas and by our forest sector are substantial, but keeping our heads in the sand for

another few years will not produce solutions. It's time to move forward with reforming our forestry laws for the 21<sup>st</sup> century.

*Jessica Clogg is the Executive Director and Senior Counsel at West Coast Environmental Law.*

**For more information, see:**

Jessica Clogg. *West Coast Environmental Law Submission to the Special Committee on Timber Supply*. West Cost Environmental Law. (2012)

<http://www.wcel.org/resources/publication/west-coast-environmental-law-submission-special-committee-timber-supply>

*The Forest Solutions for Sustainable Communities Act: A Summary of Draft Citizens' Legislation*. (website content is historical)

<http://forestsolutions.wcel.org/PDF/FSSActsummaryApril28.pdf>

*Bill M xxx – 2003, Forest Solutions for Sustainable Communities Act, July 18 Discussion Draft*. (website content is historical)

<http://forestsolutions.wcel.org/PDF/PMBJuly18jc.pdf>

*A Conversation on BC Forests*. Healthy Forests, Healthy Communities. <http://bcforestconversation.com/>



## C. Protecting Wildlife & Water



## 10. Protecting Species at Risk

BY JACQUELINE LABEL

My most vivid childhood memory is of my brother weeping over a picture of the Dodo bird in our children's encyclopedia. His grade three assignment had been to read about an extinct species; and he chose the giant, cartoon-like bird driven to extinction in the 17<sup>th</sup> century. The tears came when he realized that the Dodos were no more, that all had died. He would never see a real Dodo.

An Ecojustice report, *The Last Place on Earth*, has described the importance of protecting British Columbia species at risk:

*British Columbia has the richest biodiversity of any Canadian province. It is home to 76 percent of Canada's bird species, 70 percent of its freshwater fish species, and thousands of other animals and plants. Well over 3,600 species call BC home, and many of these, such as mountain goat and mountain caribou, live mostly – or only – in the province. For others, such as the migratory trumpeter swan and sandhill crane, BC is a critical*

*wintering ground or stopover. Unlike most Canadian and US jurisdictions, BC still has all the large species that were present at the time of European settlement, including grizzly bears, wolverines, wolves, and cougars.*

However, scientists tell us that more than 1,600 species – from mountain caribou to Vancouver Island marmots, from Swainson’s hawks to peregrine falcons, from sharp-tailed snakes to spotted owls, from maidenhair ferns to grizzly bears – are currently at risk in BC.

Yet the majority of BC species at risk receive no legal protection. Eighty-nine percent of known threatened and endangered species are not protected under BC’s laws or policies **or** under the federal *Species at Risk Act*. The federal law generally only protects aquatic or migratory bird species and species on federal land (one percent of BC). And less than six percent of BC’s species at risk receive legal listing under provincial laws. Furthermore, existing provincial laws do not require protection of a species’ habitat – despite the fact that habitat loss is by far the biggest threat to species. In fact, habitat protection of some species at risk is actually *prevented* by provincial law that gives priority to industrial logging. BC and Alberta remain the only Canadian provinces – and some of the only jurisdictions in North America – that have not yet implemented a dedicated law to protect endangered and threatened species.

Why should we care? Species at risk are an invaluable – and irreplaceable – public resource. Our home would not be SuperNatural British Columbia if we lost our endangered and threatened species like the mountain caribou, the spotted owl, and the Vancouver Island marmot. Species at risk like the grizzly bear have enormous economic, tourism, social and cultural value to British Columbians. Without the mountain caribou and the grizzly, what would distinguish us from Chicago or Sacramento? In California, the last remaining grizzly bear is the one stitched on the state flag.

Environment Canada has described the importance of protecting endangered species in stark terms:

*The disappearance of a species from the earth marks not the beginning but the end of the process of deterioration. It is a sign that the ecosystem in which the species played its integral role has also been damaged. At some point, the ecosystem itself may be so destabilized by the loss of interactive species that it will lose its integrity and collapse. Should the actions of man place that sort of stress upon the biosphere, then the human species, for all its inventiveness, could well be the author of its own extinction.*

Furthermore, rare species can offer valuable contributions to agriculture, industry and science. For example, approximately half of all prescriptions written contain naturally derived ingredients – and scientists have examined only a minute fraction of the world’s species for medicinal properties. As

*BC and Alberta remain the only Canadian provinces – and some of the only jurisdictions in North America – that have not yet implemented a dedicated law to protect endangered and threatened species.*

species become extinct, we lose untold medical and scientific breakthroughs. For example, we only discovered in recent years that a chemical extracted from BC's rare Pacific Yew tree is one of the most useful treatments for cancer.

The province needs to create stand-alone legislation to protect BC's biodiversity. Effective endangered species legislation must:

- Enshrine the principle that healthy ecosystems are essential to healthy human societies and economies – and that biological diversity (especially diversity of species) is essential to healthy ecosystems;
- Identify, protect and recover at-risk biodiversity across BC;
- Protect and recover biodiversity by protecting habitat;
- Identify, assess and develop recovery strategies for at-risk biodiversity on the basis of sound science; and
- Identify and protect ecosystems that are at risk, as well as species that are at risk.

In addition, legislation should be passed to establish a permanent endowment to fund species at risk and other environmental initiatives. Funding could be drawn, for example, from lottery funds, from a tax or royalty imposed on Crown resources extracted in BC, or from a one-percent tax on sporting goods, as has been done in the US.

BC's ongoing failure to pass a stand-alone law to protect its at-risk biodiversity puts it well behind most jurisdictions in the industrialized world. It's time to address this glaring gap in our provincial environmental laws and ensure that BC's incredible natural heritage doesn't share the fate of the Dodo.

*Jacqueline Lebel was a law student at the ELC Clinic.*

**For more information, see:**

*The Last Place on Earth: British Columbia needs a law to protect species from habitat loss and global warming.* Ecojustice. (2008) <http://www.ecojustice.ca/publications/reports/the-last-place-on-earth>

*Rich Wildlife Poor Protection: The urgent need for strong legal protection of British Columbia's Biodiversity.* Ecojustice (formerly Sierra Legal) and the David Suzuki Foundation. (2007) <http://www.ecojustice.ca/publications/reports/rich-wildlife-poor-protection>

*On The Edge: British Columbia's Unprotected Transboundary Species.* Ecojustice, the David Suzuki Foundation and Conservation Northwest. (2010) <http://www.ecojustice.ca/publications/reports/on-the-edge>

*Failure to Protect: Grading Canada's Species at Risk Laws.* Ecojustice. (2012) <http://www.ecojustice.ca/publications/reports/failure-to-protect-grading-canada2019s-species-at-risk-laws/attachment>

Calvin Sandborn. "Endangered Species and Biological Diversity." *Law Reform for Sustainable Development in British Columbia.* Sustainable Development Committee, Canadian Bar Association (BC Branch) (1990) <http://sd-cite.iisd.org/cgi-bin/koha/opac-detail.pl?biblionumber=16185>

*Conservation of Species at Risk under the Forest and Range Practices Act: Marbled Murrelets on the Sunshine Coast.* Forest Practices Board. (2008) <http://www.fpb.gov.bc.ca/publications.aspx?id=2076>

EXCUSE ME... I DON'T  
MEAN TO COMPLAIN BUT I  
NEED MORE WATER.



## 11. *Modernizing the 100-Year-Old Water Act*

BY JENNIFER CAMERON AND DEBORAH CURRAN

Water is vitally important to the environment, the economy and the daily lives of British Columbians.

We need water for everything from taking a bath to watering the garden, from filling a reservoir to filling the toilet. And an adequate supply of clean drinking water is essential to our very lives and health.

Just as important, the blue and green veins running deeply through the province are the life-blood of nature. No plant or animal can survive without water. Biological communities are richest and most diverse along streams, wetlands and other water bodies.

At the same time, an adequate supply of water is necessary for a strong economy. Water is essential for fisheries and agriculture – and for hydroelectric production, pulp mills, smelters, manufacturing and service

*Given that all water systems (both surface and groundwater) are connected, it is essential that planning and management occur comprehensively across an entire watershed.*

industries. While healthy streams are obviously critical for tourism, adequate water supplies are also necessary for residential development. The preservation and wise use of the water resource is key to future prosperity in every community.

Unfortunately, Canada ranks as one of the most profligate users of water in the world, on average consuming two to four times more water per person than in Europe. Current water use in BC is increasing at a rate that exceeds population growth. Partly as a result, BC municipalities are reporting more water shortages. In 2003, severe droughts affected the Okanagan valley and Vancouver Island. In 2006, the “wet” area of Tofino ran out of water during the height of tourist season. The 2012 drought threatened water supplies – as well as salmon runs and pulp mill jobs – on Vancouver Island. Continued industrial, agricultural and urban growth will further increase pressure on already stressed water systems in different regions.

The BC *Water Act* is clearly not equipped to deal with emerging problems. The Act is one of the oldest laws in the province and was designed to promote industrial and agricultural growth when water was plentiful and human impact minimal. It focuses on allocating water for private uses (through licensing) and fails to mandate conservation, minimum flows for nature, and long term planning. It falls short on “adaptive management” provisions – provisions to allow flexible responses to changing environmental conditions and increasing demands on a finite water supply.

As recognized by the government of BC in its *Living Water Smart* commitments, BC needs a comprehensive scheme that treats water first as the foundation of ecological, social and economic health – and not just as an entitlement held by licence. We need a scheme that treats water the way people perceive it: as a public resource that should be safeguarded for ecosystems first – and then made available through regional water planning for a variety of high efficiency uses.

The blueprint for reforming the *Water Act* has five elements:

**1. Protect stream health and aquatic environments by establishing legally enforceable minimum environmental flows in each watershed system.**

Low flows can threaten the water cycle in a region. They can lead to impacts on fish and wetland wildlife, pollution build up, diminished recreational opportunities, and water bans for consumptive uses such as agriculture and lawn watering. Under current law, decision makers are not required to take

specific ecosystem or water quality criteria into account when making water licensing decisions. Establishing and enforcing minimum flows will ensure that licensees are not taking too much water from any watershed – and will make decision making about ecological health more transparent.

## **2. Improve water governance arrangements by creating regional *Watershed Agencies* that have a clear mandate and financial capacity to engage in water management activities and decision making.**

Water governance in BC has developed in an ad hoc fashion, and there are now a wide range of local governments and administrative bodies involved in water management. However, they are not operating under one land use and water management regime, even when located in the same watershed. The result is these bodies share a water supply – but fail to plan or operate together for sustainable water management. Given that all water systems (both surface and groundwater) are connected, it is essential that planning and management occur comprehensively across an entire watershed. Implementing watershed planning and management regionally allows the governance system to be more responsive to changing local conditions.

## **3. Improve the water allocation system.**

The *Water Act* is based on the historical principle of “first in time, first in right” – meaning that older licenses automatically take priority over newer licences. The purpose was to ensure certainty of water supply for licence holders as they developed their farms, industries, and mines. However, applying this priority doctrine today often makes no sense – many streams are over-allocated, actual water use is not monitored, and the most senior license holder may not use the water for the highest and best use as determined by provincial and community priorities.

Water allocation must *first* be based on maintaining minimum instream flows to ensure ecosystem function. The regime for allocation water entitlements must also have some flexibility to respond to annual or seasonal environmental change. This requires monitoring, enforcement and drought planning. Review and amendment of existing licenses as part of regional water planning, as well as cost recovery from water use, are also key needs for the new regime.

## **4. Regulate ground water use by requiring licensing in all areas of the province.**

BC is one of the only jurisdictions in North America and one of the last in the world that does not regulate groundwater use. This ignores the basic functioning of the water cycle; ground water and surface water are one interconnected resource. To stop the practice of landowners drilling a well five metres away from a stream that is over-allocated, comprehensive groundwater licensing is imperative.

## **5. Enshrine the Public Trust Doctrine in the *Water Act* by acknowledging**

**water as a public resource that the provincial government holds in trust for the public that must be preserved and maintained for future generations.**

Water is widely viewed as a public resource; however, the *Water Act*'s main focus is to allocate water to private users. Thus, there is no way to hold the provincial government accountable when water shortages affect ecosystems and the public interest. The solution is to make public use and conservation a priority and enable the public to legally enforce these goals.

The current *Water Act* is overdue for fundamental changes. It simply does not reflect ecosystem needs, modern values or socio-economic challenges. The BC government has already recognized the need for change and initiated the *Water Act* Modernization project. Now a new government has the opportunity to create a modern water governance regime. Any new regime must ensure that environmental flows take priority through local water management. And it must ensure that water management supports ecosystems, the people that live in them and economic activities for generations to come.

*Jennifer Cameron was a law student at the ELC Clinic and former ELC Executive.*

*Deborah Curran is the Hakai Professor in Environmental Law and Sustainability in the Faculty of Law at the University of Victoria.*

**For more information, see:**

Oliver Brandes and Deborah Curran. *Water Licences and Conservation: Future Directions for Land Trusts in British Columbia*. The Land Trust Alliance of BC. (2008) [http://poliswaterproject.org/sites/default/files/Water\\_Licence\\_Report\\_FINAL2.pdf](http://poliswaterproject.org/sites/default/files/Water_Licence_Report_FINAL2.pdf)

*British Columbia's Water Act Discussion Paper*. Ministry of Environment. (2010) [www.livingwatersmart.ca/water-act/](http://www.livingwatersmart.ca/water-act/)

*Statement of Expectations on Reform of the BC Water Act from BC Nongovernmental Organizations*. (2009) [http://poliswaterproject.org/sites/default/files/NGO\\_SoE\\_Jan05\\_0.pdf](http://poliswaterproject.org/sites/default/files/NGO_SoE_Jan05_0.pdf)

Randy Christensen and Linda Nowlan. *Comparison: Proposed Water Sustainability Act against ENGO Statement of Expectations*. Ecojustice and WWF-Canada. (2011) <http://www.poliswaterproject.org/publication/398>

Oliver Brandes and Deborah Curran. *Setting a New Course in British Columbia: Water Governance Reform Options and Opportunities*. Polis Project on Ecological Governance. (2009) <http://poliswaterproject.org/publication/272>

*Reinventing Rain Water Management: A Strategy to Protect Health and Restore Nature in the Capital Region*. Environmental Law Clinic. (2010) <http://www.elc.uvic.ca/press/documents/stormwater-report-FINAL.pdf>

Linda Nowlan. *Buried Treasure: Groundwater Permitting and Pricing in Canada*. The Water and Duncan Gordon Foundation. (2005) [http://www.gordonfn.org/resfiles/Buried\\_Treasure.pdf](http://www.gordonfn.org/resfiles/Buried_Treasure.pdf)

Oliver Brandes and Randy Christensen. *The Public Trust and a Modern BC Water Act*. POLIS Water Sustainability Project. (2010) Legal Issues Brief 2010-1 [http://poliswaterproject.org/sites/default/files/public\\_trust\\_brief\\_2010-1.pdf](http://poliswaterproject.org/sites/default/files/public_trust_brief_2010-1.pdf).

The POLIS Project on Ecological Governance website: <http://www.polisproject.org/policy>.



## 12. Protecting Fish in British Columbia

BY DEBORAH CURRAN AND MEGAN SEILING

The federal *Fisheries Act* – first enacted in 1868 – has been one of Canada’s strongest environmental protection laws. The Act has been effective because it’s done more than simply protect individual fish – it was one of the first laws to recognize larger ecological processes and protect the *habitat* that species depend upon. However, Ottawa recently weakened *Fisheries Act* habitat protection. It is critically important that the province now step in to attempt to fill the regulatory gap – and protect fish habitat.

For years, section 35 of the *Fisheries Act* was important because it prohibited harmful alteration, disruption or destruction of fish habitat (HADD). Where a proposed activity could create a HADD, habitat officers had to approve the project before the work commenced, and those approvals often involved environmental assessment and measures to compensate for habitat loss.

Although officers had discretion to allow fish habitat to be harmed or destroyed, the section 35 requirement preserved much habitat – and created much compensatory habitat. This beloved federal law prevented hundreds of

kilometres of riparian habitat from being paved, rip rapped, seeded for lawn, or otherwise degraded.

However, the era of comprehensive habitat protection abruptly ended in June 2012 when the federal government enacted Bill C-38. The new law amended the *Fisheries Act*:

- The HADD provision and the prohibition against killing fish are merged into one prohibition against “serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery;” and
- “Serious harm to fish” is a new concept defined as “*death* of fish or any *permanent* alteration to, or destruction of, fish habitat.”

These *Fisheries Act* amendments mean that federal authorization is only required for impacts on *commercial, recreational, or Aboriginal fisheries*, or to fish that support such a fishery. And the level of harm that triggers an authorization requirement is now much higher. Now many activities that have an impact on fish and fish habitat – including non-lethal impacts on fish and non-permanent habitat destruction – will not be scrutinized.

But perhaps most damaging, Ottawa recently chopped budgets for habitat field offices and staff positions in Fisheries and Oceans Canada (DFO). DFO’s budget was reduced by \$79 million just months after the introduction of Bill C-38. This will mean losing half of the habitat staff in BC that assess the impact of land development on fish and fish habitat. Half as many human resources will be deployable in favour of fish during environmental assessment processes.

This gutting of fish protection laws and staff has left many asking how the provincial government might fill the regulatory gap and protect fish habitat. This question is timely because the province has spent a number of years working on modernizing one of its oldest laws, the *Water Act* – and the provincial review of best practices in water and riparian habitat management is pointing to progressive, community-involved, watershed-scale approaches that work elsewhere.

A number of BC laws could be amended to limit the disturbance of fish habitat. At the same time, well-focused amendments could foster community-based ecological planning and create a new generation of habitat stewards. Although no replacement for federal oversight, shoring up these provincial legal tools may help fill the hole in habitat protection that Bill C-38 created.

The province of British Columbia should consider the following reforms:

### **1. Implement Water Management Plans (WMPs) across the province.**

Part 4 of the *Water Act* gives the minister the authority to designate areas for the development of a Water Management Plan if a WMP will address conflicts between water users, conflicts between water users and in-stream flow requirements, and risks to water quality. The minister may also consider concerns about fish, fish habitat and other environmental matters. If adopted

*This gutting of fish protection laws and staff has left many asking how the provincial government might fill the regulatory gap and protect fish habitat.*

by regulation, WMPs can require statutory decision makers such as local and provincial governments to consider the WMP when making decisions.

