



**Reflections on Public Interest Environmental  
Lawyering in British Columbia  
Draft 2 October 24, 2007**

**A. Introduction**

The British Columbia bar has a more than 30 year tradition of engaging in issues that aim to improve the quality of the natural and built environment in the province, and to safeguard human health. British Columbia is recognized in North America as an ecological jewel, its environmental organizations attracting a disproportionate amount of the funding from U.S. foundations as compared with all other provinces in Canada.<sup>1</sup>

In support of the lawyers across the province who work on public interest environmental law cases and funded by the Law Foundation, the Environmental Law Centre (ELC) in the University of Victoria's Faculty of Law initiated an Associates Program this fall. The ELC Associates Program will see cohorts of ten lawyers engage in continuing legal education-type activities over a two year period. The initial vision for the Program is for three cohorts in six years, with the aspiration of creating a valuable environment for mentoring and networking lawyers across the province.

The reflections presented here are a summary of the thoughts of the first cohort of lawyers in the ELC Associates Program and lawyers from each of the public interest environmental law organizations in B.C. on where environmental law has come from and where it is going in British Columbia.

**B. What is Public Interest Environmental Law in B.C.?**

Public interest environmental law refers to legal advice and cases that aim to uphold environmental quality and human health. The client is usually acting in a representative capacity in support of ecosystem services or an ecosystem component, such as water or trees. The challenged activity may also involve adverse human health impacts. The case may stem from protection of private rights, such as upholding a water license, stopping a nuisance, or enforcing a covenant, but also contains broader public interest implications. Finally, public interest environmental law is concerned with providing greater access to justice, transparency in decision-making and access to information.

Public interest environmental law can be contrasted with the general practice of environmental law. Environmental law includes, in large part, providing advice to clients on environmental liabilities such as contaminated sites and pollution for land and business

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<sup>1</sup> Most of this funding was focused on securing the Gwaii Haanas National Park Reserve and the Great Bear Rainforest conservation campaign. This concentration of funding has likely waned in the past two years. [Confirm cite with David Bremner at Ecotrust].

transactions, as well as giving advice about regulatory requirements for operating businesses in B.C.

Public interest environmental law involves the following issues:

- Aboriginal rights and title (including shared decision-making);
- Agricultural land reserve;
- Air quality;
- Biodiversity;
- Climate change;
- Contaminated sites;
- Energy (including oil, gas, and independent power producers);
- Environmental assessment;
- Fisheries;
- Forestry;
- Green buildings;
- Mining;
- Parks and protected areas;
- Pesticides;
- Pollution;
- Smart growth and local government land use (including growth management);
- Species at risk;
- Transportation;
- Water;
- Waste management and hazardous waste; and
- Wildlife.

The B.C. bar can boast of three founding environmental law organizations in Canada. The first is West Coast Environmental Law Association (WCEL), started by students from the University of British Columbia law school in 1974.<sup>2</sup> WCEL has four staff lawyers working on climate change/energy, forestry and livable communities issues, and administers the Environmental Dispute Resolution Fund. The Fund supports individuals and community organizations to engage lawyers, preferably from the region in which the issue arises, at a reduced fee to address environmental law challenges.

The second is Ecojustice Canada (known as the Sierra Legal Defence Fund until September of this year), created in 1990 to initiate strategic litigation in the tradition of the former Sierra Legal Defense Fund (now called Earth Justice) in the U.S.<sup>3</sup> Ecojustice now has three offices (Vancouver, Toronto, Ottawa) and is considering opening two further offices: one in Alberta and a second in Halifax. Ecojustice employs thirteen lawyers and one of its staff lawyers is

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<sup>2</sup> [www.wcel.org](http://www.wcel.org).

<sup>3</sup> [www.ecojustice.ca](http://www.ecojustice.ca).

the Director of the second Canadian environmental law clinic for law students at the University of Ottawa.

The third organization is Canada's oldest environmental law clinic, the Environmental Law Centre (ELC) at the University of Victoria. The ELC has been active since the early 1990s as a grassroots legal-focused environmental non-governmental organization. In 1995, it was incorporated as a non-profit society and entered into a partnership with the Faculty of Law to offer a clinical program in public interest environmental law. It has operated the clinic on a year-round basis since 1997.<sup>4</sup> Its current staffing complement includes three lawyers (Executive Director, Legal Director and Program Director) and an articling student.

Lawyers in the private bar also provide significant public interest environmental law services to clients each year, and have done so since before the founding of any of the public interest environmental law organizations. Between 2001 and 2006, 82 lawyers worked on cases that were funded through WCELS Environmental Dispute Resolution Fund alone, with more than 30 lawyers providing services through the Fund each year.<sup>5</sup>

### **C. Lawyers Engaged in Public Interest Environmental Law Surveyed**

The reflections reported in the remainder of this article are based on discussions with the 2007-2008 ELC Associates Program cohort of eleven lawyers who have collectively over 150 years of lawyering experience, over half of which involves working exclusively on public interest environmental law issues.<sup>6</sup> In addition, the reflections also include discussions with one lawyer from each of the public interest environmental law organizations in B.C. and law instructors who supervise students working on environmental law issues.