Applying WMPs across the province could be a comprehensive approach to ecosystem-based planning that addresses the protection of broader ecological processes, including fish life processes. Amending section 65 of the *Water Act* to require all statutory decision makers to ensure that their decisions conform to a WMP – and extending WMPs to include forestry-related decisions – could effectively replace the federal HADD provisions.

## **2. Reform the *Riparian Areas Regulation* and expand its application to all regional districts in BC.**

The *Fish Protection Act's Riparian Areas Regulation* (RAR) requires that proposals to local governments for new developments within 30 metres of water bodies containing fish must be assessed by a qualified professional to determine the impact of the development on fish. The professional determines a streamside protection and enhancement area for that location – which is an area that must be protected.

While the application of RAR has been widely criticized, its premise is sound: protect the riparian habitat that fish depend upon, and health outcomes for fish will improve. However, at present the RAR only applies to the geographic area of 14 regional districts and their member municipalities. The province should expand the application of the RAR to all regional districts and municipalities in the province, to ecosystem health in general, and make RAR protections more effective.

## **3. Apply section 9 of the *Water Act* as a replacement for HADD assessments.**

Section 9 of the *Water Act* empowers provincial water management staff to approve proposals to make changes in and about a stream. The *Water Act Regulation* goes on to require persons making changes in and about streams to protect habitat by complying with terms and conditions imposed by the habitat officer for the timing of the change, minimum instream flows, removal and addition of material, the salvage or protection of fish, and restoration.

The *Water Act Regulation* defines “habitat” as the areas in and about a stream and includes spawning grounds, nursery, rearing, food supply and migration areas, and the quantity and quality of water on which fish or wildlife depend directly or indirectly in order to carry out their life processes.

Section 9 approvals could be applied in a way that would replace HADD assessments and also take into account other ecosystem values.

Finally, it should be noted that a number of the reform recommendations found elsewhere in this book will also improve general environmental protection and protect fish habitat.

In a province where salmon are an icon of our way of life, and where respect for ecological integrity is a common value, action should be taken to restore comprehensive protection for fish habitat.

*Deborah Curran is the Hakai Professor in Environmental Law and Sustainability in the University of Victoria Faculty of Law.*

*Megan Seiling is a student in the ELC Clinic.*

### **For more information, see:**

Oliver Brandes, Keith Ferguson, Michael M’Gonigle and Calvin Sandborn. *At A Watershed: Ecological Governance and Sustainable Water Management in Canada*. The POLIS Project on Ecological Governance. (2005) <http://www.polisproject.org/PDFs/AtaWatershed.pdf>

*Bill C-38 and Offloading Fisheries onto the Provinces*. West Coast Environmental Law. (2012) <http://wcel.org/sites/default/files/publications/OffloadingFisheriesFinal.pdf>

The chapter “[Privatizing Salmon Protection: The Failure of the Riparian Areas Regulation](#)” in this publication.

The POLIS Project on Ecological Governance website: <http://www.polisproject.org/>.



## 13. Privatizing Salmon Protection: The Failure of the Riparian Areas Regulation

BY ANDREW GAGE

British Columbians care a whole lot about salmon. In a 2011 poll, 86% of British Columbians agreed that development should not come at the expense of salmon habitat. In BC, key protection for fish habitat is supposed to be provided by the *Riparian Areas Regulation* (RAR) – a law intended to ensure that residential and other development is set back from the waterways that provide critical fish habitat on lands regulated by local governments.

Unfortunately, this law is not working because the RAR turns responsibility for assessing exactly what is needed to protect fish habitat over to private professionals – consultants hired by the developer. If that’s not the fox guarding the hen house, it’s at least the fox hiring the guard.

It’s not just RAR – over the past few years more and more environmental laws have turned over environmental protection to privately hired professionals,

and the government is planning to expand the approach further. But the *Riparian Areas Regulation* provides a great case study to show how laws of this type are failing salmon, failing the environment and failing the public.

Under the *Riparian Areas Regulation*, anyone wanting to build close to a stream is required to hire a biologist, engineer, forester or other “qualified environmental professional” to apply government rules to figure out how far back from the fish habitat their new building should be located and any protective measures that should be taken.

Unfortunately, the professionals are frequently less than professional. In 2009, a review by Ministry of Environment staff of the work done by the professionals found that 53% – more than half – of assessments had not been done properly for one reason or another – and this figure was 62% for Vancouver Island. While this extraordinarily low rate of effectiveness was blamed on a learning curve for some professionals, internal ministry documents obtained by West Coast Environmental Law appear to recognize that the ministry rules being applied by private professionals to protect fish are often unclear and capable of different interpretations:

*[Staff] described their experiences with QPs [qualified professionals] where their performance was considered to be sub-standard. ... [O]ften, [Staff] are seeing performance [by professionals] that is not clearly non-compliant, is marginal, and it is less clear when action should be taken and that action should entail. ... For many of the Ministry’s QP requirements, it can be difficult to determine the performance standard; it is not as clear as when an engineer’s bridge collapses.*

How the RAR is applied can make a huge difference for salmon and other fish. In 2009, experts hired by SmartCentres – a mall development company – examined the fish habitat on lands in the estuary of Salmon Arm’s Salmon River. Their report identified a relatively small area required to protect fish habitat, justifying SmartCentres’ plans to build a mall on most of the property. A local conservation group, the Wetlands Alliance: The Ecological Response (WA:TER), disagreed with the report prepared by SmartCentres (which they had to obtain through a freedom of information request), and, at considerable cost, took the unusual step of hiring its own experts. WA:TER’s experts found that almost two-thirds of the property was important fish habitat and should have been protected under the RAR.

After much discussion, including the intervention of a consultant hired by the Ministry of Environment, the experts hired by SmartCentres accepted that the larger area was correct. The SmartCentres development is now proposed to be

*How much valuable habitat is lost where no citizen heroes exist to watchdog events?*

built on roughly one-third of the property, largely avoiding the controversial fish habitat – a great win for WA:TER and for fish habitat. However, protection of fish should not depend on whether or not a local group springs up to raise tens of thousands of dollars for experts to challenge the system. How much valuable habitat is lost where no citizen heroes exist to watchdog events?

Meanwhile, another recent court case has demonstrated that the federal and provincial governments may not even have the power to step in when the privately hired experts get it wrong. In a recent court case, the BC Court of Appeal rejected the suggestion that the federal government could step in to “vary” an expert’s view of the buffer and other measures that should be required to protect fish. The Court emphasized that the RAR turned the power to set buffers and other requirements over to the professionals hired by the developer, and disparaged the government’s approach which the court said “appear[s] to be based on a scheme that is not found in the [law].”

Clearly the RAR – along with many of BC’s environmental laws – is not striking the right balance between environmental protection on the one hand, and government cost-savings and flexibility for developers on the other. While there is an important role for professionals in implementing environmental laws, we need laws that make sure that these professionals are accountable to government and the public. The law must ensure that the professionals work in a transparent way, applying clear, scientific standards, and that the government ultimately ensures that salmon and other environmental resources are protected.

*Andrew Gage is a West Coast Environmental Law Staff Lawyer. One of the first ELC Clinic students and Executive members, he is also an ELC Fellow.*

**For more information, see:**

The chapters “[Reliance on Qualified Professionals in Environmental Regulations](#)” and “[Re-Regulating Private Septic Systems](#)” in this publication.



## *14. Run-of-River Projects and Related Issues*

By JOSH PATERSON

### Planning for a Renewable Electricity Future

---

The future of electricity generation in BC has been highly controversial for the last several years.

The provincial government was initially enthusiastic about renewable generation such as run-of-river projects – and about switching away from fuels that create greenhouse gases. However, it pursued its agenda in a way that did not result in public confidence or buy-in. Many have doubts about provincial and federal environmental assessment and regulatory systems. For example, BC exempts many run-of-river projects from any environmental assessment at all – and the recent gutting of federal environmental assessment laws has reduced confidence even further.

*This policy lurch makes it even more clear that BC needs a rational system for electricity planning that will consider environmental impacts in a credible way.*

The public has raised many crucial questions. Should facilities be privately or publicly owned? Do we need more power and for what purpose should additional power generation be built? (For export? For the liquefied natural gas industry? To move BC away from fossil-fueled transportation?) Could particular regions sustain new electricity projects on top of existing activities without compromising important ecological and social values? Are there certain places so special that they should be forever off limits for renewable electricity development?

The BC government failed to create a process to help the public answer these questions. Its *Clean Energy Act* required creation of an “Integrated Resource Plan” that simply doesn’t address the big picture policy questions – and doesn’t attempt to predict the environmental, social and cultural impacts of development in any particular area. The debates over new power generation were left to fester, resulting in reduced social license for renewable electricity projects.

Now things have changed. Today the provincial government has largely shifted away from a renewable agenda (except large-scale hydro construction). Instead it is encouraging the expansion of the use of natural gas to generate electricity. In turn, some of that electricity is being used to power more natural gas production – contributing to climate change and raising a range of other issues around drilling, fracking and water. This policy lurch makes it even more clear that BC needs a rational system for electricity planning that will consider environmental impacts in a credible way. The Integrated Resource Plan needs to be supplemented with a process that will allow communities to have a real say in the future of their regions – and that will result in better environmental decisions and outcomes. In order to achieve this:

**A system of regional energy assessment and planning needs to be created that is linked to provincial electricity planning**

This would include regional cumulative effects assessments and would make decisions through the lens of whether a particular decision will make a genuine contribution to sustainability. Regional planning should undertake a comparative evaluation of alternatives – including the option of permitting no renewable electricity projects in the region, if that is found to be appropriate. This planning must be administered credibly and impartially, and would likely be best done by a provincial agency created specifically for that purpose. First Nations would need to be involved in the design of this process, and they have

the right to be involved as decision makers on a government-to-government basis with the province.

### **Cumulative effects must be assessed and mitigated as part of the renewable electricity planning process**

Even when an individual development is “small” in scale, there are crucial concerns about the expanded road and power supply networks needed and the “domino-like” cumulative effects of multiple different projects in the same region – seen in the context of other past, present and possible future development. In order to provide meaningful direction to decision makers, cumulative effects assessment must be conducted proactively on a regional level. It must focus on valued components of the ecosystem and human well-being. In addition, the regional planning should be linked to any future project-specific environmental assessments.

### **Planning could be rolled out region by region**

While Independent Power Projects can be found all around the province, the priority focus could initially be on regions:

- That are likely to see near- to medium-term development pressure for electricity generation or transmission;
- Where cumulative effects concerns and opportunities are likely to be greatest; and
- Where the initiation of immediate assessment work can provide timely guidance for regional preparations (e.g. infrastructure planning), community capacity development (e.g. job training, entrepreneurial development) and licensing/permitting.

### **Sustainability assessment should be central to the process**

Regional planning for renewable electricity in BC, and environmental assessment generally, should be based on a “sustainability assessment” model, and this should be spelled out in legislation. Sustainability assessment is aimed not at reducing the negative impacts of a project, but at producing environmental decisions that deliver a fair distribution of multiple, mutually reinforcing and lasting benefits while avoiding significant adverse effects. The process must ask whether we need the development at all. If a project does not result in benefit on the ecological, social and economic fronts, it should not be pursued.

### **Regional planning must respect the role of First Nations as decision makers in their territories**

New assessment, planning and decision-making mechanisms should be designed and implemented in a manner that respects the role of First Nations governments as decision makers in their territories.

## Planning must involve robust public participation

There should be a direct role for citizens and interested nongovernmental organizations in determining the purpose, scope and priorities of electricity planning. This must be done in a transparent and consistent way.

The province is advocating a huge expansion in electricity generation in BC. Yet it is clear that BC needs to change the way it makes environmental decisions in the electricity sector and elsewhere. This might make people more comfortable with the idea of increasing the generation of renewable electricity in their areas – if it is ecologically and culturally appropriate. And it will certainly lead to better environmental decisions, based on a deeper understanding of the potential environmental impacts of new developments.

*At the time of writing, Josh Paterson was Staff Lawyer with West Coast Environmental Law. He is also an ELC Associate.*

### For more information, see:

Tim Thielmann. *Testing the Waters: A Review of Environmental Regulation of Run of River Power Projects in British Columbia*. Wilderness Committee and BC Creek Protection Society with the Environmental Law Centre. <http://www.bc-creeks.org/wp-content/uploads/testing-the-waters.pdf>



## 15. Re-Regulating Private Septic Systems

BY MORGAN BLAKLEY AND GEORGE BRYCE

To protect public health from potentially dangerous small scale sewage and septic systems, the *Sewerage System Regulation* (SSR) requires substantial reform.

In 2005, the Liberal Government implemented the SSR to deregulate these small-scale sewerage systems. The SSR removed government oversight over the design, construction and approval of these systems, and replaced it with an unproven self-regulatory model. British Columbia became virtually the only North American jurisdiction that does not require a government official to examine a sewerage system before it goes into use.

The SSR now grants a practice monopoly to engineers and wastewater practitioners to plan, construct and maintain private septic systems. Wastewater practitioners who sell a system have been given the power to “legalize” the same system. This conflict of interest encourages installation on unsafe lots and has caused system prices to skyrocket. The private monopoly

has led to such an increase in costs that the Union of BC Municipalities passed a resolution demanding change. More important, it created health and environmental risks, documented in the 2009 ELC/SSR Improvement Coalition report, *Reforming the Regulation of BC's Sewerage Systems: An Urgent Need to Protect Public Health*.

The SSR replaced specific rules for these systems with a vague, discretionary and unenforceable Standard Practice Manual. While the SSR was promoted as an attempt to encourage innovation and allow development of previously unsuitable locations, essential rules to protect health and environment were lost in the process. The resulting guidelines provide little material protection for public health or the environment.

For example, the SSR dropped the longstanding requirement for a 30-metre setback from wells. After objections by the ELC and others, a 2010 amendment reintroduced the 30-metre setback – but a lesser setback can still be granted by a professional hydro-geologist. Still missing from the SSR is vertical separation from the bottom of the system to groundwater or an impermeable barrier and horizontal setback to fresh water; both of these had been in the earlier regulations for decades.

Today, system installation can begin right after plans are filed. The SSR stripped neighbours of the right of notice about the system – and the right to appeal its installation. As a result, owners of adjacent or affected properties cannot mitigate potential harm from a poorly designed system.

The 2005 SSR stripped health authorities of the power to stop a flawed system from being built – even if they suspected it could become a pollution hazard. In response to ELC objections, in 2010 the SSR was amended to allow health authorities to act on proposed construction if “in the opinion of a health officer” it may cause a health hazard. However, since prescriptive rules have been replaced by industry-determined and self-approved standard practice, intervention by the authorities is still difficult and controversial.

The process often leads to arguments between the authority and the engineer or wastewater practitioners. These arguments often end up with the authority eventually having to present its concern to the regulatory bodies – or worse,

*While the SSR was promoted as an attempt to encourage innovation and allow development of previously unsuitable locations, essential rules to protect health and environment were lost in the process. The resulting guidelines provide little material protection for public health or the environment.*

a later problem causes a health hazard. The reality is that there is little a neighbour or authority can do to prevent harm until a system actually fails.

The SSR depends on the professional self-regulatory mechanisms of two other statutes, both of which need reform. While professional engineers have a more viable disciplinary process under the *Engineers and Geoscientists Act* (EG Act), the disciplinary regime for wastewater practitioners under the *Applied Science Technologists and Technicians Act* (ASTT Act) is seriously flawed.

For example, under the SSR, neither the Applied Science Technologists and Technicians of BC (ASTTBC) or the Association of Professional Engineers and Geoscientists of BC has the power to inspect private property where defective sewerage systems may exist. An installed system can only be inspected by one of the governing bodies if the property owner consents to an inspection. Without the power to inspect the actual system, the adequacy of investigations may be questionable.

In addition, unlike the case for engineers, the disciplinary hearings for wastewater practitioners are closed to the public.

More problematic is that the ASTTBC does not have the legislative authority to investigate or discipline wastewater practitioners who are no longer members. If a practitioner commits an egregious and expensive error, he or she can simply resign their membership in ASTTBC to avoid an inquiry or disciplinary hearing.

Unlike engineers, wastewater practitioners are not required to carry professional liability insurance. Without a built-in dispute resolution and compensation process, individuals harmed by negligence of a practitioner must resort to expensive and time-consuming civil litigation to try to obtain compensation.

In 2009, the SSR Improvement Coalition and the Environmental Law Centre filed a submission with the government which proposed two different approaches to remedy the deficiencies in the SSR regime. The first option was to significantly over-haul the defective and unaccountable self-regulation system created by the SSR. In the second option, if the SSR was not improved, the Coalition recommended a return to direct government involvement.

As of September 2011, only a few amendments had been made to the SSR, and necessary changes have not been made to the EG Act or ASST Act to address the Coalition's recommendations to improve the self-regulatory model. The Standards Practice Manual also continues to be a controversial set of guidelines. Change is overdue.

*George Bryce is a lawyer who has worked on many public health issues.*

*Morgan Blakley is staff lawyer at Ecojustice and was an ELC Clinic student.*

**For more information, see:**

*Reforming the Regulation of BC's Sewerage Systems: An Urgent Need to Protect Public Health.* Sewerage System Regulation Improvement Coalition and the Environmental Law Centre Clinic. (2009) <http://www.elc.uvic.ca/press/SSR-2009.html>

The chapter “[Reliance on Qualified Professionals in Environmental Regulations](#)” in this publication.



## 16. *The Case for a Coastal Zone Management Act*

BY JAMIE ALLEY AND CALVIN SANDBORN

The BC coast is perhaps the province's most important single asset. Home to most of our population, it is also home to some of the most important and productive ecosystems on earth.

Today the coast faces unprecedented challenges, including:

- Increased development and loss of public access to the coastline;
- Proposals for new oil ports and marine transportation corridors;
- Threatened fish stocks; and
- The need for emergency programs to deal with earthquakes, tsunamis, and the extreme weather, storm surges and sea level rise caused by climate change.

Response to these challenges often falls short because the coast is governed by a patchwork of federal, provincial and municipal agencies that largely

fail to co-ordinate regulatory efforts. The province needs a *Coastal Zone Management Act* to secure the future of the BC coast.

It is clear that the province must not abdicate coastal protection to other levels of government. Because the province has not yet legislated a strategy and overall plan for our coast:

- The federal National Energy Board's hearings on the Northern Gateway Project – the most important coastal management issue to face BC in decades – will be decided by a three person panel, none of whom are British Columbians. Unfortunately, BC failed to plan beforehand about oil ports and other infrastructure decisions;
- When industrial interests objected to funding arrangements, Ottawa's process for developing a north coast ocean management plan faltered. That process is now likely to ignore major issues such as oil terminals. Although the province and First Nations are now working to create Coastal Management Area Plans, they are doing so without a clear statutory mandate;
- It took the Cohen Commission to remind us that the future of salmon rests as much upon actions of BC as on Canada. Salmon are affected by stormwater, riparian development and numerous activities under provincial jurisdiction. Yet there has not been a co-ordinated federal/provincial strategy to protect salmon and our coast; and
- Most coastal resources are common property with ill-defined access rights. This has caused overuse, neglect and degradation of essential ecosystems. This problem has not been addressed.

### Coastal Jurisdiction and Ownership

Management of coastal and marine resources is an area of complex, shared jurisdiction between all orders of government, including First Nations and local governments. For example, Ottawa has jurisdiction over fisheries regulation and navigation. Local governments have zoning and other powers over local shorelines and some coastal waters.

Meanwhile, the province has broad regulatory jurisdiction over numerous activities in the coastal zone. In addition, it has jurisdiction and ownership over the foreshore seaward of the high tide mark and all coastal or "inland" waters within the "jaws of the land," including the seabed. The seabed of the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait and Queen Charlotte Strait are the property of British Columbia.

As a consequence, the coastal ecosystem is regulated by a plethora of agencies from numerous governments. This thwarts effective planning and management – especially because of the absence of effective legislative mechanisms to coordinate the actions of multiple agencies.

Thus, it is not surprising that management of the coastal zone has been more problematic than terrestrial resource management. The province needs to address this. It needs to create a legislative framework to assert

*Management of coastal and marine resources is an area of complex, shared jurisdiction between all orders of government, including First Nations and local governments.*

jurisdiction and ownership of coastal resources – and to coordinate with other governments.

### **Models of Coastal Management Legislation**

There are successful models in other jurisdictions around the world. For example, the US *Coastal Zone Management Act* of 1972 empowered US coastal states to develop some of the most progressive coastal management in the world. Under the Act, state level coastal management programs provide for:

- Protection of wetlands, floodplains, estuaries, beaches, dunes, barrier islands, and fish and wildlife habitats;
- Management of coastal development to minimize the loss of life and property;
- Initiatives to improve coastal water quality;
- Siting of coastal-dependent uses and restriction of inappropriate development on the coast;
- Public access to the coasts for recreation;
- Redevelopment of deteriorating urban waterfronts and ports, and preservation of historic and cultural features;
- Coordination and simplification of coastal management decision making;
- Opportunities for public and local government participation; and
- Improved coordination between coastal management agencies.

In Canada, provinces such as Nova Scotia and Newfoundland and Labrador have developed Coastal Management Strategies that have highlighted the need for improved governance arrangements and may lead to specific provincial legislation. The Law Faculty at Dalhousie University is currently reviewing integrated coastal zone management law to develop options for Coastal Zone Management model legislation.

### **Potential Elements of Coastal Management Legislation for BC**

Following the models in the Canadian *Oceans Act* and the US *Coastal Zone Management Act*, a coastal management act for BC could include some or all of the following provisions:

- A preamble to reaffirm BC's commitment to the conservation and sustainable management of estuarine, coastal and marine resources;

- Powers to enter into agreements and to delegate and accept powers from other orders of government;
- Development of a Coastal Management Strategy;
- A legislative basis for coastal and marine spatial planning, including regional management plans for estuarine, coastal and marine ecosystems;
- Establishment of a comprehensive network of marine protection areas within provincial waters that link with other networks of marine protection areas;
- Establishment of a voluntary local government coastal management program to protect and restore coastal ecosystems and private and public property. That has been the basis of shoreline restoration programs in US;
- Coastal and marine emergency planning and preparedness;
- Climate change adaptation strategies for issues such as extreme weather events, storm surges and sea level rise;
- Strategic assessment of marine transportation corridors, including decision-making processes for coastal infrastructure and port facilities;
- Programs for the revitalization of coastal communities; and
- Provisions to allow for collaboration with other levels of government and First Nations.

A *Coastal Zone Management Act* would signal BC's intent to take coastal management seriously and fully exercise its jurisdiction and ownership. This is preferable to leaving the future of the coast to the National Energy Board, foreign governments like China, or to disorganization and neglect.

*Jamie Alley is former Director of the BC Oceans and Marine Fisheries Branch. He currently teaches Integrated Coastal Zone Management at Universities in Canada and Iceland, and is Vice President (Pacific) for the Coastal Zone Canada Association.*

*Calvin Sandborn is the Legal Director of Environmental Law Centre.*

**For more information, see:**

Coastal Zone Canada Association website. <http://www.czca-azcc.org/html/home.html>

*External Evaluation of State Coastal Zone Management & National Estuarine Research Reserve System Programs.* SRA International, Inc. & the Council Oak for the Office of Ocean and Coastal Resource Management National Oceanic and Atmospheric Administration US Department of Commerce. (2010) <http://coastalmanagement.noaa.gov/success/media/evaluationczmnerrs.pdf>

*Integrated coastal management law: Establishing and strengthening national legal frameworks for integrated coastal management.* Food and Agriculture Organization of the United Nations. Legislative Study 93. <http://www.fao.org/docrep/012/a0863e/a0863e00.pdf>

Legislating Integrated Coastal Zone Management: Trends and Strategies for Coastal Law-Making website. Dalhousie University, Schulich School of Law. (2009-2013) <http://law.dal.ca/Institutes/Marine%20&%20Environmental%20Law%20Institute/Projects/LICZM.php>

The POLIS Project on Ecological Governance website: <http://www.polisproject.org/>.



## **D. The Urban Environment**



## *17. Implementing Regional Sustainability Strategies*

BY DEBORAH CURRAN

The liveability of our communities is inextricably linked to the spectacular natural environment they occupy – their forests, meadows, streams, farms and shorelines.

However, the allure of Beautiful British Columbia is bringing more and more people to our urban centres. And this makes managing urban growth a key challenge. The province’s population increases by approximately 60,000 people each year and will be home to over five million people in just a few years, 80% of whom will live in urban areas.

This is problematic because much of this growth occurs in our most ecologically sensitive and agriculturally productive valley bottoms. For example, 80% of our population – and 80% of farm gate receipts – are both found on the same two percent of our landscape, in the southwest corner of the province.

The best way to manage this growth is to take a regional perspective at

coordinating land use, transportation, environmental protection and other values that are most efficiently addressed at a regional scale. BC now provides the planning mechanism of regional growth strategies (RGS) to allow municipalities and regional districts in a region to coordinate regional approaches on important issues. Currently, 10 regional districts in BC have completed an RGS. Metro Vancouver has just adopted a new RGS titled Metro Vancouver 2040: Shaping Our Future, and the Capital Regional District is converting its RGS into a regional sustainability strategy. Key aspects of all of the RGS in the province are a commitment to containing urban areas, protecting agricultural lands and sensitive ecosystems, and coordinating regional transportation.

However, the RGS legislation does not require local governments to follow any well-established planning principles. Nor does it set provincial goals for creating sustainable communities. While it sets out some guidelines, there are no specific metrics that local governments must meet and no explicit enforcement mechanisms for RGS. This offers an opportunity to retool Part 25 of the *Local Government Act* to address sustainability within the context of regional local government jurisdiction.

Recommendations for strengthening this important regional sustainability tool include:

### **1. Make regional sustainability planning mandatory**

Most high growth areas have addressed coordinating growth in some way by adopting an RGS. However, there may still be areas, such as mid-Vancouver Island, where regional strategies are necessary. Where population or the growth rate reaches a specified threshold level, local government can be mandated to undertake regional sustainability planning to ensure that coordination and growth management issues are addressed before problems occur.

### **2. Establish provincial minimum requirements for regional sustainability strategies**

Although the RGS legislation sets out goals, such as creating compact communities and protecting the environment, it does not mandate minimum sustainability targets that local governments must meet. These could include the percentage of a watershed that must remain in a natural state, urban containment boundaries, minimum density targets before new greenfield

*The best way to manage this growth is to take a regional perspective at coordinating land use, transportation, environmental protection and other values that are most efficiently addressed at a regional scale.*

sites can be used, and greenhouse gas reduction goals through land use and attached housing forms.

### 3. Create enforcement mechanisms for regional sustainability strategies

Regional districts have no ability to enforce the requirements of the *Local Government Act* with respect to municipal implementation of the RGS. For example, regional districts have no ability to mandate that a municipality submit a regional context statement to it although municipalities have a legal obligation to do so. Likewise, if a municipality takes action not consistent with a RGS, a regional district's recourse is to challenge that decision in court. Part 25 of the *Local Government Act* needs to have explicit enforcement mechanisms and a non-litigious dispute resolution process.

*Deborah Curran is the Hakai Professor in Environmental Law and Sustainability in the University of Victoria Faculty of Law.*

#### For more information, see:

*Sustainability in the Capital Regional District: Sustainable Systems and their Implementation through the Regional Sustainability Strategy.* Environmental Law Centre and Dogwood Initiative. (2011) [http://www.elc.uvic.ca/publications/documents/RSS\\_white-paper.pdf](http://www.elc.uvic.ca/publications/documents/RSS_white-paper.pdf)

*Green Bylaws Toolkit: for Conserving Sensitive Ecosystems and Green Infrastructure.* Environmental Law Clinic and Deborah Curran for the Wetland Stewardship Partnership, Ducks Unlimited Canada, Grasslands Conservation Council of British Columbia, Environment Canada and the Province of British Columbia. (2007) [www.greenbylaws.ca](http://www.greenbylaws.ca)



## 18. *Protecting Natural Areas in our Communities*

BY CALVIN SANDBORN

“Our options are expiring. As far as open space is concerned, the land that is still to be saved will have to be saved within the next few years. We have no luxury of choice. We must make our commitments now and look to this landscape as the last one. For us it will be.

- William Whyte, *The Last Landscape*

---

In the 1990s, British Columbia led the world in wilderness preservation. It doubled the park system by setting aside millions of hectares, mostly in remote areas. Today’s major challenge is to bring that kind of effort closer to home.

*The simple fact is that communities that maintain natural areas are going to be the economic winners in the 21st century.*

Indeed, perhaps the greatest need for conservation is right at our doorstep – in protecting the neighbourhood stream, the town’s favourite meadow, the city’s beloved beach, the forest where children play after school. The challenge of the next decade will be to protect the natural areas in the communities where we live.

Each year, BC grows by over 60,000 people and 30,000 new homes. Asphalt is becoming the land’s final crop as development engulfs the Fraser Valley, the Okanagan and southern Vancouver Island. If we want to maintain the British Columbia lifestyle, we need to develop a province-wide plan to conserve natural lands in and around our burgeoning cities and towns.

A Community Green Space Strategy would enhance the daily lives of all British Columbians. It would protect those nearby places where we can escape for a few moments to listen to the sounds of nature instead of the sound of traffic. It would give our children “wild places to be young in.” And it would ensure that our great grandchildren will still thrill to the sight of salmon, deer and eagles not far from home.

In addition to meeting human needs, a strategy would address critical environmental and economic concerns. For example:

- Protecting community natural areas will meet one of the greatest threats to biodiversity. Communities tend to be located in the fertile, temperate valleys where wildlife is most abundant and diverse – and loss of this valuable habitat threatens many species. For example, about half of BC’s “at risk” vertebrate species are threatened by urban/farm development; only about one-quarter are threatened by extractive industries like logging and mining.
- If our endangered fisheries are to survive, we must improve protection for natural areas around urban streams. Urbanization of stream banks has been a major factor in reducing the number of streams that support Georgia Strait coho from 100 to about 20.

But a conservation strategy would be far more than merely a “green” initiative – it makes good economic sense. A number of US states now implement green-space strategies as an integral part of their economic development efforts.

The simple fact is that communities that maintain natural areas are going to be the economic winners in the 21st century. CEOs move businesses to places where they want to live – and studies show that the quality of an area’s physical environment is one of the top two factors in siting an enterprise. As a prominent Oregon corporate official put it, “The liveability of Oregon is our competitive edge in economic development. Practising healthy environmental

stewardship isn't just a matter of good citizenship; it's also a matter of good business." When Microsoft established its new gaming centre in Victoria, a company spokesman said that the city's liveability was one of two reasons for locating there – and pointed out that creative people “pay attention to their environment.”

Clearly, protecting community green space addresses critical human, environmental and economic needs.

As we face a provincial election, an important question arises: Does anybody have a comprehensive plan for protecting urban green space, and our quality of life?

Now is the time for the province to bring the same vision that saved the Stein Valley to the vanishing wetlands of suburban Kelowna. The same energy and imagination that protected the Walbran and the Carmanah needs to be unleashed to create greenways in Chilliwack and Campbell River. And the provincial government that saved the Khutzeymateen now needs to focus on the vanishing open spaces in the Nanaimo-Comox urban corridor.

Much needs to be done if we are going to avoid becoming California North – and losing the quality of life that attracted us here in the first place. In the previous chapter, Deborah Curran pointed out the critical need for regional sustainability strategies. In addition, the following actions should be taken to expand parks and protect other green space near our homes.

### **Creating Greenways for the 21st Century Program**

The province should set the goal of completing a greenways network in every BC community over the next 10 years. New green corridors would connect each community's open space: parks, stream corridors, beaches, schoolyards, rail rights-of-way, farms and forests.

Within a decade, every British Columbian would live within a 20-minute walk of a greenway system – a continuous park system that would take people across the community, and then out into the countryside, without once getting into a car.

Greenways link people and nature and city and country. Linking green space into an integrated system creates a whole that is far greater than the sum of its parks – for walkers, cyclists, commuters and wildlife.

A number of BC communities are developing extensive greenways networks. However, the provincial government should follow the example of Maryland and several other states and launch a province-wide greenways initiative. And it should consider the US federal government's rule of dedicating a percentage of gasoline taxes to the creation of greenways. (See the chapter “A Greenways Strategy for the 21st Century,” below.)

### **Green the Development Rules and Cut Red Tape**

Some jurisdictions require developers to give the public more green space than

BC currently does. If we want to build a world-class greenways system, BC could increase its requirements.

In addition, we should cut the red tape that makes it hard for developers to “cluster” housing on one part of their property and leave large areas untouched. Such creative cluster developments can often leave 50-80% of the land as green space. They can be a critical part of building a community greenways network at no additional cost to taxpayers. Yet, today it is sometimes easier for developers to get approval for conventional subdivisions that fragment the entire property into houses, streets and lawns.

### Raise Money to Buy Natural Lands

Where can the province get the money for an ambitious green space program? It should consider innovative funding sources. More than 30 American states allow taxpayers to donate their income tax refund to habitat acquisitions by simply checking a box on their tax return. California raises over \$40 million annually by selling an “environmental licence plate.” A percentage of proceeds from the sale of Crown lands could be dedicated to land purchases.

Perhaps most intriguing, a number of states raise environmental funds by reclaiming abandoned pop bottle deposits from the bottling industry – reclaiming the nickels or dimes that customers paid but never redeemed. Instead of the unclaimed deposit going as a windfall to industry, the government recaptures part of the windfall. A British Columbia “Pop for Parks” program might raise more than \$10 million annually.

### Mobilize the Private Sector to Save Land

Government simply cannot afford to buy all the land that needs to be purchased. Yet the private sector has enormous potential to help. Millions of hectares have been protected by local groups of private citizens in the US and this “land trust” movement has grown dramatically in BC.

Local citizens have raised impressive sums to save numerous properties around the province – fundraising for Jedediah Island and for Matthews Point on Galiano Island are good examples of a common success story. But far more needs to be done.

Government can encourage land trusts by matching privately raised dollars with public money. Many US states systematically use “matching grant” programs to encourage private citizens to donate to land trusts. And BC has previously had great success with this approach. In 2004, the provincial government endowed the BC Trust for Public Lands with \$8 million to encourage land trusts and other partners to acquire and manage conservation lands. Partners were charged with raising \$3 million dollars for every provincial government dollar invested. In the end, partners far exceeded the target and raised almost \$42 million in non-provincial funding. In sum, government sparked \$50 million in conservation investments at a public cost

of less than 20 cents on the dollar. Government should set up a new version of this highly successful program.

Perhaps most important, government needs to launch a public awareness campaign to ensure that every British Columbian is aware of the possibility of writing a “Will for Wildlife” – a will that leaves the proceeds of their house for habitat. Many childless couples who love nature are likely to want to leave such a legacy. And if land trusts can capture just one percent of the assets bequeathed over the next 25 years, a billion dollars would go into land conservation.

### Make Developers Throw Away the Cookie Cutters

Did you ever wonder why all subdivisions look so familiar, whether you’re in Sacramento or Surrey? Too often a standard subdivision design is pulled off the shelf and imposed on the land with little attention paid to topography, hydrology and plant cover. Instead of designing a development that respects the unique natural systems on the land, bulldozers move in to make the land fit the standard plan.

We can prevent unnecessary bridging of streams, filling of wetlands and fragmentation of endangered meadows if we require developers to “design with nature.” This simply means that the first step in design is to identify key natural features and plan around them instead of identifying a standard road system first and then designing everything around the roads.

Designing with nature pays off for developers, too. For example, by maintaining natural watercourses, they can dramatically reduce the need for costly storm sewers. By planning around wetland and streams, road and bridge cost can be reduced – while building the same number of housing units.

As British Columbians debate our future in this election campaign, let us not forget the issue of green space. In a decade we will have another 650,000 people and 300,000 new homes. But will we still have natural places near our homes?

We lack neither the knowledge nor the resources to preserve such places. But who has the vision to protect the BC way of life? Who has a plan to save the natural lands at our doorstep?

*Calvin Sandborn is Legal Director at the Environmental Law Centre.*

### For more information, see:

*Greenways and Growth: Conserving Natural Areas in BC Communities.* Calvin Sandborn for Commission on Resources and Environment, Wildlife Habitat Canada, Fisheries and Oceans Canada, and Ministry of Municipal Affairs and Housing. (1996) [http://www.elc.uvic.ca/documents/Sandborn\\_Greenspaces\\_Report\\_1996.pdf](http://www.elc.uvic.ca/documents/Sandborn_Greenspaces_Report_1996.pdf)

# Sea to Sea Regional Park Reserve

The Sea to Sea Regional Park Reserve is nestled in the Sooke Hills, and comprises a number of land parcels which together total more than 2,500 hectares.