The lawyers surveyed have been called to bar from three to 35 years (2 lawyers have practiced law less than five years, 6 for five to 15 years, and 6 for more than 15 years). Seven are women and eight are men, with most of the men being more than 15 years call. Two are sole practitioners, seven work with small- to medium-sized firms, one is from a large firm, and three work for non-profit environmental law organizations. Thirteen of the lawyers/instructors surveyed have practices that represent clients from across the province. The remaining two lawyers represent clients in small to medium sized regions (northwest B.C. based in Smithers and central/northern Vancouver Island based in Nanaimo). Most of the lawyers/instructors interviewed have a mixed barristers practice.

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<sup>4</sup> [www.elc.uvic.ca](http://www.elc.uvic.ca).

<sup>5</sup> The lawyers working on cases funded by the Environmental Dispute Resolution Fund are listed in each annual report at <http://www.wcel.org/aboutus/anrep/>.

<sup>6</sup> The lawyers canvassed for this review include Bill Andrews, Alyssa Bradley, Wally Brault, Jo-Anna Cowan, Deborah Curran, Stacey Edzerza Fox, Andrew Gage, Mark Haddock, Jennifer Millbank, Richard Overstall, Krista Robertson, Stuart Rush, Q.C., Calvin Sandborn, Chris Tollefson, and [Margot Venton].

## **D. Contemplations**

Three general questions were asked of the lawyers interviewed:

1. What environmental law issues or practices are becoming more prevalent?
2. What environmental law issues or practices are less common than five or ten years ago?
3. What is needed to further public interest environmental law?

### ***1. Issues or Practices that are More Prevalent***

#### **1.1 Integration of Aboriginal Rights and Title with Environmental Concerns**

Many indigenous communities are now exercising their rights to be consulted about activities that have an impact on the environmental integrity of their traditional territories. The significance of Crown land in B.C., the extent of traditional territories, and the intensity of resource development such as forestry and mining create the potential for infringement of aboriginal rights and title on over 95 percent of the land base in the province. Developments in aboriginal law over the past decade allow First Nations to challenge these activities that may also have adverse environmental impacts.

Both environmental organizations and indigenous communities have formed partnerships to forward aboriginal rights and title arguments that have positive implications for protecting the environment. These alliances have involved forestry, Crown land use planning, pesticide plans, fish farming, and watershed management issues.

#### **1.2 Attention to Shared Decision-Making or Co-Management Regimes**

In the more rural areas of the province where a variety of parties have interests in a watershed or river system opportunities are emerging for shared decision-making or co-management regimes. These are taking the form of a trust or a board that includes representation from indigenous communities, all levels of government, resource users, and other stakeholders whose purpose is to coordinate integrated land use decision-making. The intent is that through public consultation and discussion the agencies and communities are able to work within existing jurisdictions to create integrated management approaches. No party gives up their ability to resort to statute or common law remedies, and the specter of litigation plus transparency of the process is seen as a key incentive to keeping all parties cooperating.

#### **1.3 Integration of Environmental Law into Law Practice Areas**

Environmental law has, to an extent, gone mainstream because of concerns about environmental liabilities. It is standard practice in corporate law to seek opinions on contaminated sites, pollution liabilities and now greenhouse gas emissions for clients buying and selling businesses or land. In addition, securities regulations increasingly require the disclosure of environmental liabilities, which reflects shareholder concerns.

## **1.4 Energy and Climate Change**

The recent concern about climate change and energy (oil and gas) has the potential to dramatically change business practices, regulation, and land development. However, aside from voluntary measures, for example local government community energy plans, there are no legal requirements to address the emission of greenhouse gases. This is an area that is ripe for law reform, and carbon trading will emerge as a new industry. Public interest environmental lawyers must play a key role in shaping new laws in this area that take an integrated and comprehensive approach to addressing climate change.

## **1.5 Enforcement of Environmental Laws is Minimal**

The provincial and federal governments enforce very few infractions of environmental laws. Enforcement remains in the hands of the public who must raise issues in the media in hopes of attracting sufficient attention to warrant a response from the appropriate level of government. Local governments are also taking a great role in enforcing riparian regulations (such as watercourse protection bylaws and development permit areas for protection of the natural environment) because the federal Department of Fisheries and Oceans is no longer prosecuting the harm of fish habitat.