The land lies within the traditional territory of the T'Sou-ke Nation, who have long used the area for food, medicine, spiritual and other purposes. More recently these lands have been used for logging, mining and recreation.



## Please Conserve the Park Reserve

Please help preserve the park reserve for everyone to enjoy:

- Stay on the paths.
  - Please do not touch rock walls.
  - Do not remove or disturb animals or plants, with or without them.
  - Keep your dog under control and on the leash, and do not take a dog to the park.
  - Leave no trace and carry out all trash.
- Motorized vehicles, camping, horse use, and other uses are prohibited.

## Future of the Park Reserve

A park management plan is being prepared to describe the existing and future use of the Sea to Sea park. The plan will outline the activities, facilities, and services that will be provided at the park. An Assessment of the park's future management plan, which will be provided to the public.

Sea to Sea Regional Park - 8400 West Hill  
 250-866-6666  
 www.sea-to-sea.ca

## Natural Hazards

The park contains several natural hazards that could affect visitors.

- The park contains several natural hazards that could affect visitors, including:
  - Steep slopes and other terrain that could cause falls or other injuries.
  - Areas that are prone to landslides or other geological hazards.
  - Wildfire hazards, including the risk of fire starting in the park.
  - Poor weather conditions, including heavy rain, snow, and ice.
  - Poor visibility and other conditions that could affect visitors.



For more information on natural hazards, please contact the park office at 250-866-6666. For more information on natural hazards, please contact the park office at 250-866-6666.

CPI

## 19. A Greenways Strategy for the 21st Century

BY CALVIN SANDBORN

The opening of the Selkirk Trestle in the 1990s was a landmark moment in the development of Victoria. This addition to the Galloping Goose Trail meant that residents of the Western Communities and Saanich have been able to commute to Victoria on a safe and beautiful bicycle path.

On weekends, Victorians are able to bicycle from home directly into the countryside. City families are able to pick blackberries at Metchosin farms, swim at Matheson Lake, picnic at Roche Cove, explore Sooke Potholes, and plumb the wilderness as far as Leechtown – all without getting into a car.

Victoria has clearly become a world leader in the establishment of greenways. But far more needs to be done, both on Vancouver Island and around the province.

Traditionally, we have viewed parks as isolated pockets of green. The Greenways Vision is to establish narrow green corridors that link those parks together along with all of the community's other open space – schoolyards, beaches, hospital grounds, farms and forests, stream corridors, and rail rights-

of-way. The resulting greenways network will ensure that the community exists within a vast, interconnected web of green space.

Greenways offer many advantages:

### **Recreation**

Take an evening to wander along the Galloping Goose with the cyclists, hikers, horseback riders, and people just out for a short stroll, and you'll get a sense of the trail's immense recreational value. The National Association of Homebuilders claims that trails consistently remain the number one community amenity sought by prospective homeowners. The biggest recreational need is for inexpensive opportunities close to home. Because of this, the US Presidential Commission on outdoor recreation made greenways creation its number one priority.

### **Commuter routes**

The Goose is already a busy commuter route. A complete network of such trails will give every worker and schoolchild a safe commuting route – and reduce pressure on our expensive road systems.

### **Environmental protection**

Greenways can protect stream corridors and other sensitive lands. Vegetation retained in greenways provides wildlife habitat, controls stormwater flooding, cleanses surface water, and provides ecological connections between natural areas.

### **More liveable communities**

Greenways provide “green buffers” between neighbourhoods. From a distance, a narrow greenway provides the same visual effect as a much larger park. For every dollar spent on a traditional park, a greenway can provide the same visual effect for a fraction of a dollar.

### **Reduced government health expenses**

Greenways networks can help reduce government medical costs. It has been estimated that for every mile a person walks or runs, they save society 24 cents in medical and other costs.

### **Business and tourism**

Liveability is one of the top factors considered by companies looking to site operations. Cities like Sacramento and Boulder, Colorado, aggressively market their greenways in order to recruit new businesses. The San Antonio Riverwalk is the biggest draw in the city's \$1-billion-plus-a-year tourism industry. The emerging greenway system in Victoria is becoming an international tourism draw.

*...in 10 years every British Columbian should live within a 20-minute walk of a greenways system.*

How can we create more greenways?

Community groups can get together and map the potential greenways links in their neighbourhoods. Look at undeveloped lands, and identify those where a narrow trail could link a schoolyard to a park, or hospital grounds to a stream corridor. Create an overall vision and a greenways map for your neighbourhood. Then talk to developers, local businesses that might be able to help and to your local government. Remember that the 300-kilometre greenway system in the San Francisco Bay area was created primarily at the instigation of private groups.

BC local governments have done great work on greenways development – from the Vancouver Greenways network to Victoria’s Galloping Goose Trail to the Experience the Fraser network that will connect Hope to the Salish Sea. However, they need to redouble those efforts to incorporate greenways plans into all planning and development. Often a little foresight can create marvellous green links, at no cost to developers.

Perhaps most important, the provincial government needs to be more proactive. Its emerging Provincial Trails Strategy is one step in the right direction. But it needs to establish a “Greenways for the 21st Century” Program – with a goal that in 10 years every British Columbian should live within a 20-minute walk of a greenways system.

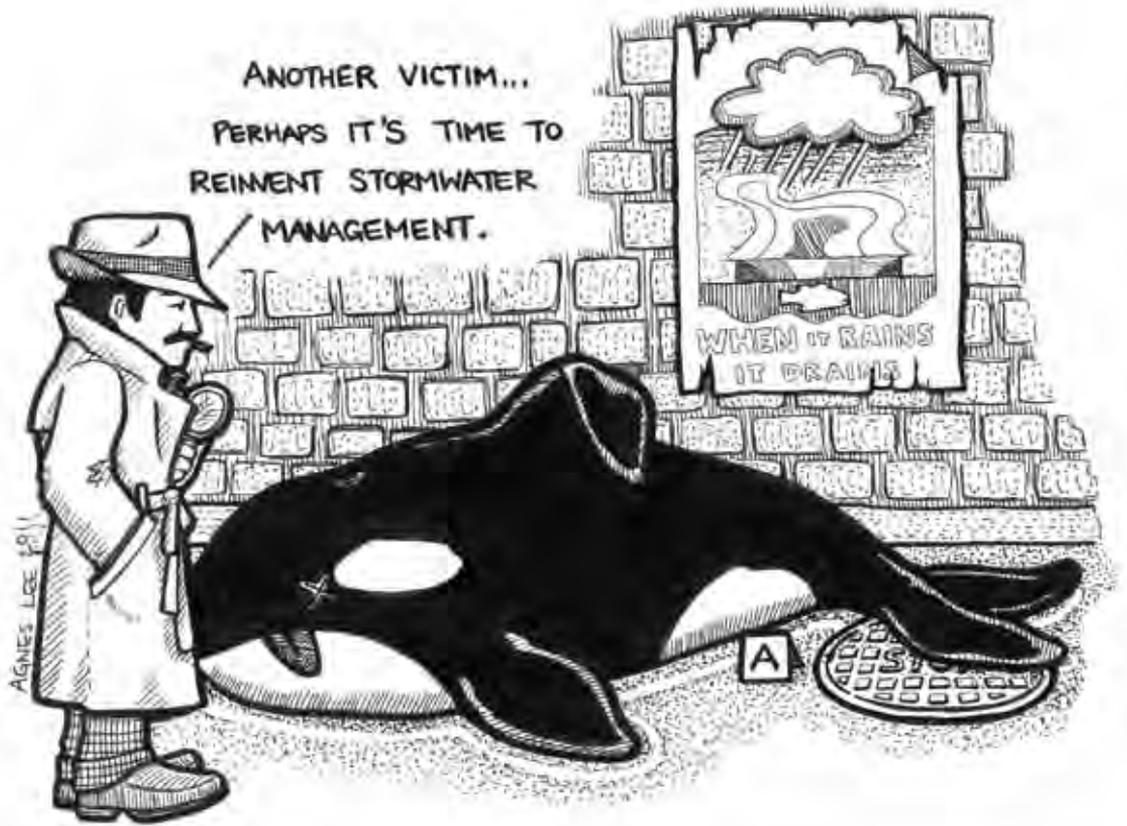
The province could establish routine matching grants to local groups that are working to create greenways. Such grants could be funded through dedication of a small percentage of the gasoline tax, as is done by the US federal government. Or the province could dedicate the \$10 million in pop bottle deposits that are abandoned annually – money which currently goes by default to the bottling industry – to greenway building.

Together, we can create a British Columbia greenways system that “links city to country, and people to nature.” No single endeavour could improve our communities more.

*Calvin Sandborn is Legal Director at the Environmental Law Centre.*

**For more information, see:**

*Greenways and Growth: Conserving Natural Areas in BC Communities.* Calvin Sandborn for Commission on Resources and Environment, Wildlife Habitat Canada, Fisheries and Oceans Canada, and Ministry of Municipal Affairs and Housing. (1996) [http://www.elc.uvic.ca/documents/Sandborn\\_Greenspaces\\_Report\\_1996.pdf](http://www.elc.uvic.ca/documents/Sandborn_Greenspaces_Report_1996.pdf)



## 20. Reinventing Rainwater Management: Designing the Green City

BY CALVIN SANDBORN AND OLIVER BRANDES

Shakespeare had it right – rain is a gentle blessing that “drops from heaven upon the place beneath.” Rain quenches thirst and sustains all life on earth. It greens our world. Without rain, we would inhabit a stark desert.

But we’ve built our cities in a way that turns rainfall into blight. When it rains in our cities, water sweeps over roofs, streets and parking lots, picking up a multitude of pollutants on the urban landscape. Then a network of curbs, gutters and pipes deliver that tainted water at high speed and volume into sensitive water bodies.

This stormwater runoff carries vast quantities of oil, gasoline, heavy metals, solvents, old lead paint chips, pesticides, herbicides, fertilizers, and PAHs into our streams and ocean. It also delivers fecal contaminants, leading to public health advisories for our beaches.

*Often cheaper than conventional pipes and concrete, LID provides additional benefits – it adds urban green space and recreational areas, cleans water and air, and makes the community more attractive.*

Stormwater has destroyed our urban salmon streams. Its high velocity erodes stream banks and destroys spawning beds. Its toxins kill fish. And stormwater culverts block fish migration.

At one time, salmon in Victoria's Colquitz Creek were so thick farmers speared them and scattered them on fields for fertilizer. Over 30 streams in Vancouver were chock full of the big fish. But stormwater has turned these bountiful creeks into drainage ditches. Local restoration groups regularly see their efforts washed away by stormwater surges and toxins.

Polluted runoff has also closed many of the shellfish beds near our cities. In addition, stormwater runoff has now been documented as the chief source of PCB contamination in orcas – one of the main threats to survival of that endangered species. Stormwater washes PCBs off of roofs and other surfaces and delivers the chemicals to fish at the bottom of the orca's food chain. Recent scientific studies draw the link between runoff and survival of this region's most majestic animal.

All the above problems are the legacy of our obsolete 19<sup>th</sup> century stormwater management system – a system that fails to respect natural systems and water cycles. However, rainwater management practices have recently been developed that make the 21<sup>st</sup> century Green City possible.

Instead of relying heavily on pipes and concrete, this new approach relies upon soil, trees and open space to naturally absorb, store, evaporate and filter rainwater. This Low Impact Development (LID) approach mimics the natural water cycle – allowing water to infiltrate down through the soil and slowly release into the watershed.

Engineers, developers, and governments across North America are adopting green rainwater management techniques – including porous pavement, brick pavers, narrower streets, sidewalk planter boxes, replacing curbs and gutters with grassy boulevards and swales, improving soil absorption, retention ponds, rain gardens, and green roofs. Such LID techniques are now required for all new development in western Washington State.

Often cheaper than conventional pipes and concrete, LID provides additional benefits – it adds urban green space and recreational areas, cleans water and air, and makes the community more attractive. In fact, a Philadelphia study concluded that the LID approach provided **23 times** the total social, environmental and economic benefits of conventional stormwater management. The City of Philadelphia recently launched the most ambitious

LID effort in North America – a comprehensive plan to “peel back the pavement” and convert the city into an urban oasis.

Our provincial and local governments need to adopt a similar strategy. For its part, the province needs to encourage local governments to move forward on this issue. The province should:

- Follow the example of Washington State and require Low Impact techniques for all new developments – and create a long-term plan to retrofit developed urban areas with green infrastructure;
- Mandate each region and municipality in the province to establish *Integrated Watershed Management Plans* for dealing with rainwater through modern green techniques. Planning must take place at a watershed scale – it won’t work if Oak Bay protects Bowker Creek and Victoria and Saanich fail to protect their portions of the same watershed;
- The watershed plans should integrate planning for stormwater with planning for water supply and sewage to ensure the most efficient use of the precious water resource;
- The watershed plans should be required to set the following mandatory targets:
  - Elimination of stormwater discharges rated “high” for public health concern by 2017;
  - Elimination of discharges rated “high” for environmental concern by 2017; and
  - Making fish and shellfish near urban areas edible by 2035.
- To meet the targets, we must fix the old pipes that allow sewage to mix with storm water and flow onto our beaches. LID will reduce this problem, but money is still needed to fix the pipes. Cities such as Portland have successfully shifted such stormwater financing from property taxes to a “user pay” system, which encourages homeowners to reduce their runoff, saving both the homeowner and government money. The city of Victoria is adopting such a user-pay system, and the province should encourage this approach across BC.

It is clearly time for a change in the way that we manage stormwater. If we act now, our grandchildren will benefit dramatically. They’ll be able to walk on beaches free of stormwater fecal contamination. From those clean beaches they’ll be able to spot the occasional orca, still wild in the Straits. They will walk along the banks of local urban streams, awed by the magic of restored salmon runs. They will harvest shellfish from long-closed shellfish beds.

We can do all of this – but the province and local governments must first take action and establish a rainwater management strategy.

*Calvin Sandborn is the Legal Director at the Environmental Law Centre.*

*Oliver M Brandes is the Water Sustainability Project Leader and Co-Director of POLIS Project on Ecological Governance. A former ELC Clinic student, he is a current ELC Associate.*

**For more information, see:**

The Environmental Law Centre's proposed new strategy for stormwater is found in *Re-inventing Rainwater Management: A Strategy to Protect Health and Restore Nature in the Capital Region*. (2010) <http://www.elc.uvic.ca/press/stormwater.html>

*Peeling Back the Pavement: A Blueprint for Reinventing Rainwater Management in Canada's Communities*. Polis Project and the Environmental Law Centre. (2011) [http://poliswaterproject.org/sites/default/files/Peeling\\_Back\\_highres\\_nov17.pdf](http://poliswaterproject.org/sites/default/files/Peeling_Back_highres_nov17.pdf)

The POLIS Project on Ecological Governance website: <http://www.polisproject.org/conservation>.



## **E. Pollution**



## 21. Home Heating Oil Tanks: The Threat to Salmon and Your Wallet

BY CALVIN SANDBORN AND NAOMI KOVAK

The heating oil tank at your house may pose a major threat to local salmon streams – and to your fiscal well-being. There ought to be a law.

Last November, a home heating system spilled more than 1,000 litres of oil into Saanich's Colquitz River during the salmon run. Dorothy Chambers, a Colquitz stewardship volunteer, described the results:

*The fish fence is saturated with reeking oil and all of today's Coho are dead. What a sight for the families who came to watch the salmon release. Twenty-four large dead Coho in three days...carrying eggs which will not hatch and will affect this run for years to come. It is also probable that the 162 Coho we released on Tuesday are affected.*

Meanwhile, the homeowner faced a potential cleanup bill of over \$60,000.

That November spill was not an anomaly. Two months later, a fuel company

pumped oil into a Saanich basement through an oil supply pipe that had been left when the old tank was removed. The oil contaminated the property and ran into the storm sewers – which connect to local water bodies. In the end, the house had to be demolished. Just three weeks after that incident, another 634 litres of oil spilled into Colquitz River from a ruptured fuel line on yet another home oil tank system.

By March of this year, the Saanich Director of Public Works described the problem posed by six heating oil spills in Saanich in just six months, stating, “Responding to oil spills has become almost full-time for our drainage guys since November.” Unfortunately, such spills find their way into municipal storm sewers – and eventually into local streams.

A big part of the problem is that heating oil tanks and plumbing are getting old, rusting out, and failing. The other part of the problem is that current law fails to prevent these accidents.

This is why the UVic Environmental Law Clinic has developed a possible solution to this important environmental challenge. Based on a review of what other jurisdictions have done to address the problem, the Clinic recommends that the province and local governments legislate:

- Mandatory regular inspection of tank systems;
- Establishment of government-issued ID tag systems that confirm a tank and system is in good shape and not obsolete. Delivery of fuel to tanks without a valid tag should be prohibited;
- Minimum physical standards for tanks and plumbing, and maximum life spans for heating oil tanks; and
- A requirement that installers of new home heating systems ensure that existing oil tanks are properly decommissioned.

We should emphasize that this is not just an environmental problem. It is also a serious issue for any homeowner who has an oil tank on their property. Most homeowner insurance policies do not cover such oil spills – and these spills can be extraordinarily expensive. For example, in one recent BC spill the property owner faced a clean-up cost of over \$200,000. Such accidents have the potential to bankrupt a family.

*By March of this year, the Saanich Director of Public Works described the problem posed by six heating oil spills in Saanich in just six months, stating, “Responding to oil spills has become almost full-time for our drainage guys since November.”*

Government should consider making oil companies pay for spills when the company has filled a flawed tank. This would provide companies with a powerful incentive to carefully check before they pump oil into a system. In addition, BC should establish a public insurance fund – paid for by a surcharge on fuel – to pay for spills from the property of homeowners who register their tanks with government. In Washington State, such a system helps authorities keep track of where old tanks are – so they can be properly decommissioned when the time comes.

With appropriate law reform, we can work together to address this important threat to the environment and to unsuspecting homeowners.

*Calvin Sandborn is Legal Director at the Environmental Law Centre.*

*Naomi Kovak was an ELC Clinic student and ELC Executive and she is an articulated student at the Environmental Law Centre.*

**For more information, see:**

*Preventing Home Heating Oil Spills in British Columbia.* Environmental Law Clinic. (2012) [http://www.elc.uvic.ca/press/documents/2012-02-01-PreventingHomeHeatingOilSpillsinBC\\_Nov2012.pdf](http://www.elc.uvic.ca/press/documents/2012-02-01-PreventingHomeHeatingOilSpillsinBC_Nov2012.pdf)



## 22. *Reforming Contaminated Sites Laws*

BY WALLY BRAUL

British Columbia has inherited a legacy of contaminated soil and groundwater sites from a wide array of industrial activities going back a century. Leaking oil tanks, “back forty” dumping of chemical wastes and insecure tailings ponds are just some examples which to this day cause risk to human health and the environment. To many British Columbians, the Erin Brokovich saga is not some remote possibility – they live the same fears and worry that their contaminated family homes are now a liability.

Probably no environmental issue is more challenging to legislators than contaminated sites. Any law reform initiative must address complex questions, such as: How clean is clean, given imperfect science? What is acceptable remediation? Should parties who discharged waste at a time when it was not illegal be held liable today? Who pays for contamination at orphan sites where original polluters cannot be found? Should today’s legislation create special rights for current owners and victims of historic contamination to sue the original polluters?

These questions were the subject of law reform in 1997 when the *Environmental Management Act* (EMA) and its supporting *Contaminated Sites Regulation* were implemented. While this legislation has prompted remediation of many sites, it is far from optimal. Several significant problems stand in the way of fair, cost-effective and timely remediation.

The following four changes would lead to significant improvements.

### 1. The Act Should Directly Address the Off-Site Migration Problem

In many cases, contamination has migrated far beyond the source property. EMA is silent on who should attend to the migrating plumes and when. Nor have Ministry of Environment (MOE) guidelines filled the gap.

The gap can be summarized as follows:

- Sections 57 and 60.1 of the *Contaminated Sites Regulation* essentially require that parties who encounter migration while investigating or remediating their properties must report that plume to the MOE and local property owners. This off-site notification rule is a laudable first step, but does nothing to compel remediation of the plume;
- The MOE has attempted to fill this legislative gap by sending letters to the notifying parties requesting that they go further afield to investigate and take steps to remediate the off-site plume. These so-called “expectation letters,” while well-meaning, have no legal effect; EMA does not contemplate that liability can be imposed by such letters. Not surprisingly, the MOE rarely follows up on its expectation letters;
- Unfortunately, the expectation letters are sent indiscriminately to innocent parties who have not been deemed “responsible persons” under EMA or would not otherwise fall within this net of potentially liable parties. While there is no EMA requirement to comply with expectation letters, the effect is not benign – well-informed prospective buyers who wish to acquire and remediate contaminated properties are reluctant to do so, knowing that the expectations letters will be posted on the MOE website, and thus suggest to the public and future buyers that there remains an unfulfilled regulatory requirement. Rather than sending a chill to investors that they might be required to remediate all down-gradient properties as well, a better policy would be to encourage non-polluters to acquire and remediate sources of contamination, thus preventing further leakage; and
- Ministry policies are internally inconsistent. Some policies allow for the remediation of part-sites. But other policies (e.g. Protocol 6) require all parties (whether “responsible” under EMA or not) to remediate all contamination at the source-site and off-site as preconditions to Certificate

*To many British Columbians, the Erin Brokovich saga is not some remote possibility – they live the same fears and worry that their contaminated family homes are now a liability.*

of Compliance (COC) approvals. The MOE's use of Protocol 6 to impose liability conditions in COCs was recently found by the Environmental Appeal Board to be unauthorized.

The off-site migration regime, in short, is due for a significant overhaul. An important first step is to amend EMA to send a two-fold message that "responsible persons" will be liable for contaminate plumes caused by them – and other innocent parties will not be punished for acquiring and remediating others' contamination. Clear legislative intention would help the MOE work up the necessary guidance and undertake appropriate enforcement actions. Delaying the overhaul of the off-site regime simply means higher costs later as plumes continue to migrate.

## 2. The Ministry of Environment Should Make More Strategic Use of its Order Powers

EMA provides the MOE with broad powers to require remediation. Few would disagree that the MOE's limited resources should be devoted to high risk and high priority sites. The MOE, however, exercises its order powers infrequently – a small handful of cases in the past decade.

The MOE's apparent unwillingness to order remediation has several adverse consequences:

- It sends a message that it will not proactively apply polluter-pay;
- Many down-gradient victims of migrating contamination wake up to a nightmare of health risks and loss of any value in their family homes. They often cannot raise funds to remediate, especially if their only asset (their home) has become a liability. It is not uncommon for remediation of a residential property contaminated by a nearby gas station to exceed one million dollars;
- Litigation is expensive. For example, plaintiffs can easily incur litigation costs of \$100,000 in simple civil actions, and often much more, against large companies with ample legal resources. Litigation costs are better spent on remediation; and
- Parties may decide to leave their properties un-remediated. These brownfields create significant challenges for effective land use planning.

BC should follow the lead of US regulators. In the US, the mere threat of regulatory order powers can trigger expeditious remediation and settlement of disputes which otherwise would require lengthy and expensive litigation.

## 3. The Act Should be Amended to Allow the Determination of Recoverable Remediation Costs

Section 47 of EMA provides that a plaintiff may recover incurred – not prospective – remediation costs from "responsible persons." Remediation at some sites could take several years (and longer if the risk-based remediation standard is applied and the site requires monitoring). The potential delay in recovering remediation costs dissuade parties who can invest elsewhere.

Amending EMA to allow a court to prospectively order what costs would be recoverable from which “responsible persons” would give plaintiffs a reasonable degree of confidence that costly and time-consuming remediation is ultimately worthwhile.

#### 4. EMA Should Require More Frequent Reporting of COC Compliance

Certificates of Compliance indicate satisfactory remediation and are recognized by the markets. They provide certainty and encourage investment and ultimate re-use of contaminated sites. They are essential if the system is to avoid abandonment of contaminated sites.

However, the value and credibility of Certificates is being eroded. COC-holders are generally not required to report to the MOE on whether they are complying with the COC conditions. Nor does the MOE have the monitoring and enforcement capacity to systematically ensure that Certificate conditions are satisfied. The MOE is therefore not in the position to use its EMA power to rescind COCs for failure to comply. The value of COCs to future owners thus diminishes over time.

As a starting point, EMA should be amended to require more frequent reporting by COC-holders. This increased reporting should, for example, require COC-holders to provide updates on measures used to contain contamination at sites subject to risk-based remediation.

*Wally Braul, lawyer, has specialized in contaminated sites law and played a key role in drafting contaminated sites legislation. He is an ELC Fellow.*

#### For more information, see:

Discussion Papers and Reports on Contaminated Sites Issues: Ministry of Environment website: <http://www.env.gov.bc.ca/epd/remediation/reports/index.htm>



## **F. Climate Change and Energy**

IS IT ME, OR IS  
IT GETTING HOT  
IN HERE?



## 23. *We Need a Provincial Carbon Budget*

BY ANDREW GAGE

BC has received much public praise for adopting strong greenhouse gas emissions reductions targets, while Ottawa has been blasted for setting weak ones. But one thing is true of both the provincial and the federal governments: it is unclear whether and how they will meet their respective targets.

In 2007, the BC government established the Climate Action Team, a blue-ribbon panel of experts to set interim greenhouse gas reduction targets and to make recommendations on what the government needed to do to meet those targets. However, many of those recommendations remain unimplemented, and the panel was disbanded in 2008 after submitting its recommendations report. Unfortunately, the expected expansion of oil and gas operations (subsidized and authorized by the province) and the construction of new highways could increase emissions – and cancel out the reductions that the province’s ground-breaking carbon tax and other initiatives may have achieved.

Meanwhile, Environment Canada's scientists are warning the federal government that Canada is unlikely to achieve its own already weak greenhouse gas emissions target.

We need to get more serious about meeting such targets. Imagine a government that promised to cut its financial deficit significantly over the next five years. The public would naturally expect the government to have budgets and other plans describing how this goal was to be achieved. They would expect the government to have fully costed measures intended to raise or save money. It would be surprising (although not, unfortunately, unheard of) if the government designed programs to reduce government spending without understanding how those programs would impact the specific budgeted deficit cuts.

Reducing greenhouse gas emissions, like cutting the deficit, is complicated and involves value judgments about how best to meet targets. Budgets are one of the best models we have for dealing with these types of complicated decisions about values and allocations of limited resources.

BC has promised to achieve a six percent reduction in greenhouse gas emissions by 2012 (relative to 2007 levels), and an 18% reduction by 2016. If we treated those goals with the seriousness that we treat financial planning, the government would periodically table a carbon budget, describing what the government was going to do to achieve that goal and how those government actions would help achieve the emissions levels allowed under the budget. The government would need to quantify the emissions that it anticipates different sectors of society will generate – and how government laws, policies and programs would help ensure that those goals would be achieved. The public would be able to assess how realistic and responsible the government was being. And at the end of the budget period, a group of carbon auditors would be able to assess whether the government had achieved the reductions that it had promised.

Sound farfetched? Not really – in 2009, the United Kingdom became the first country in the world to establish carbon budgets in law – tabling three budgets setting out how much carbon dioxide the country plans to emit between 2008 and 2022. A fourth budget, tabled by the current Conservative government, was adopted in June 2011, and covers the period from 2023 to 2027. These budgets were developed with the advice of an expert committee – the Climate Change Committee – which also audits the government's performance to evaluate whether the budgets are being achieved.

Carbon budgeting is only part of the solution to climate change. But it is an important one. Right now both the federal and provincial governments have established greenhouse gas emissions targets (albeit inadequate ones at the federal level) and have developed laws, policies and programs intended to reduce greenhouse gases. What's missing is the budgeting process, where governments demonstrate that those programs will actually achieve the targets that they have set.

*What's missing is the budgeting process, where governments demonstrate that those programs will actually achieve the targets that they have set.*

West Coast Environmental Law Association recommends that the BC government and the federal government adopt a carbon budgeting model. This approach could include:

- A requirement that carbon budgets be introduced in the provincial Legislature and federal Parliament every four years that describe how much carbon dioxide and other greenhouse gas emissions will be emitted and which government ministries and programs will take the lead on achieving the necessary cuts;
- A scientific committee, with expert representation from each of the provinces, with a mandate to advise both the federal and provincial governments on the development of the carbon budgets and to audit whether or not those budgets are being achieved and the relative effectiveness of different measures; and
- A legal requirement that government ministries and agencies re-evaluate their policies and laws, and make their decisions, in light of its carbon budget constraints.

Right now we are “overspending” – in the sense that we are living beyond our means and emitting carbon at levels we cannot sustain. It’s time that we treated that problem with the same seriousness that we apply to financial planning.

*Andrew Gage is a West Coast Environmental Law Staff Lawyer. One of the first ELC Clinic students and Executive members, he is also an ELC Fellow.*



## 24. *In Defence of the Carbon Tax*

BY SHI-LING HSU

Climate experts from around the world have praised British Columbia's carbon tax. It is North America's first such tax – and arguably the world's cleanest and most efficient carbon tax. Yet some British Columbians now call for repeal or rollback of this tax.

Repeal or rollback would be a serious mistake. Climate change is not a problem because we are sure that the world will be worse off. Climate change is a problem because of the *risk* that changes to rainfall patterns, ocean currents, and other climate indicators could be catastrophic. Infrastructure and governments are at risk. We are not talking about people doing without 32-terabyte iPads. We are talking about future generations of North Americans lining up for food and water. The risk of this scenario is, as best we can tell, still small. But the risk is there and it is real.

We insure ourselves against car accidents, fires, and even theft, in a manner that is far, far more prudent than the way we are treating the risk of climate change. Reducing greenhouse gas emissions by imposing a carbon tax is a far better insurance policy than anything that has ever been sold by an insurance

*Reducing greenhouse gas emissions by imposing a carbon tax is a far better insurance policy than anything that has ever been sold by an insurance company. The world needs to act, and BC has set a good example.*

company. The world needs to act, and BC has set a good example. It follows in the footsteps of Sweden, which introduced a carbon tax in 1991, and reduced carbon emissions by nine percent – even as its economy grew by 44%.

But perhaps the most compelling reason for keeping the BC carbon tax is a purely selfish one. Eventually, the world will come around to the realization that not only must the community of nations agree to reduce emissions, it must price carbon. Granted, if that day never comes, then there is no point to even talking about reducing greenhouse gases, and we should party our way to climate oblivion. But if it does come, there will be those that are prepared for a new economic reality, and those that won't. We want to be one of the prepared ones.

Re-orienting an economy takes time. Even small economies like the BC economy are hard to change. Despite the decades of economic volatility and low profits in industries such as logging, fishing, and pulp and paper processing, BC still finds itself wedded to these anachronistic resource industries. Shifting gears and breaking up is very hard to do.

While the BC carbon tax has not moved mountains, it has, at the margins, moved the province towards an economy that is slightly more prepared than other North American jurisdictions to weather a shift in the political and economic climate. The carbon tax sends an important price signal on greenhouse gas emissions by charging for carbon. It sends a signal to people who are making capital decisions on big-ticket items today, for items they will be keeping for decades.

For example, medium-sized emitters like the University of British Columbia now routinely look for ways to reduce emissions in the interests of reducing its long-term carbon tax bill. In so doing, it makes capital decisions that will last for decades. UBC's new law school building features a geothermal unit, one that would have been hard to justify without a price for carbon. Similarly, the contractor that renovated our house was able to lay out a whole new case for us to replace our furnace with a high-efficiency unit and to pay a little more for energy-efficient windows. Big box stores in BC are exploring a variety of new ways of increasing heating efficiency because they, too, face a carbon tax going forward.

The innovation needed to save the world from climate change will come from small changes such as these and small discoveries multiplied millions of times

over. BC's carbon tax is still not great enough to truly move BC's economy into the 21<sup>st</sup> century, but it is getting there with the help of the carbon tax.

A final reason for keeping the BC carbon tax is it would make BC more productive. The BC carbon tax represents a shift from taxing labour to taxing consumption. Taxing consumption instead of labour would provide incentives for us to work harder, produce more and consume not necessarily less, but *more efficiently*.

In addition, a carbon tax enables government to lower income taxes, and who likes income taxes?

A carbon tax will not change BC into a low-carbon, high-technology juggernaut overnight. But such a transition, as with all long journeys, begins with a single step. The BC carbon tax is that first step. We must not step back now.

*Professor Shi-Ling Hsu taught at the UBC Faculty of Law and recently published a book on carbon taxes. He is currently a professor at Florida State University College of Law.*

#### **For more information, see:**

Calvin Sandborn and Tim Thielmann. "Making the Case for a Carbon Tax in Canada." *Victoria Times Colonist*. (2008) <http://www.canada.com/victoriatimescolonist/news/comment/story.html?id=4e457423-60a5-403e-98df-4bddd31c9bda>

Shi-Ling Hsu. "Nine Reasons to Adopt a Carbon Tax." (2009) [SSRN paper](#)

Shi-Ling Hsu. *The Case for a Carbon Tax: Getting Past Our Hangups to Effective Climate Policy*. (2011)



## *25. A Rational Strategy for Electricity Rates, Conservation and Intergenerational Equity*

BY WILLIAM J. ANDREWS

On May 22, 2012, the BC government stepped into a contentious Utilities Commission proceeding and ordered the Commission to keep BC Hydro's electricity rates lower than the cost of providing service. A victory for affordability? No. In my opinion it was a setback for intergenerational equity, energy conservation and independent, evidence-based decision making.

The actual cost of providing electricity in BC is going up, and someone has to pay for it. Putting a lid on rate increases may be politically expedient in the short term. But requiring BC Hydro to provide electricity for less than the cost of supplying it simply means one of two things:

- The cost has to be subsidized by taxpayers; or
- The bill has to be pushed onto future generations.

We pay among the lowest electricity rates in North America because previous

generations of BC ratepayers and taxpayers paid for dams and transmission lines that were painfully expensive at the time – even though they now seem cheap. Since we now benefit from the providential spending of previous generations, we have an obligation to at least pay our own way – and not leave an unfair burden for future ratepayers. This is “intergenerational equity.”

Furthermore, conservation and efficiency are far less expensive than new electrical generation and transmission lines. But conservation and efficiency are undermined when electricity rates are much lower than the real cost of supplying the electricity. Artificially low electricity rates actually hinder conservation and efficiency – letting usage of electricity rise, requiring more spending on new generation and transmission, and, ironically, pushing rates even higher. In contrast, rates based on legitimate costs are an “economically rational price signal” that can encourage conservation.

So what exactly are the legitimate costs of supplying electricity that rates should be based on? That’s for the BC Utilities Commission to determine (except when the government intervenes as it did in May 2012). The Commission is a politically independent tribunal that makes decisions based on evidence. It has expertise in everything that goes into BC Hydro’s costs of supplying electricity: generation, transmission, distribution, accounting, employee remuneration, planning, customer service, First Nations consultations, conservation and efficiency programs, you name it.

The Commission’s review of BC Hydro rate increases includes intervenors representing industrial customers, low-income customers, commercial customers, green rate-payer groups, independent power producers, other utilities and so on. The review begins when Hydro files thousands of pages of evidence justifying its costs. But no one accepts Hydro’s figures at face value. Literally thousands of written information requests are put to Hydro by the Commission staff and intervenors. Hydro’s written responses are scrutinized and there is a *second* round of information requests and responses. Intervenors can file written evidence challenging BC Hydro’s case and there is a round of information requests on that evidence.

All this merely sets the stage for a formal oral hearing where all the parties cross-examine BC Hydro’s and intervenors’ expert witnesses. Following final arguments, a panel of Commissioners issues a lengthy decision approving rate increases that allow Hydro to collect enough revenue to cover its true cost of supplying electricity.

That’s the way it’s supposed to happen. But after BC Hydro filed an application in 2011 for 10% rate hikes over each of the next three years “things went sideways.” Everyone in the electricity rates world – including the government – knew that Hydro’s costs were going up and so big rate increases were expected. However, the new Clark government publicly implied that the rate hikes must be due to mismanagement at BC Hydro. The government appointed senior bureaucrats to “investigate” and they reported that BC Hydro could cut costs (they didn’t say how) enough to reduce the rate increases by half.

*Since we now benefit from the providential spending of previous generations, we have an obligation to at least pay our own way – and not leave an unfair burden for future ratepayers. This is “intergenerational equity.”*

BC Hydro – which follows directions from its shareholder the government – dutifully “found” huge costs savings and revised its rates application to about five percent per year and the Commission’s proceeding carried on.

Under scrutiny, it became clear that much of BC Hydro’s supposed “cost savings” were really just transfers into “deferral accounts” that ratepayers would eventually have to pay back through rates. However, the Commission, being independent of government, did not go along. In an interim decision in February 2012, the Commission expressed concern about intergenerational equity and the continuing growth in the deferral accounts “without any opportunity in sight to clear them.” The Commission scheduled a three-week oral hearing for June 2012 and a major issue would be whether Hydro’s proposed rate increases were too *low*, not too *high*.