## **1.6 Providing Non-Legal Advice to Clients**

Public interest environmental lawyers provide clients with a wide variety of non-legal advice because there are often no legal mechanisms by which to assert environmental quality claims. They provide fundraising, media, campaign and negotiation services. It is well-accepted that those issues that receive public exposure and attention in the media often receive the most attention by government.

## **1.7 Municipal and Land Use Law**

Most of the private land and settlements in the province are located in the same habitats (valley floors and adjacent to waterbodies) as the majority of the endangered species and sensitive ecosystems. Indeed, 80 percent of the population of the province lives on two percent of the landbase in the Okanagan and Lower Mainland. Local governments are playing a larger role in environmental protection, particularly in urban areas and through growth management.

## ***2. Issues or Practices that are Less Common***

### **2.1 Judicial Review**

There is some concurrence that challenging provincial government decisions by judicial review is less common than it was a decade ago because of the patent unreasonableness

standard of review in administrative law that applies to many judicial reviews and the potential for an adverse cost award.

As noted above, judicial review is used increasingly by indigenous communities to challenge the adequacy of consultation and accommodation of aboriginal rights and title, often with environmental implications.

## **2.2 Private Prosecutions**

Private prosecutions have been an effective way to enforce existing legislation. However, the Attorney General now intervenes in private prosecutions and has stayed all of them in the past five years on the basis that they did not meet the public interest test.

## **2.3 Law Reform**

Engagement in law reform activities, other than responding to calls for consultation or making submissions on proposed legislation, is less prevalent. The notable exception to this trend is in the local government sphere where many local governments are willing to enact bylaws to reflect environmental quality issues.

The repeal of many aspects of environmental legislation in the past six years may point to weaknesses in the environmental movement and the ability of the public to communicate its concern for environmental values.

## **3. Needs**

### **3.1 Integrating Human Health and Environment**

The term “environment” in B.C. has for many years been synonymous with trees and bears. This perception is changing as current issues are increasingly linked to protecting people, their health or property, from impacts to the environment. What is emerging is a human rights argument for a clean environment with a view to using section seven of the *Charter of Rights and Freedoms* to pose this argument before a court.

### **3.2 Public Information and Education**

The public does not have enough information about environmental law issues and how they can engage in environmental decision-making. The transfer of knowledge from lawyers to the public in accessible formats is insufficient to assist the public to prevent environmental harms before they occur and generate adequate public support for law reform. More legal education materials and better promotion of them are needed.

### **3.3 Public Interest Environmental Law Organizations Engaged in Law Reform**

There is wide consensus that the organizations dedicated to public interest environmental law must engage in law reform.

### **3.4 Reform of Environmental Legal Institutions**

Many decisions that affect environmental quality are not reviewable by the Environmental Appeal Board. Broadening its jurisdiction could provide an opportunity for greater accountability to environmental values.

It is also clear that solutions for environmental issues are complex and rarely involve a “right” answer. They require complex agreements or decisions based on adaptive management. Existing legal institutions may not be able to engage stakeholders in a process that will result in integrated solutions. One suggestion is for an environmental mediation body that is able to take an integrated, adaptive management and cumulative effects approach to decisions that affect the environment. This approach is already being used by and with some indigenous communities for land use processes.

### **3.5 Build the Capacity of the Public Interest Environmental Law Bar**

While there are greater opportunities in 2007 for working on public interest environmental law issues than there were ten year ago, there is still a need to provide more opportunities for lawyers to engage in environmental law. Supporting the human capital needed to work in this area will build the capacity for law reform and public education that is needed.

### **3.6 Promoting Access to Justice**

The concept of access to justice is foundational to public interest environmental law. Yet in this area of practice, as in many others, it is a concept that is becoming increasingly elusive and aspirational. In the environmental law context, this is a product of a number of factors:

- a general lack of intervener funding and support (particularly in lengthy and complicated tribunal hearings);
- the high and ever-escalating cost of legal services (and gaps in the availability of *pro bono* and reduced fee services);
- the cost and availability of expert witnesses (often essential in public interest environmental cases);
- lack of protections against SLAPP suits (Strategic Lawsuits against Public Participation); doctrinal and practical barriers to securing injunctive relief (particularly in environmental cases); and
- the ever-present specter of adverse costs awards.

Rarely is this suite of obstacles to access to justice recognized as such. Consequently some would argue that, potentially in coordination with public interest practitioners in other areas, a concerted strategy to address these obstacles must be a high priority.

## **E. Conclusion**

The public interest environmental law bar in B.C. is a committed, engaged, and diverse group of lawyers who approach environmental law from many practice areas. There are emerging opportunities in more collaborative approaches to environmental protection, such as shared decision making and in strategies to deal with climate change. However, the need for law reform and access to justice continues to limit the extent to which lawyers engaged in public interest environmental law can secure healthy ecosystems.