But the hearing never happened. As stated above, on May 22, 2012 the government ordered the Commission to approve BC Hydro’s watered-down rate increases, effectively moving substantial current costs into deferral accounts for future ratepayers to pay back.

Unfortunately, the government’s decision to override the Utilities Commission regarding BC Hydro rate increases is not an isolated event. In 2010, the government passed legislation exempting most of BC Hydro’s most contentious – and expensive – upcoming expenditures from Commission review. The list includes the smart meter program, the Site C dam proposal, the Northwest Transmission Line, many upgrades and renovations of existing Hydro facilities, and various contracts with independent power producers. In addition, the government eliminated the Commission’s authority to review BC Hydro’s highly important 20-year plan and gave that role to itself. This is peculiar, since the government (acting as BC Hydro’s shareholder) controls what BC Hydro puts in the long-term plan in the first place.

What is to be done? I say the government should take action to protect low-income ratepayers but otherwise leave Hydro’s rate increases to the rigorous scrutiny of the BC Utilities Commission. And the government should restore the Utilities Commission’s authority to review and make evidence-based decisions on all BC Hydro’s major projects, contracts and long-term plans. This would better serve both conservation and the rational management of electricity in BC.

*William Andrews is a BC lawyer who represents the BC Sustainable Energy Association in utilities commission proceedings. He is also an ELC Fellow.*

**For more information, see:**

BC Sustainable Energy Association website. [www.bcsea.org](http://www.bcsea.org)



## *26. How to Save the World Without Hurting the Poor: An Energy Poverty Strategy*

BY JILL VIVIAN, MAINE McEACHERN AND CALVIN SANDBORN

Climate change is the great environmental challenge of our time. Yet our high rates of childhood poverty and the huddled figures we pass on downtown streets remind us that poverty is important too. What if we could fight climate change *and* poverty at the same time? It turns out, we can.

Hiking energy rates and retrofitting homes to make them “Power Smart” are two ways the province is trying to conserve energy. However, without safeguards such programs can actually increase poverty problems.

Almost 300,000 BC households already spend over 10% of their income on energy. This forces them to make difficult choices, like whether to heat or eat. It finds them living in cold damp homes, suffering higher rates of pneumonia, asthma, bronchitis, high blood pressure and cardiovascular problems.

This “energy poverty” can also cause unsafe heating practices. Accidents

happen when people heat their homes by burning newspapers or using an open oven door, faulty electric heater or a Coleman stove. In fact, energy poverty significantly contributes to the 1,600 “excess winter mortality” deaths in BC each year. The World Health Organization has recognized that poor housing and poverty lead to low indoor temperatures, which, in turn, leads to cold-related deaths.

Rate hikes and energy-efficiency retrofit programs can increase these problems. They can also be unjust. Low-income families pay the rates that fund programs, but they don’t have the money to purchase retrofits themselves. And since they are usually renting, they lack the incentive to upgrade a home that belongs to someone else. On the other hand, their landlords lack incentive to upgrade insulation and windows – because they don’t pay the energy bills.

The result is that low-income people are often unable to participate in energy efficiency programs. They end up subsidizing programs for wealthier people while facing increased poverty themselves. At the same time, British Columbians miss the opportunity to reduce greenhouse gases through upgrading old, drafty homes and obsolete appliances.

Fortunately, there’s a solution that is not only fair – but also does a better job of reducing greenhouse gases. Power Smart-type programs that focus on the low-hanging fruit of older homes and appliances can achieve quick greenhouse gas reductions. And these programs can help, not hurt, low-income families. Energy bills are lowered, health improves and jobs are created.

BC already has some low-income energy efficiency programs in place. For example, BC Hydro offers a low-income version of the Power Smart program, which provides free retrofit services in larger population centres. The province also offered a similar but short-lived program under its LiveSmart initiative; it was halted in 2009.

Such programs are a good start, but more needs to be done. For example, under its last government the United Kingdom established ambitious efficiency programs aiming to reduce greenhouse gases and actually *eliminate* energy poverty over the next decade. It’s time for BC to adopt a similarly aggressive approach.

The province should:

- Set targets to eliminate energy poverty by a certain date;
- Legislate program commitments and funding requirements for all energy utilities;
- Establish a central energy efficiency body to oversee, fund, and monitor both mainstream and low-income energy efficiency programs;
- Deliver “full-service” programs that address all savings opportunities, all fuel types and all housing types (including rental, social and apartment building housing);
- Provide services at no cost to low-income persons (and low or no cost to owners of low-income rental buildings);

*Almost 300,000 BC households already spend over 10% of their income on energy. This forces them to make difficult choices, like whether to heat or eat.*

- Partner with trusted community-based organizations to market and deliver low-income programs in target communities; and
- Develop and support a household energy efficiency workforce. Construction, retrofit, and energy auditing skills are needed. Low-income programs can provide additional benefits by training and employing low-income consumers from target neighbourhoods.

Taking these steps will help create a win-win situation. The province will improve the health and livelihood of its citizens and, at the same time, address its climate and energy goals. In the end, those are improvements we all benefit from.

*Jill Vivian, lawyer, is a former student at the ELC Clinic, ELC Executive and articulated with the Environmental Law Centre.*

*Maine McEachern was a student at the ELC Clinic.*

*Calvin Sandborn is Legal Director of the Environmental Law Centre.*

**For more information, see:**

Maine McEachern and Jill Vivian. *Conserving the Planet Without Hurting Low-Income Families: Options for Fair Energy-Efficiency Programs for Low-Income Households*. Environmental Law Centre for the Energy Poverty Initiative of the Climate Justice Project. (2010) <http://www.elc.uvic.ca/press/energy-poverty-report-May2010.html>

Marc Lee, Eugene Kung and Jason Owen. *Fighting Energy Poverty in the Transition to Zero-Emission Housing: A Framework for BC*. Canadian Centre for Policy Alternatives for the Energy Poverty Initiative of the Climate Justice Project. (2011) <http://www.policyalternatives.ca/energypoverty>



## **G. Ensuring Justice for Nature**



## 27. Access to Justice: Reforming Environmental Tribunals

ETHAN KRINDLE, MARK HADDOCK AND CALVIN SANDBORN

The environment cannot be protected if the case for clean air, pristine water and healthy wildlife is excluded from the halls of justice. Unfortunately, environmentally concerned citizens are often unable to enter these halls. While industry has broad access to tribunals to promote private rights, citizens are often unable to enter those same government tribunals to argue for public rights. For example:

- Forest companies can appeal government Allowable Annual Cut, stumpage and plan approval decisions – but environmental groups and members of the public may not.
- Citizens can't appeal when an industry gets a water licence (unless they happen to own waterfront land or land physically affected by the new licence.) This excludes salmon enhancement groups and recreation groups from appealing on behalf of nature.
- In 2005, the law was changed to eliminate the right of neighbours to appeal potentially hazardous proposed sewerage (septic) systems.

- In 2003, the public’s right to appeal pesticide use permits was effectively lost when the requirement to obtain such permits was dramatically reduced. From 2003-2010 there were no public-interest based appeals.

BC currently has several tribunals with some form of environmental mandate. However, citizen access to these tribunals is very limited due to “standing” rules and restrictions on which environmental decisions may actually be considered by the tribunals. Even citizens that get past those barriers face the problem that many decisions can only be reviewed at specific times – such as when a licence is first granted or amended.

If it turns out that an industrial operation harms someone, wrecks their quality of life or even interferes with other licenced rights (e.g. water rights holders, tourism operators with commercial recreation tenures), there is often little recourse available to them. Those who have legal remedies may sue in court but face numerous hurdles and risks discussed in the next chapter. Those without judicial remedies can only hope for the goodwill of the minister responsible or try to get media attention to put pressure on politicians.

In many cases, environmental disputes could be resolved by requiring new standards or technology, but today there is often no mechanism to bring such issues before a tribunal. In addition, some tribunals do not see themselves as having a mandate to *resolve* disputes – and tend to act more like courts in deciding winners and losers.

Clearly, the tribunal system needs to be improved to better serve the public and protect the environment – and to ensure better “access to justice” for those affected by industries such as mining, logging, and oil and gas development. The mandate and procedures of environmental tribunals need to be modernized if “environmental justice” is to be done.

Reform must recognize that environmental harm is inherently unpredictable – and tribunals must be able to address it when and where it occurs. They need to have the discretion to grant standing where parties can show a legitimate grievance even if it wasn’t foreseeable at the time a permit was issued. Our environmental tribunals also should be mandated to apply dispute resolution techniques, as we do in many other sectors.

In addition, participant funding should be made available to citizens pursuing meritorious appeals. The ability to start an appeal is of little use if one cannot afford to hire experts and make an effective case. Participant funding would reduce the imbalance between parties and would put better information before tribunals and improve tribunal decisions.

A study published by the Environmental Law Centre in 2011 looked at environmental tribunal systems in other provinces and countries and made a series of recommendations for improving the system in BC, including:

- Consolidate and expand tribunal mandates: currently, some kinds of environmental decisions fall under the jurisdictions of multiple tribunals, while others (such as local government decisions) are not covered at all. Expanding and consolidating tribunal mandates where appropriate

*While industry has broad access to tribunals to promote private rights, citizens are often unable to enter those same government tribunals to argue for public rights.*

could close some of these “accountability gaps” and would allow for more consistent rules and procedures;

- Make tribunals more accessible: Allow review of decisions by appeal whenever the environmental impacts of those decisions become felt – not just at set points such as license amendments;
- Recognize that where the government chooses not to act in relation to an environmental issue, this is a decision and should be appealable in the same way as other decisions;
- Improve the standing rules so that individuals or public interest groups who can show that an environmental decision negatively affects them can appeal it. In addition, “advance costs” should be more readily available to public interest litigants; and
- Give tribunals broader investigative powers as well as a greater scope to take a problem-solving approach to disputes and/or to use alternative dispute resolution techniques such as mediation.

BC is falling behind many jurisdictions that have taken steps to ensure that environmental tribunals are accessible, fair, efficient, effective and accountable, and mandated to deliver environmentally sustainable outcomes. The above tribunal reforms would remedy this – and provide the public with access to environmental justice.

*Mark Haddock is a lawyer with the Environmental Law Centre and Senior Instructor at the UVic Faculty of Law.*

*Ethan Krindle is a former ELC Clinic student and ELC Executive who also articulated with the Environmental Law Centre.*

*Calvin Sandborn is the Legal Director for the Environmental Law Centre.*

### **For more information, see:**

*Environmental Tribunals in British Columbia.* Environmental Law Centre (2011) <http://www.elc.uvic.ca/press/ET-Report.html>

On elimination of appeals for septic systems:

*Reforming the Regulation of BC’s Sewerage Systems:*

*An Urgent Need to Protect Public Health.* Sewerage System

Regulation Improvement Coalition and the Environmental Law Centre.  
(2009) <http://www.elc.uvic.ca/press/SSR-2009.html>

On the lack of citizen involvement in environmental assessments,  
*Environmental Assessment in British Columbia*. Environmental Law Centre.  
(2010) [http://www.elc.uvic.ca/publications/documents/ELC\\_EA-IN-BC\\_Nov2010.pdf](http://www.elc.uvic.ca/publications/documents/ELC_EA-IN-BC_Nov2010.pdf)



## 28. Citizen Access to Courts

BY ERIN PRITCHARD AND CALVIN SANDBORN

The previous chapter discusses problems with the public’s access to justice before BC environmental tribunals. Similar problems prevent the public from using the courts to obtain justice on environmental issues.

### Access to Courts

Lawsuits against companies that create a public nuisance (e.g., by polluting the air or a river) could be a powerful tool. However, citizens can’t generally sue for public nuisance unless the damage done to them was different than the damage done to society at large. Otherwise, the Attorney General controls such lawsuits.

The Ontario Law Reform Commission recommended that citizens be given the right to sue for public nuisance without having to show that they suffered a special loss of their own. The Ontario *Environmental Bill of Rights* today enables citizens to obtain standing to sue for “public nuisance.” Similar reform in BC would recognize that concerned citizens are sometimes better positioned

to provide the courts with the best evidence because they are the ones most directly affected.

### Cost Awards – One of the Main Barriers to Access

If you lose a court case, the traditional Canadian approach has been that you can be ordered to pay the other side's legal costs. As a result, many environmentalists decline to pursue valid cases, fearing a negative costs award. The citizens may want to save their local lake or airshed – but they don't want to lose their house.

Cost awards can devastate public-spirited citizens who are not seeking private profit or gain but are simply trying to protect our shared environment. More important, the spectre of such awards may systematically stifle lawsuits that could halt harmful activities.

The Canadian approach to costs is borrowed from Great Britain. There the prevailing rules have come under increasing criticism for undermining access to justice. For example, the European Environment Commissioner recently stated:

*The Commission is concerned that United Kingdom legal proceedings can prove too costly, and that the potential financial consequences of losing challenges is preventing NGOs and individuals from bringing cases...*

*When important decisions affecting the environment are taken, the public must be allowed to challenge them... [and] these challenges must be affordable. I urge the UK to address this problem quickly as ultimately the health and wellbeing of the public as a whole depends on these rights.*

In response to these criticisms and spiraling litigation costs, England has now embarked on radical reform of its costs rules. Canadian courts are beginning to develop a more progressive body of case law, and it is important to maintain judicial discretion in this area. However, some legislative guidance may be needed to allow public interest groups to enter proceedings without trepidation.

Professor Chris Tollefson, who has written about costs issues in public interest cases since the early 1990s, has advocated legislation that would insulate responsible public interest litigants from adverse costs liability. He has also proposed "citizen suit" legislation that would give citizens the right to sue polluters and public agencies that violate environmental laws and allow them to recover their costs where such suits are successful. Such legislation has been an essential feature of US environmental and civil rights law since the 1970s.

Another barrier is the frequent requirement that public interest groups post large security before being granted an interim injunction to stop a harmful

*Cost awards can devastate public-spirited citizens who are not seeking private profit or gain but are simply trying to protect our shared environment.*

activity. American courts have generally declined to stifle public interest litigation with such onerous security requirements.

**Recommendation**

Government should comprehensively review the issue of public access for environmental justice and implement necessary reforms. Reforms should include:

- Enhance the ability of public interest groups to bring public nuisance cases;
- Address the barriers to access created by legal cost awards and security requirements for injunctions; and
- Provide for citizen suits to enforce environmental laws (See the chapter “[Enhancing Citizen Enforcement Powers](#).”)

*Erin Pritchard is an articulated student at the BC Public Interest Advocacy Centre.*

*Calvin Sandborn is the Legal Director for the Environmental Law Centre.*

**For more information, see:**

Chris Tollefson. “Costs in Public Interest Litigation Revisited.” (2011), 39 *The Advocates’ Quarterly* 197-221

Chris Tollefson (D. Gilliland and J. DeMarco). “Towards a Costs Jurisprudence in Public Interest Litigation.” (2004), 83 *Can. Bar. Rev.* 473-514

Murray Rankin. “Public Interest Standing-Public Nuisance.” *Law Reform for Sustainable Development*. Canadian Bar Association (BC Branch) (1990)



## 29. *Enhancing Citizen Enforcement Powers*

BY JENNIFER CAMERON

BC environmental laws aim to keep our air and water clean, and to maintain our amazing wildlife and wilderness. Only by enforcing these laws can we pass on SuperNatural BC to our children.

These laws are important – they are the rules that society has agreed should apply to all. Yet unenforced laws are little more than a string of words on a sheet of paper. Today, British Columbia laws are all too often mere words – words without action. Whether because of budget constraints, politics or other reasons, the BC government is simply not doing the job of enforcing its own laws.

By 2005, the number of enforcement actions taken by the BC Ministry of Environment had plummeted to less than half of that of 1990. The ministry no longer employs enough conservation officers to catch all the polluters, poachers and other bad guys.

However, there may be a simple solution. If the government can't do it right,

perhaps the people can. By putting enforcement powers in the hands of citizens, we can increase enforcement without straining the public purse. And we won't have to wait for a minister to finally give top priority to environmental enforcement.

Citizen enforcement has many benefits. It safeguards against government negligence and undue industrial influence on government officials. It can lift a burden from an overworked civil service. Finally, it can give citizens an important participatory role in law enforcement.

Historically, citizens have had the power to lay charges and conduct private prosecutions of offences. This has been an important tool. For example, in the early 1980s a private prosecution led to convictions of North Vancouver for its landfill operations and Great Vancouver for its Iona Sewage plant operations. These convictions created pressure for the local governments to comply with the law and upgrade their facilities.

However, in recent years, the provincial Crown has almost invariably exercised its power to stay all private prosecutions within its jurisdiction. This government policy needs to change if citizens are to be empowered again to enforce the law. The province needs to restore the venerable and historic remedy of private prosecutions to its rightful place – and stop routinely staying private prosecutions.

To further encourage citizen involvement, financial incentives for laying successful charges should be created. For example, under the federal *Fisheries Act*, private citizens can charge persons with offences under the Act and be rewarded with a bounty. This type of provision should be added to provincial environmental laws.

In addition, other measures should be taken to increase the ability of citizens to enforce the law. The following law reform measures would enhance citizen capacity:

### **Citizen Suits**

In the US and other jurisdictions, environmental laws empower citizens to bring enforcement actions by launching “citizen suits.” In a citizen suit, private citizens are enabled to sue companies civilly for breaking statutes and regulations. Thus, the private citizen can give teeth to the law when the Attorney General fails to act. Professor Chris Tollefson has argued that such “citizen suit” provisions – which have played a key role in US environmental law since the early 1970s – bring both competition and new resources to the

*By putting enforcement powers in the hands of citizens, we can increase enforcement without straining the public purse.*

task of law enforcement. Not only are more polluters caught, but government enforcement increases as well.

Citizen suit legislation is normally designed to minimize the financial risk to the citizen. If a citizen successfully sues someone for violating the law, the polluter pays her litigation costs. However, if she is unsuccessful in court, she does not have to pay the defendant's costs.

Citizen suit laws encourage citizens to act, giving people a sense of participation in the justice system and legitimacy to environmental law. Such provisions exist in numerous statutes across the United States, including the *Endangered Species Act* and the *Clean Air Act*. Similarly, in the Yukon citizens are now empowered to take on the role of the Attorney General and prosecute environmental offences. It should be noted that citizen suit provisions are extremely popular – once enacted, they are rarely repealed.

In Canada, there is precedent for other measures that enhance the ability of citizens to enforce the law. Under the federal *Canadian Environmental Protection Act* and the Ontario *Environmental Bill of Rights*, citizens can trigger an environmental investigation simply by applying to the government. If the government investigation into a significant offence is not reasonable, the citizens are empowered to bring a court action against the lawbreaker.

Empowering citizens to enforce the law can be effective and inexpensive. In an age when industry is expanding at the same time as enforcement officials are laid off, we cannot continue to rely solely on government. BC is behind the United States and the rest of Canada. We must act now to allow citizens to participate, to prosecute, to sue – and to breathe life into the words that are our laws. If government cannot enforce the law, it must allow the public to take steps to enforce the law and protect Mother Nature.

In sum, in addition to previous measures discussed, BC law should be reformed to:

- Stop the routine staying of private prosecutions;
- Provide financial incentives for those who lay prosecutions that the Crown eventually prosecutes successfully;
- Provide for US-style citizen suits; and
- Empower citizens to trigger environmental investigations and launch follow-up lawsuits.

*Jennifer Cameron was a law student at the ELC Clinic and former ELC Executive.*

### **For more information, see:**

Meinhard Doelle and Chris Tollefson. *Environmental Law: Cases and Materials*. (Carswell: 2009)

Chris Tollefson (D. Gilliland and J. DeMarco). “Towards a Costs Jurisprudence in Public Interest Litigation” (2004) 83 *Can. Bar. Rev.* 473-514

Keith Ferguson. “Challenging the Intervention and Stay of an Environmental Private Prosecution.” (2004) 13 *J. Env. L. & Prac* 153

The chapter “[Citizen Access to Courts](#)” in this publication.



## *30. An Environmental Bill of Rights*

BY JENNIFER CAMERON AND JACQUELINE LABEL WITH DAVID BOYD

There are some fundamental principles that Canadians have come to hold so dear that they are protected by law. Canadian law protects the right to a fair trial, equal treatment before and under the law, and the right to life, liberty and security of the person. These are principles that bind our nation. They are principles we have enshrined in our constitution.

But there is one important principle that British Columbians value that is not protected by law and is not enshrined in the constitution. This is the principle that every person has the right to clean air, water, and access to nature – a right to a healthy environment.

As global environmental problems intensify, more and more people are impacted. For example, the World Health Organization estimates that over 30,000 premature deaths in Canada each year are the result of pollution, toxic chemicals and other environmental risk factors. However, BC law continues to often treat the environment as more of a property right rather than a public right. Once a person or company obtains a legal right to land or water, that private right often trumps public rights regarding the water or land. The

*British Columbians must have the right to participate in decisions that affect their environment and must have recourse when polluters have damaged their air, water, land and health.*

public often has little recourse for negative effects that the private use has on the wider community.

However, governments around the world are recognizing that to protect the public from environmental harm, legislation must make the public interest a priority. More than 100 nations now recognize constitutional environmental rights and responsibilities. Still others protect environmental rights in statutes. When the right to things like “clean water” and “clean air” is legislated, the public interest becomes more than an empty principle – and can be asserted legally against the private rights of those who would damage the environment.

Canada is lagging behind. Our constitution does not contain protection provisions and the federal government has not legislated environmental rights. In fact, the Canadian government has opposed international recognition of the right to a healthy environment. Fortunately, the governments of Ontario, Quebec, the Yukon, Northwest Territories and Nunavut have enacted different forms of enforceable environmental rights. However, British Columbia has not acted – even though an *Environmental Bill of Rights* was proposed in the legislature as early as the 1970s.

There is currently no *right* in BC to a minimum level of air or water quality. As environmental lawyer Margot Venton has written, “In our current legal political legal system, when a right meets an interest, the right almost always wins.” Current legislation doesn’t ensure any particular level of environmental quality; it just sets conditions on polluters once a license is granted. Any environmental harm that lies outside the scope of what the permit contemplates remains unregulated.

BC should consider legislating environmental rights and responsibilities. This could ensure that environmental risks are controlled – and that the rights of those who pollute for economic gain are balanced against the interests of individuals and communities that suffer the burden of that pollution. British Columbians must have the right to participate in decisions that affect their environment and must have recourse when polluters have damaged their air, water, land and health.

Environmental rights can take numerous forms. The Constitution of Ecuador represents a progressive model, granting the right for nature to exist in and of itself:

*Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital*

*cycles, structures, functions and its processes in evolution.  
Every person, people, community or nationality, will be able to  
demand the recognitions of rights for nature before the public  
organisms.*

The Ecuadorian model is consistent with the Indigenous law of many BC First Nations.

More limited rights exist in other Canadian jurisdictions. The Northwest Territories protects residents from the release of harmful contaminants. In the Yukon, private citizens are empowered to take on the role of the Attorney General and prosecute environmental offences. Ontario citizens enjoy an *Environmental Bill of Rights*, enshrining every resident's right to a healthy environment. Included in the bill are rights to access information, public participatory rights in ministerial decision making, and opportunities to access justice in cases of environmental harm.

Legislated environmental rights could take the form of an *Environmental Bill of Rights* like that of Ontario. Such legislation might help counterbalance the law's current tilt in favour of private property rights. Such a law should prioritize the principles of transparency, access to information, accountability, public participation in decision making and adequate enforcement.

Government should consider legislation that would:

- Include freestanding environmental right provisions that require the protection, conservation and restoration of the environment for the benefit of future generations. The rights must be enforceable to be effective;
- Impose a duty on the government to hold the environment in trust for the public;
- Legislate public participatory rights in ministerial decision making where decisions have potential effects on the environment, including the right to information, participation in decisions and access to the courts;
- Empower individuals to bring their own proceedings against polluters;
- Establish an environmental tribunal to hear public complaints;
- Establish a Commissioner of the Environment to oversee the facilitation of environmental rights into existing ministries;
- Include whistleblower and anti-SLAPP protection provisions to prevent reprisal for conscientious citizens; and
- Reflect established environmental principles such as the precautionary principle, intergenerational equity and the polluter pay principle.

Environmental rights like these can be powerful. In countries from Argentina and Costa Rica to Finland and France, environmental rights have resulted in improved air quality, safer drinking water, the clean up and restoration of contaminated sites, the rejection of ecologically destructive development proposals and enhanced protection for species ranging from scarlet macaws to sea turtles.

British Columbia must act now to conserve the integrity of our environment

for both present and future generations. Government has a moral obligation to create a British Columbia *Environmental Bill of Rights*.

*Jennifer Cameron was a law student at the ELC Clinic and former ELC Executive.*

*Jacqueline Lebel was an ELC Clinic student.*

*Professor David Boyd, author of Unnatural Law: Rethinking Canadian Environmental Law and Policy, assisted with this article.*

**For more information, see:**

*Restoring the Balance: Recognizing Environmental Rights in British Columbia.* Ecojustice (2009) <http://www.ecojustice.ca/publications/reports/restoring-the-balance/attachment>

David R. Boyd. *The Right to a Healthy Environment: Revitalizing Canada's Constitution.* (2012)

David R. Boyd. [The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment.](#) (2012)



## *31. Protecting Public Participation: The Need for an Anti-SLAPP Law*

BY CARMEN GUSTAFSON

Free public debate about government decisions is essential in a democratic society. It is absolutely necessary for good environmental decision making. Without such free debate, information about possible environmental damage – and alternative approaches that would avoid such damage – may be lost. Unfortunately, developers and corporations sometimes use strategic lawsuits against public participation (SLAPP) to stifle such debate.

A SLAPP is a lawsuit – often with little or no legal merit – that aims to stop democratic expression by those opposed to development. Although a SLAPP suit may allege defamation, conspiracy, trespass, interference with contractual relations, and nuisance, the main objective of a SLAPP is tactical: to stop people from speaking out, demonstrating, boycotting, posting information on the Internet or signing petitions.

Professor Chris Tollefson has been writing about SLAPPs suits since 1992 and spearheaded the campaign for anti-SLAPP law in British Columbia. He argues

that SLAPPs have a range of negative impacts – among other things, such lawsuits can:

- Force SLAPP targets to spend time and expense defending unmeritorious cases, while distracting them from political advocacy and lawful democratic expression;
- Squander scarce judicial resources; and
- Chill the climate for robust public debate.

In 2001, BC became the first Canadian jurisdiction to enact anti-SLAPP legislation, responding to a nine-year campaign supported by 40 groups, including environmental groups, the Civil Liberties Association, BC Federation of Labour, local municipalities, and the Union of BC Municipalities. However, this law was promptly repealed by a new government months later – before it had a chance to operate. Since then, the province of Quebec has passed an anti-SLAPP law, and last year an Advisory Panel to the Attorney General of Ontario recommended passage of an Ontario anti-SLAPP law. Twenty-eight US states have already legislated on this important issue. It is time for BC to revisit the decision to repeal its anti-SLAPP law.

### SLAPP-like Cases in BC

In the first Canadian case explicitly discussing SLAPPs, local residents (and Saanich) were sued for successfully petitioning to have a property down-zoned. Citing the fundamental importance of the freedom to sign petitions, make submissions to council and to organize in the community, Justice Singh rejected the suit – stating that it “has been used as an attempt to stifle the democratic activities of the defendants, the neighbourhood residents.”

When the city of Powell River threatened to sue three local residents opposing a development, the city’s actions were challenged by long-time civil liberties activist John Dixon. Dixon applied to court for a declaration that the city had no legal authority to sue for defamation of its reputation as a municipal government. The Court agreed, stating that it would be:

*...antithetical to the notion of freedom of speech and a citizen’s right to criticize his or her government concerning its government functions, that such criticism should be chilled by the threat of a suit in defamation.*

Recently in Langley, a concerned neighbour and a citizen conservation group found themselves embroiled in a court battle with a land developer. The court dismissed the developer’s lawsuit, concluding that the allegations were unproven and there was no evidence that the neighbour or group acted maliciously. An Ecojustice lawyer said the May 2011 ruling: “... is a clear statement that meritless lawsuits against people who speak up for the environment will not stand.” Awarding special costs against the claimant, Madam Justice Bruce recognized that “the claimant’s lawsuit achieved one of the recognized purposes of SLAPP litigation. It effectively silenced the respondents’ public opposition to the claimant’s permit application.”

*Although a SLAPP suit may allege defamation, conspiracy, trespass, interference with contractual relations, and nuisance, the main objective of a SLAPP is tactical: to stop people from speaking out, demonstrating, boycotting, posting information on the Internet or signing petitions.*

It is important to note that even when citizens are vindicated in court, they may have lost valuable time and resources in fighting the suit. It can be difficult for the citizens to recover all of their costs. In addition, it can be highly stressful for people to be sued and have to hire a lawyer to defend themselves for simply expressing an opinion. They often withdraw from future debates about important issues in their community.

BC environmental groups clearly would benefit from a law that protects free and democratic participation in society – without unduly restricting meritorious court actions. A new anti-SLAPP law to protect a right of public participation should draw on the previous BC law as well as Ontario and Quebec experiences. It should:

- Include a Purpose Statement that acts as an interpretive guide for the judiciary when exercising discretion to grant or deny relief;
- Enable courts to quickly identify a SLAPP. Once a defendant shows it is a case involving a protected activity of public participation, the onus should shift to the plaintiff to demonstrate the case's merit;
- Reduce economic inequity by:
  - quickly disposing of SLAPPs by fast-tracking proceedings;
  - allowing dismissal of SLAPPs that fail to demonstrate merit; and
  - fully indemnifying the defendant in such a case.
- Provide for damages, in addition to court costs, to be paid by the person or corporation bringing this type of litigation.

*Carmen Gustafson was an articulated student at the Environmental Law Centre.*

**For more information see:**

Chris Tollefson, "Strategic Lawsuits Against Public Participation: Developing a Canadian Response" (1994), 73 *Can. Bar. Rev.* 200 [http://www.cba.org/cba\\_barreview/Search.aspx?VolDate=06%2f01%2f1994](http://www.cba.org/cba_barreview/Search.aspx?VolDate=06%2f01%2f1994)

*Anti-SLAPP Advisory Panel: Report to the Attorney General.* (2010) [http://www.attorneygeneral.jus.gov.on.ca/english/anti\\_slapp/anti\\_slapp\\_final\\_report\\_en.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.pdf)

Scott, M. and Tollefson, C. "Strategic Lawsuits Against Public Participation: The British Columbia Experience." (2010) 19 *Review of European Community & International Environmental Law*. 45-57 <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9388.2010.00663.x/full>

Canadian Environmental Law Association website: *The Need for Anti-SLAPP Legislation in Ontario* <http://www.cela.ca/collections/justice/need-anti-slapp-legislation-ontario>



## ***32. The Case for a BC Environment Commissioner***

BY MURRAY RANKIN, QC AND ANNELIESE SANGHARA

The BC government needs an independent environmental watchdog. We need to follow the lead of other jurisdictions and appoint someone who can blow the whistle when political decisions are shown to harm the environment – and suggest constructive change where warranted.

Destructive political decisions are legion. For example, over the last decade there has been a systematic gutting of environmental regulations in BC. Ministry of Environment staff have been slashed by 25%. In 2005, the regulation of our septic systems was radically altered, leading to widespread septic failures and health risks. The oil and gas industry was given a free pass from effective regulation – and allowed to log Old Growth Management areas, something that even our forest companies cannot do. All Tree Farm Licence private lands were returned to forest companies without proper compensation in the form of public parks. Our Auditor General looked at one deal and concluded that government put the company's interest above the public interest. Government has failed to require mining companies to post sufficient bonds to avoid long-term damage to watersheds. And government

*An Environment Commissioner would provide independent, objective and focused information to the public and advice to government.*

has failed to establish an effective system to ensure that companies implement the commitments they make during environmental assessments.

The Auditor General recently issued a scathing report that confirmed this last problem. But for most problems there is no watchdog at all. The Auditor General only occasionally looks at environmental regulation. And the Forest Practices Board oversees forestry practices – but has no mandate to review mining, oil and gas, industrial development or urban problems. That’s why we need an Environment Commissioner.

In 2001, the provincial government actually passed a law to create a Commissioner of the Environment and Sustainability within the Auditor General’s Office. The Commissioner was empowered to receive public complaints and to oversee government performance by issuing reports on sustainability progress and ecological health. However, the Commissioner’s office was never established and the law was repealed.

BC needs to re-establish a Commissioner for the Environment. We can learn from other jurisdictions:

- The Canadian Commissioner of the Environment and Sustainable Development provides analysis and recommendations to government on environmental and sustainability initiatives. The Commissioner also receives citizen environmental complaints (that government must respond to) and may conduct performance audits of departmental sustainability objectives;
- The Environmental Commissioner for Ontario plays a similar role and monitors compliance with the Ontario *Environmental Bill of Rights*;
- The New Zealand Commissioner for the Environment investigates and reports on government actions and policies. He or she acts as an impartial advisor to Parliament – in one recent example by critiquing a draft energy plan for inadequately addressing emissions; and
- In the Australian Capital Territory, the Commissioner for Sustainability and the Environment advances environmental sustainability through advocacy, scrutiny, reporting, and advice.

These examples could be adapted to create a “made in BC” model for a new Commissioner for the Environment. We recommend:

- The BC Auditor General’s office should be expanded to include a Commissioner for the Environment;
- The Commissioner should be specifically mandated to review government decisions, policies and laws that negatively impact the environment – with

the power to make public reports and recommendations;

- As with the federal Commissioner, the provincial Commissioner should be mandated to address citizen complaints;
- The Commissioner should provide legislators and the public with information, analysis and recommendations on proposed environmental policies and laws. For example, the Commissioner might compare the carbon tax's effectiveness in decreasing emissions with cap and trade, and make recommendations;
- The Commissioner could also conduct performance audits of government, as well as track sustainability indicators for society as a whole; and
- The Commissioner should also be empowered to conduct mediation of environmental conflicts.

British Columbians are increasingly concerned about their environment: about weak mining regulations, practices such as hydraulic fracturing ("fracking") and inadequate management of our fragile provincial parks. An Environment Commissioner would provide independent, objective and focused information to the public and advice to government. The Commissioner would raise the level of public debate and improve information available to decision makers. In sum, the Commissioner would help government adopt more effective environmental laws and policies.

Both legislators and the public could access independent, non-partisan and credible advice when deciding on environmental issues. The public could expect better accountability from government. And British Columbians would have a process for raising environmental concerns and having them addressed. It is time to create a BC Commissioner for the Environment.

*Murray Rankin, Queens Counsel, is a Victoria lawyer and former Co-Chair of the Environmental Law Centre Society. He was elected Member of Parliament for Victoria in November 2012.*

*Anneliese Sanghara is a university student who volunteered with the Environmental Law Centre.*

### **For more information, see:**

New Zealand: Parliamentary Environment Commissioner to the Environment website <http://www.pce.parliament.nz/>

Australia: Office of the Commissioner for Sustainability and the Environment website <http://www.envcomm.act.gov.au/>

Canada: Commissioner of the Environment and Sustainable Development website [http://www.oag-bvg.gc.ca/internet/English/cesd\\_fs\\_e\\_921.html](http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_921.html)

Environmental Commissioner of Ontario website <http://www.eco.on.ca>



## H. Key Structural Changes





### *33. Reliance on Qualified Professionals in Environmental Regulations*

BY MARK HADDOCK

The past decade has seen a new generation of “results-based” environmental laws in BC, accompanied by deregulation and a shrinking of civil service staff and budgets. Results-based regulations specify a desired outcome or environmental objective – but allow the regulated party to choose how it will meet that outcome. This is in contrast to “means-based” regulations, which specify how the regulated entity must operate.

A key part of the results-based reform policy is to give the responsibility for decision making to private registered professionals – a role that had been performed previously by civil service staff that approved permits or granted permissions. In a variety of fields – including the remediation of contaminated sites, development in streamside riparian areas, the installation of sewage systems, mining and forest practices, pesticides, wildlife management and environmental assessment – private professionals now oversee private sector

development of plans and onsite activities. These professionals, including biologists, foresters, agrologists, hydrologists, geoscientists, engineers and others, have a new and heightened responsibility for environmental stewardship.

This new regulatory approach has both benefits and challenges. In some cases the same individual can be evaluator, planner *and* the person (or supervisor) actually carrying out the activity on the site. The person may be an employee or contractor for the regulated company. These varied roles and obligations raise the potential for conflicts of interest when a professional is left to determine both the public interest in environmental protection of our land, air and water, and their duty to the employer or client.

Through this regulatory shift, government has significantly increased its reliance on the judgment of independent professionals and on the ability of professional associations to address any problems through disciplinary procedures. Does this new approach have an adequate system of checks and balances in place to ensure that the public interest in a clean environment, the maintenance of biological diversity and a sustainable future is maintained?

Some of the benefits of relying on registered professionals include:

- Faster site evaluation and planning by the private sector;
- Faster approvals by the regulator;
- Decreased public cost as the proponent pays for the site evaluation and approvals;
- Decreased liability on the part of local governments;
- Benefiting from the professional judgment of qualified individuals where the same level of expertise may no longer be found in the civil service; and
- Increased ability to incorporate new technology and flexibility to meet results-based or performance standards.

Some of the problems or challenges with relying on registered professionals include:

- Increased cost for the private sector;
- Lack of public participation in and notice of the permitting process;
- Fewer checks and balances and opportunities to appeal environmental decisions;
- Potential for conflict of interest where the professional is an employee or contractor of the regulated entity, or where registered professionals from the same firm undertake all aspects of the regulatory function;
- Uncertainty with respect to the incorporation of the public interest into environmental decision making;
- Lack of monitoring and evaluation of how professional judgment results in compliance with results or performance-based standards; and
- Unproven self-regulation of professionals as some professional bodies are relatively new to evaluating member performance and taking disciplinary

*Does this new approach have an adequate system of checks and balances in place to ensure that the public interest in a clean environment, the maintenance of biological diversity and a sustainable future is maintained?*

action relating to these new professional duties and functions.

British Columbia now has a decade of experience with this new regulatory model. To date, however, it has not been the subject of independent study for its effectiveness and best practices – or reform measures designed to address known and perceived problems. Through discussions with government agencies, citizen organizations, professionals, their associations and disciplinary bodies, the Environmental Law Centre has become aware of many actual and perceived problems. Thanks to financial support from the Law Foundation of British Columbia, we are carrying out a legal research and law reform project designed to evaluate the professional reliance regulatory model adopted by British Columbia over the last decade. We will work closely with lawyers, professional associations and their individual members, government staff and the academic community to identify what works well and where there is room for improvement in regulation of the role of qualified professionals – with the goal of proposing law reform measures where warranted.

This project will answer the following questions:

- To what extent has British Columbia come to rely on qualified professionals in the environmental regulatory sphere?
- What issues have arisen in this new regulatory model, and how have they been addressed?
- How do the various professional reliance models in BC compare and contrast to each other and to those in place in other jurisdictions?
- Are the qualifications for professionals adequately defined, and do they ensure that decisions are made by competent experts?
- How have the professional associations responded and adapted to this new regulatory model?
- What are the indications of effective professional reliance regulatory models?
- Are there areas of environmental regulation that do not lend themselves to the professional reliance model?
- Are there adequate checks and balances in the model, or in the system of government and professional association oversight?
- Are there any lessons to be learned from BC's experience with this

regulatory model to date?

- How do other jurisdictions deal with these issues?
- Are any law reform measures warranted?

Our research will be broadly consultative, and the final report with recommendations will be available on our website at [www.elc.uvic.ca](http://www.elc.uvic.ca).

We invite those with relevant information and experience to contact us so that effective law reform measures can be formulated, if warranted.

*Mark Haddock is a lawyer with the Environmental Law Centre and Senior Instructor at the UVic Faculty of Law.*

**For more information, see:**

See the chapters “[Privatizing Salmon Protection: the Failure of the Riparian Areas Regulations](#)” and “[Re-Regulating Private Septic Systems](#)” in this publication.



## 34. Reforming Freedom of Information Law

BY VINCENT GOGOLEK AND MURRAY RANKIN, QC

The *Freedom of Information and Protection of Privacy Act* was designed to give citizens direct access to government records – to unvarnished, un-spun information that can be used to hold government to account.

However, the Act isn't working as intended. High fees, long delays and unjustified government claims for exemption from the duty to release are common problems. We're coming up to the 20<sup>th</sup> anniversary of the Act's passage, and it is showing its age. Some problems have become so extreme that only legislative changes will fix them. Here are some key things that need urgent overhaul.

### Policy Advice Exemption

This exception from the general duty to disclose records is supposed to allow ministers to receive 'full and frank' advice from civil servants about policy matters – without having to worry about the policy advice being released later.

This statutory exemption from disclosure was explicitly *not* meant to include factual material, audits, and other studies and reports to government.

However, a 2002 Court of Appeal decision and Information Commissioner orders following that decision have interpreted the “advice or recommendations” exemption so broadly that:

- Responses to a government stakeholder consultation exercise are now considered “policy advice;”
- A pamphlet on the HST to be sent to every household in British Columbia is considered by the government to be “policy advice;” and
- A university’s request that the government bring in a retroactive law to make illegal parking fines legal is counted as giving the government policy advice (rather than just lobbying).

A 2004 Special Committee of the Legislative Assembly that reviewed the Act recommended amendments to fix the problems created by the Court of Appeal’s decision. However, government has not acted. (Another Special Committee review of the Act, in 2010, recommended no change, which would leave the Court’s decision in place.) This black hole at the centre of the public’s right to know is getting deeper. As the 2004 Special Committee saw, legislative reform is the only way to fix this problem.

### Cabinet records

The current law allows government to make an excessive number of claims for Cabinet secrecy. Again, a Court of Appeal decision broadened this exemption from the public’s right to know, and that decision has led to too much secrecy. Particularly for background analyses and other documents, the Act should be amended to protect legitimate Cabinet confidentiality – but also enhance the public’s right to know about environmental matters.

### Oral government, or why can’t the Deputy Minister write?

Spoken words that are not reduced to a “record” are not generally subject to Freedom of Information (FOI) requests. Unsurprisingly, governments, especially the upper levels of government, have been moving to an increasingly oral culture. Senior bureaucrats seem to hate writing things down, especially anything that might result in controversy. Two examples from the recent past:

- Ken Dobell, the Premier’s Deputy Minister said in 2003, “I don’t put stuff on paper that I would have 15 years ago...Civil servants are choosing not to write things down, or at least I am;” and
- This hasn’t improved over time. Just last year, former Premier’s Deputy Minister Allan Seckel confirmed the continued existence of the oral culture in the Premier’s Office when he wrote a letter to the Information and Privacy Commissioner. The Commissioner was investigating the absence of documents about a 33% reduction in BC Ferries rates, and Seckel stated “...the ‘proposal’ Mr. Hahn refers to in his letter was oral, hence why no

records in relation to such a ‘proposal’ exist.”

This can’t be allowed to continue. If it does, not only will accountability suffer, but the often crucial historical record of decision making will be irrevocably damaged. Major policy decisions should not have to be re-created by interviewing retired deputy ministers at the Old Bureaucrats Home in the faint hope they remember why government acted the way it did.

A positive duty to create and maintain records must be incorporated into the Act – a duty to record decision making, and minimum requirements for record keeping in critical areas.

### Proactive release of records

There should be a legal requirement to proactively post certain government records and data. The Information Commissioner has already stated that contracts and audits should be posted as a matter of course – yet that still hasn’t happened. The 2004 Special Committee recommended that public bodies be required to routinely release, pro-actively, regularly and without request, categories of records set out in “publication schemes” approved by the Commissioner. The UK has this model, and BC should adopt it.

### Open Data

Now that government’s open data and open government initiatives are underway, we should expect that certain types of information will be routinely posted. The law should require that key data is truly open, available regularly and posted in a timely way, without charge. Real-time environmental monitoring data – for example, emissions data from pulp mills and other industrial facilities – should be posted on the internet. The law should require this data to be posted in machine-readable format so that public groups can readily analyze the data and publish the results.

### Public Interest Disclosure

Then there is the battered section 25 public interest override, which is supposed to require the immediate release of information, without request, when release is in the public interest. The provision was intended to keep the public promptly informed of environmental and health risks and to promote government and polluter accountability. Unfortunately, information is almost never released under this section – despite a string of high-profile cases where

*Unsurprisingly, governments, especially the upper levels of government, have been moving to an increasingly oral culture. Senior bureaucrats seem to hate writing things down, especially anything that might result in controversy.*

public bodies sit on information involving risks to the environment and public health

Section 25 must be clarified and the threshold for determining when the public interest requires disclosure must be lowered. Similar provisions work well elsewhere and the time has come to bolster this important section.

### Delays and fees

There are other problems with the Act, two of which deserve particular mention.

There is a major issue with the number of delays that frustrate timely access to information – with no negative consequences for public bodies. It takes too long for public bodies to respond to requests for information on environmental matters, and those bodies are able to get too many extensions. Reforms should include speedier response timelines for environment-related material – consistent with the public interest over-ride concept of public disclosure without delay. Penalties should apply to public bodies that illegally delay disclosure.

Excessive fee requests (some have been in the tens of thousands of dollars) and refusals to waive fees are also a widespread problem. The law should be changed to ensure that information requests on environmental protection issues are not stymied by high fees. Non-profit groups should pay at a lower rate and be eligible for public interest fee waivers on more progressive criteria than now exist.

The provincial government has yet to fully respond to the reports of the 2004 or 2010 Special Committees of the Legislature that reviewed the *Freedom of Information and Protection of Privacy Act*. Meaningful action is overdue.

*Vincent Gogolek is Executive Director with the BC Freedom of Information and Privacy Association.*

*Murray Rankin, Queens Counsel, is a Victoria lawyer and former Co-Chair of the Environmental Law Centre Society. He was elected Member of Parliament for Victoria in November 2012.*

### For more information, see:

*Request for an Investigation into Disregard of Section 25 of FIPPA by Government Bodies.* Environmental Law Centre. (2012) <http://www.elc.uvic.ca/press/2012-HealthSafetyDisclosure.html>

*Report: Special Committee to Review the Freedom of Information and Protection of Privacy Act* (2010) <http://www.leg.bc.ca/cmt/39thparl/session-2/foi/reports/PDF/Rpt-FOI-39-2-Rpt-2010-MAY-31.pdf>

*Information and Privacy Commissioner Elizabeth Denham's letter to BC Minister of Agriculture regarding Bill 37:* [http://www.google.ca/url?sa=t&rc=t=j&q=&esrc=s&source=web&cd=3&ved=0CD8QFjAC&url=http%3A%2F%2Fwww.oipc.bc.ca%2Fpublic-comments%2F1140&ei=MCm1UO77MqbliwLmsIDIBQ&usg=AFQjCNEZ3h-7mDkFIMHciuyEA\\_plyzDlmw](http://www.google.ca/url?sa=t&rc=t=j&q=&esrc=s&source=web&cd=3&ved=0CD8QFjAC&url=http%3A%2F%2Fwww.oipc.bc.ca%2Fpublic-comments%2F1140&ei=MCm1UO77MqbliwLmsIDIBQ&usg=AFQjCNEZ3h-7mDkFIMHciuyEA_plyzDlmw)

*Submissions on Review of the Freedom of Information and Protection of Privacy Act.* BC Freedom of Information and Privacy Association submissions to the Special Committee to Review the Freedom of Information and Protection of Privacy Act (2010) [http://fipa.bc.ca/library/Reports\\_and\\_Submissions/FIPA\\_sub\\_to\\_FOIPPA\\_rvw\\_committee-Feb\\_2010\\_CORRECTED.pdf](http://fipa.bc.ca/library/Reports_and_Submissions/FIPA_sub_to_FOIPPA_rvw_committee-Feb_2010_CORRECTED.pdf)

Information on Environmental Law Centre submissions to the Special Committee to Review the Freedom of Information and Protection of Privacy Act <http://www.elc.uvic.ca/press/FOI-submissions.html>



## *35. The Need to Protect Whistleblowers*

BY RACHEL FORBES AND AMANDA MACDONALD

Imagine that you worked for BC Parks and learned that the Minister of Environment – who is supposed to protect parks – was giving the go-ahead to build a new road through park land that included habitat of a threatened turtle species, to accommodate a nearby developer. This situation happened to Gordon McAdams, a BC Parks employee of 34 years. McAdams was fired by the provincial government in 2004 for preparing documents outlining what the government was doing in order to challenge the minister’s decision in court. The court subsequently ruled that the minister had been acting illegally.

Suppose, like Gord McAdams, you find out your employer is doing something wrong – what do you do? Do you speak up? Who do you tell? What are the consequences? Will you be fired? Disciplined? Unfortunately, if you work in British Columbia, you find that our laws do not protect you very well.

Gord McAdams was a “whistleblower”: someone who discovers their employer is doing something wrong and speaks out about it. Their employer, whether government or private business, is doing something that they feel is wrong – perhaps something that is illegal, in violation of a rule or regulation, or against the public interest including a threat to health, safety, welfare or the environment – and they decide that they have to do something about it.

Blowing the whistle can involve going to internal sources, like a supervisor or human resources department, or going to law enforcement or government officials, or going public to watchdog organizations or the media.

Why is it important to protect whistleblowers? Without legal protection, people who learn about wrongdoings may not come forward because they fear repercussions. Whistleblowers who have come forward have been fired, subjected to workplace harassment, experienced a toxic work environment, been accused of unrelated misconduct, had their careers ruined, faced economic hardship, and suffered mental and emotional stress. In addition, there is often a social stigma associated with whistleblowing, labelling those who come forward as “snitches” or “tattletales” or accusing them of using their employer for personal gain.

Whistleblowers need to be protected against employer retaliation. BC needs an overarching law that can prevent such retaliation, address other harassment concerns and ensure that employees can speak out in the public interest about wrongdoing.

The reason is simple. If you were in possession of information that was in the public interest to disclose, would you blow the whistle, given the lack of legal protection? Many would not. This no doubt has a chilling effect.

Yet whistleblowers play an important social role in keeping wrongdoers in check. If they do not speak out, who will? Especially when there is a risk of harm to public health, safety or the environment, it is crucial that those who find out about risks, dangers and illegal actions can report them without fear of retribution.

That is why we need a common, predictable, and accessible law that will protect whistleblowers in BC. In 2002, West Coast Environmental Law published a report, *Whistleblower Protection: Strategies for BC*, which sets out recommendations for whistleblower protection legislation. Groups such as Federal Accountability Initiative for Reform (FAIR) – which promotes integrity and accountability by empowering employees to speak out without fear of reprisal – have also made law reform recommendations. Suggestions from both of these sources have been incorporated into our top four priorities for whistleblower law reform.

### **Broad application of legislation in both public and private sectors**

Whistleblower legislation should apply to all people who are in an employment-like relationship (including contractors, volunteers, etc.) in both the public and private sectors. The protection should be afforded to everyone

*Especially when there is a risk of harm to public health, safety or the environment, it is crucial that those who find out about risks, dangers and illegal actions can report them without fear of retribution.*

who reports on illegal activities – or reports on anything that could cause environmental harm or endanger public welfare, health or safety. This includes both acts and omissions (things that the employer should be doing but is not). In order to make a claim under the legislation, the employee must have substantiated proof or reasonable belief that what they are claiming is true, and must have “blown the whistle” promptly after learning of the wrongdoing. The West Coast Environmental Law report recommends that, since the circumstances around whistleblowing can be delicate, a year is a realistic time period for the employee to come forward.

### **Confidentiality protections for whistleblowers**

Previous experience indicates that confidentiality is one of the most important aspects of whistleblower protection as it allows greater freedom and latitude in disclosing the information. The identity of whistleblowers should remain confidential wherever possible. In some situations it may not be possible to maintain full confidentiality (e.g. it might be obvious who blew the whistle based on their position or correcting the wrong may expose the identity of those involved).

### **Channels for disclosure and mechanisms for investigation**

The lack of whistleblower protection laws also means there is no procedure for whistleblowers to come forward. They are left to report to a superior in the organization or go public to the media. There is no guarantee their complaint will be listened to or that it will be followed up with a proper investigation.

Whistleblower legislation needs to establish a system in which employees can come forward with their claims. It is recommended that the legislation establish a neutral, independent review board to deal with disclosures of wrongdoing and conduct an investigation into the claims. However, a whistleblower should, where reasonable, exercise other possible channels of disclosure within their organization or other bodies, such as their union, before going to the independent board. The board should be used as an option when the whistleblower believes the issue cannot be disclosed within the organization, or if they raised the issue internally but it was not appropriately addressed.

### **Protection against employer retaliation**

Whistleblowers should be protected against a spectrum of consequences that

could result. The legislation should include provisions that prohibit employers or other coworkers from taking retaliatory action – including harassment, employment termination or transfer – against an employee because of the fact they blew the whistle.

If the whistleblower does face negative consequences, there should also be a range of potential remedies available to them. Remedies could include reinstatement if they were fired, and/or compensation for lost income, mental/emotional suffering or relocation. It is important to provide the whistleblower with options since each situation is unique; for example, in some cases the work environment may be too hostile for a whistleblower to realistically return to that job.

The legislation should also establish provisions that would discourage abuse of the system. That is, in the extremely rare circumstance that people use the legal protections for personal gain or other reasons not in the public interest, they should be penalized. This will address the potential concern that some disgruntled employees would report false information for revenge or personal gain.

No one wants to become a whistleblower. Knowing that your employer is breaking the law or threatening the public interest – and facing the stark choice of doing nothing or speaking up – is stressful and difficult. But people who do make the choice to speak up are really protecting all of us – our health, our environment, our interests. They deserve our thanks. But even more important, they deserve laws to protect them from reprisals when they do speak out.

*Amanda Macdonald was a Legal Intern at West Coast Environmental Law, former ELC Clinic student and ELC Executive.*

*Rachel Forbes is Staff Counsel at West Coast Environmental Law. She is also a former ELC Clinic student, ELC Executive member and articulated student with the Environmental Law Centre.*

### **For more information, see:**

*Whistleblower Protection: Strategies for BC.* West Coast Environmental Law. (2002) <http://wcel.org/resources/publication/whistle-blower-protection-strategies-bc>

Federal Accountability Initiative for Reform (FAIR) website <http://fairwhistleblower.ca/>

Note: As this book went to press, BC's Auditor General called for whistleblower protection legislation, stating that whistleblowers shouldn't have to put their jobs on the line to protect the public. <http://www.bcauditor.com/pubs/2012/report8/summary-report-results-completed-projects-and-other-matte>



'wi'walsga'makw

ga'walapa

a'ekakila



*In Kwak'wala, the words in this painting by Mary McNeill mean  
All tribes together helping each other to treat something right.*